STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JONES,

Defendant-Appellant.

UNPUBLISHED
November 12, 1996

No. 184320
LC No. 93-002075

Before: M.J. Kelly, P.J., and Hood and H. D. Soet,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of five counts of kidnapping, MCL 750.349; MSA 28.581, four counts of armed robbery, MCL 750.529; MSA 28.797, two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788(3)(1)(e), and fourteen counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to fourteen concurrent terms of two years' imprisonment for his felony-firearm convictions, to be followed by concurrent terms of thirty to fifty years' imprisonment for his kidnapping convictions, thirty to fifty years' imprisonment for his armed robbery convictions, thirty-nine to sixty years' for his first-degree CSC convictions and ten to fifteen years' imprisonment for his second-degree CSC convictions. He appeals as of right. We affirm.

Defendant kidnapped five teenagers, three males and two females, at gunpoint in their jeep. The five teenagers testified that defendant drove them around for hours and stole, or allowed someone to steal from them. Defendant also forced one of the teenagers, a fourteen-year-old female, to remove all her clothing. He touched and blew smoke in her vagina, performed oral sex on her, and forced her to perform fellatio on him in front of her four friends. Defendant told her that he had a knife. He forced another complainant, a fifteen-year-old female, to show him her breasts and buttocks which he licked and touched in front of her friends. He also demanded that the teenagers drink beer.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first argues that the trial court abused its discretion in denying his motion for a mistrial because Officer James Raby improperly testified that he knew that defendant had an outstanding arrest warrant for a parole violation. We disagree. The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Haywood*, 209 Mich App 217; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.* The error complained of must be so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

The prosecution argues that Officer Raby's comment was unresponsive to the prosecutor's question. As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure that the officer has not ventured into forbidden areas which may prejudice the defense. *People v Stewart*, 199 Mich App 199, 201; 500 NW2d 756 (1993) (Connor, J. dissenting); *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Police witnesses have a special obligation not to venture into such forbidden areas. *Id.* at 415-416. Inadmissible evidence tying a defendant to other crimes is highly prejudicial. *Id.* at 416.

Although the parties agree that the prosecutor did not solicit Officer Raby's answer, we do not believe that the answer was unresponsive to the prosecutor's question. The prosecutor asked whether Officer Raby was aware that "an arrest warrant had been issued to get [defendant]." Officer Raby responded that he was not aware that there was a warrant for the instant charges, but he was aware of a parole violation warrant. The prosecutor did not limit his question to whether Officer Raby knew that there was a warrant for the instant charges. Therefore, Officer Raby's statement was responsive to the prosecutor's question. However, because defendant does not argue that he was denied a fair trial by prosecutorial misconduct, we decline to address that issue.

Assuming that Officer Raby's comment was unresponsive, a mistrial was not warranted. The prosecutor attempted to minimize the effect of Officer Raby's statement by essentially ignoring it and immediately redirecting Officer Raby to state whether he knew there was a warrant for defendant's arrest on the instant charges. Similarly, defense counsel waited until after the prosecutor had asked another four questions before he raised an objection. The testimony was then discussed outside the presence of the jury, so as not to highlight the testimony to the jury. Furthermore, the trial court offered to give a curative instruction. Defendant declined the cautionary instruction, believing that such an instruction would only highlight the testimony and increase the prejudice. An unresponsive, volunteered answer to a proper question is not cause for granting a mistrial, especially where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction. *Lumsden*, *supra*.

Moreover, there was ample evidence from which the jury could have convicted defendant regardless of whether they knew he had a criminal history. The five teenagers generally testified that

defendant kidnapped them by pointing a gun at one of the victim's head. Defendant drove them around for hours, stole, or allowed someone to steal from them, and sexually assaulted the two females. We therefore conclude that defendant was not denied a fair trial, and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant also argues that the trial court erred in scoring twenty-five points for offense variable (OV) 2, fifteen points for OV 7 and five points for OV 13. Appellate review of guidelines calculations is very limited. *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996). A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *Id.* A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *Id.*[1]

A trial court may assess twenty-five points under OV 2 when the victim is subjected to terrorism. Terrorism is defined as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Michigan Sentencing Guidelines (2d ed, 1988), p 44. Under OV 7, fifteen points should be scored where the offender exploits the victim due to a physical disability, mental disability, youth, agedness, or an abuse of authority status. Exploitation refers to the manipulation of the victim for selfish or unethical purposes. *Id.* at 45.

As indicated earlier, defendant, who at the time of the offense was twenty-nine years old, kidnapped the five victims, forced one of the complainants, a fourteen-year-old female, to remove all her clothing, touched and blew smoke in her vagina, performed oral sex on her and forced her to perform fellatio on him, in front of her four friends. Defendant told her that he had a knife. The teenager said that she was afraid that he would kill her. Defendant forced another complainant, a fifteen-year-old female, to show him her breasts and buttocks which he licked and touched, in front of her friends. Defendant said that if she did as he asked he would leave the teenagers alone. He also demanded that the teenagers drink beer. We conclude that the evidence on the record establishes that defendant's conduct was designed to substantially increase the fear and anxiety of the victims, and supports a score of twenty-five points under OV 2. We likewise find that the evidence similarly establishes that defendant exploited the victims due to their age and supports a score of fifteen points under OV 7.

Finally, under OV 13, five points should be scored where there is serious psychological injury to the victim or the victim's family, necessitating professional treatment. A sentencing court may consider all record evidence before it. *People v Walker*, 428 Mich 261; 407 NW2d 367 (1987); *People v Harris*, 190 Mich App 652; 476 NW2d 767 (1991). At sentencing, defendant objected to the scoring of five points under OV 13, arguing that there was no documentation that any of the teenagers needed professional treatment for psychological injuries arising from the crime. The prosecutor responded: "it is my understanding [that] both of the female victims in this case had to have counseling." Defendant did not challenge the prosecutor's assertion. Because the sentencing court may consider all record evidence before it and defendant did not challenge the prosecutor's assertion that the females received counseling, there was evidence to support the court's scoring of five points under OV 13. Even if the court had improperly scored OV 13, recalculation of that variable would not affect the ultimate

guidelines range. Therefore, any error is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet

[1] Defendant argues that the standard of review is clear error based on *People v Polus*, 197 Mich App 197; 495 NW2d 402 (1992). We, however, found nothing in that case to indicate that this Court changed its review to the clearly erroneous standard.