STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST STOUDEMIRE,

Defendant-Appellant.

UNPUBLISHED
November 26, 1996

No. 161380
LC No. 92-005187

Before: McDonald, P.J., and White and P.J. Conlin, JJ.*

PER CURIAM.

Defendant was convicted by a jury of criminal sexual conduct, third degree, MCL 750.520(d)(1)(b); MSA 28.788 (4)(1)(b), and thereafter pleaded guilty of habitual offender, third. MCL 769.11; MSA 28.1083. He was sentenced to twenty to thirty years in prison on the habitual offender conviction,[1] and now appeals. We affirm the convictions and remand for articulation of the reasons for defendant's sentence.

Erica Tomlinson testified that she was the manager at the New Center Liquor Store on Woodward on the evening of September 22, 1991, and that the complainant came in that night, walked back to the cooler, and then walked to the front of the store and started screaming that she had been raped. Tomlinson testified that the complainant was hysterical. Tomlinson called the police, who arrived after about twenty minutes.

The complainant testified that she lived alone in Detroit, was divorced, and had four adult children. She identified defendant as the person who sexually assaulted her on September 22, 1991, and testified that she had been at church that afternoon. She testified that she had known defendant for about two years prior to the alleged incident, having met him at the River Rouge court. Defendant told her his name was Larry and asked her where she lived. Several months after she met defendant, he rode down her street on his motorcycle, asked her to go for a ride, and said he had been riding up and down her street until he found her house. She testified that between the time she met defendant and the

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

assault she saw defendant about six times, he came to her house several more times, and that she would not go out with him. After she and her boyfriend had broken up, defendant came by her house again and kept asking for her phone number. She gave her number to defendant, and he called her a few days later.

Complainant further testified that on the evening of September 22, 1991, defendant called her and asked her to go out. She refused, but he kept insisting, and she agreed. Defendant had never been in complainant's home before and she had never gone anywhere alone with him. He arrived at her house at about 10:00 p.m., and they drove to a party store, but she did not go in. They drove to a second party store, where she bought two Coronas. They drove some more and she asked him to stop so she could use a bathroom. When he stopped, he told her to leave her purse in the car because it might get snatched, and she responded that she would not leave it in the car because her protection was in her purse. She testified that although she did not actually have anything in her purse for protection, she said this because she did not know defendant, but that she did not feel unsafe with him.. They continued driving, and at some point defendant's personality changed; he stopped talking, and she told him to take her home. Instead of taking her home, defendant told her he wanted to show her where he worked. Complainant said she did not want to see where he worked and wanted to go home. She told defendant she had to use the bathroom again, and defendant pulled in an alley and told her she had to go to the bathroom there because he was not going to take her to another bathroom. She refused, but when defendant got out of the car and made her get out of the car, she complied. She testified that the area looked like an alley, with trees on one side and a lot on the other, and that the place where he parked the car had a white building on one side and "electrical stuff" on the other. When she asked defendant what he was doing, he responded that he had been watching her for two years and was going to make love to her. She said no, they struggled over her purse, and he said that he, too, had a gun. Defendant told her to take one leg out of her pants. She tried to hail a car that drove by, but it did not stop. The complainant testified that she was really scared because defendant kept reaching toward the backseat, where he indicated he had a gun, and because there was a dumpster there and she was afraid defendant would kill her and throw her in the dumpster. Defendant made her lie down in the front seat, penetrated her with his penis and ejaculated. She threw the beer bottles and tissue she used to wipe herself after sex out of the car window so that she could find the spot where they had been parked.

After the assault, complainant asked defendant to stop so she could get something to drink, and he drove to a party store and gave her two dollars. She went in the store and told a man in the back she had been raped. The man told someone else, the complainant went behind the counter, and the police were called. She drove with the police and found the place where she had thrown out the beer bottles and tissue. After being at the police station, she went to the hospital. She testified that she was not sexually active at the time of the assault and had not had sex during the previous week.

Complainant further testified that she did not see defendant again until several months later, in April, when she was driving, and that she wrote down his license plate number and called the police. She was shown photographs and she identified defendant.

On cross-examination, complainant testified that on the evening of the assault she had dark blonde hair, which was not her natural hair color, and had not been wearing glasses. She testified that her conversations with defendant had been casual ones, and that she had told him that her boyfriend was a truck driver. She testified that there was a dumpster near the alley where defendant had parked and where she had been raped. Complainant stated that she had lied to defendant when she told him, the first time he came to her house, that she was married, and had lied to him regarding having protection in her purse on the night of the assault, even though she felt safe with him.

Detroit police officer Dwayne Thomas testified that on September 23, 1991, he was called to the New Center Market liquor store, where complainant reported a rape. They drove up Woodward looking for defendant's car, and when they did not find it, he asked complainant where the rape occurred. She explained that it was near the General Motors sign and that she had left two bottles and some tissue at the location. They found the location, which Thomas described as a parking lot with a building on one side and a dumpster next to the building. He described the area by the dumpster as only being able to fit one car and out of sight of the street. Thomas referred to his police report and testified that they took two Corona Extra bottles and one white tissue into evidence and to the sex crimes unit. On cross-examination, Thomas agreed that he had not written in his report that there was a dumpster at the location, or that complainant had been hysterical.

The prosecution next called Dr. Christopher Elrod, an emergency room physician at Detroit Receiving Hospital, who examined the complainant at 5:20 a.m. on September 23, 1991, and collected vaginal and rectal swabs. He sent the slides to the police, and kept one for himself, which he examined, finding no sperm. He testified he found no physical damage to complainant, but that that did not mean there had not been forcible intercourse.

Forensic serologist Paula Littel testified that she examined the microscope slide containing the complainant's vaginal swab and saw sperm cells, but that there was not enough of a sample to get a blood type or DNA from it. Littel also testified that complainant's underwear was analyzed and was negative for sperm. She testified that sperm can remain viable in the vaginal tract for up to seventy two hours.

Detroit police officer Marcus Hill testified that he was officer Thomas's partner on the morning in question. On cross-examination, Hill testified that he did not make a police report or make any notes about this incident. He did not go into the store from which the police had been called, and only talked to complainant when she got in the scout car.

Detroit police officer Gerald Hankins testified that he was the officer in charge of the case and maintained the file. He testified that after he was assigned to the case, complainant contacted him with a license plate number that was traced to defendant's brother. A photo show-up was held, at which complainant identified defendant, and defendant was arrested. Hankins attempted to retreive the beer bottles and tissue, but the property section could not locate them. Hankins saw dumpsters in the area where the crime was alleged to have occurred.

After the prosecution rested, the defense made an opening statement. Defense counsel stated that the jury could expect testimony that the complainant was more involved with defendant than she testified, that she had gone places with defendant, and that she was not a church lady and naïve, as she portrayed herself, but, rather, "led a double life." Counsel stated that complainant could be placed in the category of women who see older men in order to obtain money and favors. Defendant never denied that he knew complainant, and felt he had nothing to hide because he and complainant were in a "voluntary relationship." She stated the defense would also present evidence from one of the property owners that there were no dumpsters in the area where the complainant was allegedly assaulted, and that a sign in that area stating that it is under t.v. camera surveillance had been at the location for ten years. Finally, defense counsel stated that complainant had lied about this incident.

The defense called Jerome Gurney, who testified that he had a business interest in the property in question on September 22, 1991, and that there were no dumpsters on the property. He testified that he put up a sign in the lot ten years before stating that the lot is under t.v. surveillance. Gurney testified that he had never met or known defendant. On cross-examination, he testified that outside his property, about twenty or thirty yards away, and on the other side of a fence, there is a dumpster. He testified that the t.v. cameras were broken and that he had not locked the gate to the lot for several years because it was too much trouble. On re-direct, Gurney testified that he at times has used the dumpsters, but that his lot did not have direct access (he had to go out into the alley and around the fence) and that the area in which the dumpsters were located was locked.

Ernest Scott testified he was incarcerated in the Auburn Hills trustee camp and had known defendant for about two years. He testified that he and defendant gave a woman with red hair an estimate for work to be done on her porch on Apple Street. He testified that he thought he could identify her. He testified that the woman wanted the porch extended, and that defendant went into her house for five or ten minutes. When they were through, the woman came into the van which he and defendant had driven to the woman's house, and they dropped Scott off at home. After looking around the courtroom, he stated he did not see the woman. On cross-examination, Scott testified he was incarcerated in March 1992 for credit card fraud and had no prior record.

On the next day of trial, defense counsel stated out of the jury's presence that the defense intended to call Oradine Sprolls, who had indicated she would testify voluntarily. Defense counsel stated that the previous Friday she had sent an investigator to get Ms. Sprolls and that Sprolls said she would no longer testify because she had been threatened by a person she believed to be either complainant or someone acting on behalf of complainant. Defense counsel stated that she had sent a subpoena with the investigator, but that he had not served it, and that she wanted to make a record of the reason Ms. Sprolls was not present. Counsel also stated that there was another witness on whom service had been attempted, Mr. Sovarinski, and requested that the prosecutor send someone to pick him up She asserted that Mr. Sovarinski owns part of the property where the alleged rape occurred and that he had information on the lighting and dumpsters on the property.

Defense counsel also stated, apparently for the first time, that when she took over the case she did not have the full preliminary exam transcript and that prior defense counsel had gotten it for her on Tuesday, and that she therefore had not had the full transcript when she had cross-examined complainant. Defense counsel stated:

> . . . And I would like to put that on the record that there are some questions that I would like to ask [complainant]. And, you know, we've already discussed this off the record, and you've indicated that you're not going to allow me to recall [complainant]. But it would take approximately twenty minutes to do this.
>
> And I think out of fairness to my client, you know, due to him having changed attorneys, and there was a mishap regarding the file, that, you know, that would not be prejudicial to the prosecution for me to recall her. In fact, at the end of her questioning, I did reserve the right to recall.[2]

The trial court denied the request that Savarinski be picked up and brought to court:

> THE COURT: Okay. We're going to move on with the trial. I imagine we could discuss these things all day. But I don't believe there's any basis for sending anyone out to pick anyone up. I don't know how critical you feel that that testimony would be. But just from what you've said, I don't think it's that important to this case.
>
> MS. MANZIE: Okay.
>
> THE COURT: I believe that under the provisions of the Rules of Evidence, 403 in particular, would—even though it might be a little bit relevant, we have a substantial amount of evidence on the record already regarding these matters.
>
> But we're going to move with this case. Okay. Bring the jury in.

Amir Hourmiz testified that he was employed at the New Center Liquor Store on September 22, 1991, and that he and a woman named Erica were working that night. He testified that he recalled a woman coming in and saying she had been raped, but did not think that she was screaming hysterically.

Gilbert Gallegos testified that he worked for HDM Graphics on September 22, 1991, which is located on the street the alleged incident occurred on, and that there is a dumpster area outside the parking lot area, on the other side of the fence in its own fenced-in area, and that the dumpster would not be visible at night. He testified that if someone were in the area of the parking lot, in order to get to the dumpsters they would have to come out on Hastings Street, and either go back down the Boulevard or down Milwaukee to get to Oakland.

Clirtie Stoudemire, defendant's brother, testified that he was employed at Great Lakes Steel and also has had a business interest in a towing and storage company called E & C, which stands for Ernest and Clirtie, since 1986. He testified that defendant worked for him.

Defendant testified that complainant's testimony that he had only known her for two years was not true, and that he had known her since 1962. He testified that in the course of that time complainant had conversed about personal subjects, told him she had been married to two men, told him their names, and told him the names of some of her boyfriends.

Defendant testified that he had been in complainant's home more than once, and that complainant told him that if he saw a dark car in her driveway he should keep driving, because that was her boyfriend's car. Complainant told him she had four children and who their fathers were. He testified that he knew her father, and that she had two brothers, one of whom he had met. Defendant testified that complainant had given him her phone number several times, most recently in 1986. He further testified that complainant told him she received General Assistance and food stamps. He testified that he had been in her house enough times so that he would be able to draw a sketch of the interior of the house, and did so on a blackboard, with details such as where the phones were, and the color of the couches and throw pillows. Defendant testified that the day before the alleged incident, complainant came to the garage where he worked and asked him to tow her car because she had two flat tires. He told her he could do it later that day, and did do so later, recognizing her car because he knew it. Defendant testified that he took complainant's license number and plate number and put it on the tow slip; the tow slip was introduced into evidence. Complainant came to pick up her car, complained about the price of the tire defendant had put on for her, and, after defendant inquired what she was doing that evening, said that defendant could call her later. Defendant called her later and she was watching a movie. Complainant called defendant back and asked him to come by. He went by briefly, but they did not go out that night. Defendant testified that they went out the next night, riding around, and that they had done so a number of times before, in a van he owned until 1991.

Defendant denied having intercourse with complainant on the night in question. He testified that he picked her up and they went to a liquor store because she wanted a beer. When they got to the store, complainant recognized and spoke to someone in the parking lot, and asked defendant for ten dollars to buy marijuana. Defendant gave her a twenty dollar bill, and when she returned to the car after buying the beer, she did not give him change. She said she wanted to go directly home and that she needed to use the bathroom, so he took her home, and after a few minutes she re-emerged in a skin-tight outfit. Defendant testified that she brought two joints out with her and smoked some, and then asked for some beer to go with the joint. They stopped at another liquor store and she bought two beers and a pack of Pall Mall's. They later stopped at a gas station because she again needed to use a bathroom, but the station had no bathroom. They then went to a lounge and defendant suggested to her that she leave her purse in the car because there were people hanging around the entrance. Complainant stated she would not leave her purse because she had her protection in it. Complainant came out after ten or fifteen minutes with a drink, and said she had run into someone she knew who bought her a drink. Complainant asked him to park somewhere where she could smoke the pot, and he

parked in a place where there were no dumpsters. They moved the car because there were too many cars around, and defendant drove to another location at complainant's suggestion. Complainant then went to the bathroom again. Defendant testified that complainant opened the second beer and when he implied that they should "get sentimental," she asked him what was in it for her. She said to him that he told her he would give her money for her to get her hair done and asked him what else he would do for her. She said she had to pay some back taxes on her house and that defendant could not get something for nothing. Defendant then said they were going to leave, and complainant threw out the beer bottles. Defendant testified he did not have sexual intercourse with complainant. On the way back, she asked for more beer, so defendant again stopped at a liquor store. When defendant gave her two dollars, she got angry, said she thought defendant was going to give her the money to get her hair done, cursed him, and slammed the car door. She did not come out of the store, and defendant got out and looked through the window twice, but did not see her. Defendant testified that three days later, complainant came to the garage where he worked and told him that she had turned him in as a John Doe, and that she could have him arrested anytime she wanted. Defendant testified that he saw complainant many times after the incident and before his arrest.

On cross-examination, defendant testified that he had had sex with complainant several times in the 1980s. On re-direct examination, defendant testified that Barbara Brown, a friend of complainant's, had been dating his brother since April 1992, and that he first learned of this in June 1992, when he was released from jail on bond. Defendant denied learning personal information about complainant from Brown.

After the jury was excused, the prosecution stated it would recall complainant. Defense counsel stated that if the prosecution intended to recall complainant, she would need an opportunity to present a rebuttal witness. The court asked if the witness was present, and defense counsel said no. The court denied defense counsel's request for a two-minute break to make a phone call to the witness:

> You can have somebody do that for you. We're not going to stop in the middle of this. None of this is a surprise to anyone. We have drug [sic] this case out unduly. We started late. . . due to you coming in late. And there's no reason for that.
>
> THE DEFENDANT: And due to some jurors coming in late too.
>
> THE COURT: You should have been prepared. You've been in it long enough to be prepared. And I'm not going to delay it any further.
>
> If you can get someone to make a phone call for you, fine. But otherwise we're going straight through.

Apparently, prior counsel, who was present as a resource, then went to call the witness.

On rebuttal, complainant testified that she had not known defendant since 1962, and had met him at the River Rouge courthouse about two years before the incident. She denied that defendant

towed her car, or that she had given defendant her license number, and denied ever having seen the towing bill defendant produced at trial. She denied trying to get money from defendant. She testified that she had known and confided in Barbara Brown about many things, and that her friendship with Brown ended when she learned Brown was seeing defendant's brother.

On cross-examination, complainant denied telling Brown that on September 22, 1991, a man came to her house with a gun, put her in her car, and forcibly raped her. She admitted that the diagram defendant drew of her house was accurate. She testified that she could not think of a reason why Brown would take information complainant told her in confidence and provide it to someone she had known less than six months (defendant). She also admitted that defendant knew information about her that Brown did not know. The prosecution objected when defense counsel asked whether complainant had ever known Brown to take notes of conversations regarding information conveyed to her; the objection was overruled, as were several others. The court sustained the prosecution's objections when defense counsel questioned complainant regarding whether she received public assistance, whether she told Brown that she was terminated from welfare, and whether she had ever told defendant she received workers compensation.

I

Defendant first argues that the trial court abused its discretion and denied defendant due process and the effective assistance of counsel by denying defendant a one-week adjournment of trial where defendant had just retained new counsel who was unprepared for trial, and where appointed counsel was also unprepared for trial and defendant had not requested prior adjournments.

A

At the April 27, 1992 preliminary examination, appointed attorney James Albulov of the Legal Aid and Defender's Office introduced himself, stated that he had just met defendant that morning, and that defendant informed him that he was in the process of, but had not yet finalized, retaining an attorney. Albulov requested a two-week adjournment, the prosecution "strenuously" objected, and the court denied the motion, stating that it agreed with the prosecution that Albulov was more than capable of adequately representing defendant during the "straightforward one-witness examination." Defendant was bound over.

On May 13, 1992, Albulov represented defendant at a calendar conference in Recorder's Court at which bond was addressed. On June 12, 1992, Albulov represented defendant at the final conference, at the conclusion of which the court set trial for November 9, 1992, after both counsel stated how many witnesses they would present, and stated that they thought trial could be completed in two days.

At an October 23, 1992 hearing on defendant's discovery motion, defendant was represented by different appointed counsel, James O'Donnell, also of the Legal Aid and Defender's Office. O'Donnell stated he was appointed counsel, made a motion for discovery and a number of oral

motions, and stated that he had just received the endorsed witness list and that it was not timely. O'Donnell added that defendant was going to ask for an adjournment of trial because "we expect to get discovery today that we haven't received and we're only 13 days before trial. We just received the witness list and we're 13 days before trial with a name that we didn't know about and we need to contact that person." Among O'Donnell's requests was the appointment of an independent forensic serologist to analyze the microscopic slide evidence taken from complainant at the hospital following the alleged incident.[3]

The prosecutor responded to defense counsel's requests. As to the last request, the prosecutor stated that perhaps defense counsel could make an offer of proof as to what the defense would be to determine whether the request for an independent examination by a forensic serologist would be relevant. The following colloquy ensued:

> MR. O'DONNELL: Well, this takes me to something I wanted to put on the record later in the day, but I'll summarize it briefly.
>
> * * *
>
> It works like this, your Honor. When the lady went to the hospital they had a pair of panties and they did take a swab from her vagina. They tested both the panties and the swab and found no presence of semen. They took a slide, somewhere in the process they took a slide of supposedly fluid from her vagina which came back under the microscope showed presence of sperm.
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> THE COURT: All right. Well, that brings us to the question of the prosecutor's case. Why is that important to your case?
>
> MR. O'DONNELL: Well, then that gets me to my problem, your Honor.
>
> THE COURT: What is your theory of the case?
>
> MR. O'DONNELL: All right. **I'll tell you that Mr. Stoudemire is less than happy with my representation.**
>
> THE COURT: After you did all of this?
>
> MR. O'DONNELL: He was represented once by Mr. Lumumba and everyone pales in comparison to Mr. Lumumba and he said to me that if this case is lost and he goes down, I'm going down. I'm not Mr. Lumumba, but I think I know what that means. His position to me when I asked him on three occasions as well [sic] this morning for his theory and his version and he says he'll give me the theory and the version when I give him the discovery.

THE COURT: Well, you're going to have to make some decisions here so that we can proceed. If there's a real need for giving some additional information, certainly the Court is going to give full cooperation. But just to be going through the motions and wasting very valuable time, I'm not going to participate in that.

MR. O'DONNELL: Well, I can say in brief that I believe by asking that for [sic] a forensic serologist, he's saying that there was no sexual intercourse. That there may be a mistake made in the Detroit Police Lab's examination of the evidence and he wants an independent person to examine the evidence that the police already have.

THE COURT: Is it your position then that what the defense is that there was no act of intercourse?

MR. O'DONNELL: Yes.

THE COURT: There was no contact here with this woman who was allegedly assaulted; is that what you're saying, Mr. Stoudemire?

DEFENDANT STOUDEMIRE: Yes, your Honor.

THE COURT: No contact?

DEFENDANT STOUDEMIRE: Sexual contact.

THE COURT: All right. Go ahead. What was the other thing?

MR. O'DONNELL: We're going to be asking for an adjournment because there is some newly acquired evidence here.

THE COURT: What is the newly acquired evidence?

MR. O'DONNELL: The name of the witness, the fact that there was evidence missing.

THE COURT: What evidence is missing?

MR. O'DONNELL: The bottles of Corona and the tissue which may have contained evidence of significance.

THE COURT: How would that prejudice your case? I mean, how is that going to put you at any disadvantage? Actually, it's to your advantage.

MR. O'DONNELL: Well, certainly we can, in front of a jury, I can tell the jury and I can point out the fact that the evidence is lost. But because the complaining witness said

she wiped herself with these tissues, had these tissues been analyzed and come back negative, perhaps it—

THE COURT: Well, that's not the question. You're asking for more time and your reason for that is stating that there's lost evidence. If you got more time, how would that assist you in any way?

MR. O'DONNELL: Well, I suppose we can't examine lost evidence and therefore we don't need time to examine lost evidence.

But the new witness's name and any new evidence that we may get after I've spoken to [prosecutor] Baker, as well as the second page of this report from this investigator.

* * *

THE COURT: . . . I think that all of the requests that have been made have been resolved in some fashion on [items] A through O. With letter C, the section regarding the addition of the witness to the witness list and the late filing of the list, I don't think that puts the Defense at any disadvantage. They were aware or should have been aware. I'm sure that the Defense and the Defendant have gone over this through the examination transcript and other materials so that they were fully aware of who the witnesses were. So they're not at any disadvantage in that regard.

The other requests have been answered to my satisfaction. Either the reports are there or they're not there. With the 9-1-1 information, if there is any information available Mr. Baker understands that he will assist in getting that to the Defense. With the transcription of the hospital records, that portion, Defense will meet with Mr. Baker and try to resolve that. If there's a continuing problem, bring it to my attention again and we will look at it and see what further steps will have to be taken.

The requests, the other requests are all denied. There is no—does not appear to be any basis for granting any of those other requests, including the request for the independent serologist in this case. And the request for an adjournment is denied.

The lower court record indicates attorney O'Donnell filed a motion to withdraw on November 3, 1992, and noticed the hearing for November 6, 1992. At the hearing on that date, O'Donnell stated that there had been a breakdown in the attorney/client relationship:

There is a complete lack of trust. And at this point I'm not sure I'd be acting competently if I continue to represent him.

He's also informed me that he's made arrangements to hire an attorney. He's given me a letter which suggests that he's either talked to Georgia Manzie or Attorney Chokwe

Lumumba, and that he's made arrangements to pay them, or has already paid them some money.

All I can tell you is that he just doesn't choose to communicate with me. There's many things he says he has to tell me but he cannot tell me. There's a great deal of lack of trust. And it's caused a great deal of problems.

Therefore, I'm asking the Court to withdraw.

And I offer the defendant if you want to ask him some questions.

The prosecution objected to an adjournment, arguing that it was a ploy, that defendant had a lot of experience in court matters and "is in some sense a professional defendant," and simply wanted to get counsel more to his liking.

The court then asked defendant to explain what the problem was as he saw it:

DEFENDANT STOUDEMIRE: Firstly, sir, your Honor, I've never asked for an adjournment before.

And I, like Mr. Baker say [sic], we've been in each other's company. He had me in the County Jail for two years. He was adjourning on a case. I didn't adjourn. I came from Jackson and asked for a speedy trial, but he didn't want to go.

But I'm talking about a week or something, two weeks, so that the lady could prepare. I'm not trying to get a month. I want to go trial too.

THE COURT: What's wrong with the attorney?

DEFENDANT STOUDEMIRE: The attorney here—first of all, I had James Abulov at first. I met him at the bullpen. And never saw him before. He never asked me about my case. He never talked to me about witnesses. He never interviewed anyone. He never discussed anything. He never came to the jail when I was there. And the same here with Mr. O'Donnell. Okay. Mr. O'Donnell, he taken [sic] on the case on July 30th. And at the same time decided that he had a two week vacation coming up. So, then I had to wait two weeks for him to come back. I couldn't talk to him, couldn't get the case together with him. Then afterwards he came back and we got together. And I asked him would he file a motion for discovery, which he did. But he listed it for three weeks later, you know, gobbling up a lot of time that I didn't have that I needed to be prepared.

So, I have witnesses that he haven't [sic] even seen, that I talked to and can testify.

THE COURT: Did you ever give him that information, the information about your witnesses?

* * *

DEFENDANT STOUDEMIRE: Well, he had some of them from Mr. Baker when he was here. You know, some of those people were coming when he was telling them or when he talked to the complainant. But, yes, I told him that I had witnesses.

THE COURT: Did you give him the names of those witnesses?

DEFENDANT STOUDEMIRE: I didn't give him the name but a couple of them. I don't have—I have a lot of names like Bull, Mule. You know, I've been in the process of getting addresses and so forth and so on.

That's not my only, you know,--if I could just either—if the stenographer could take this down as I've written it, or I could kind of comment from it. I asked him—

THE COURT: Well, that's what I'm doing, giving you the opportunity to tell me why you want to have this case continued. The case has been pending for over a year.

DEFENDANT STOUDEMIRE: No, it hasn't been pending for over a year, sir. I only got arrested April 18th, 16th. But he's saying that the case originated over a year ago.

And he's not telling you that the lady works at Pack Rite and that she's not so traumatized by what he's saying, you know.

THE COURT: I want to know from you why you feel at this late date, the trial is scheduled for Monday, why Mr. O'Donnell should not continue in the case and why there should be an adjournment.

DEFENDANT STOUDEMIRE: I just explained to you. It's been a breakdown in the client—well, first of all, he breached the law or the contract with me when he told you last week that I had told him that I wasn't giving much information to him, and that if I went down the drain he was going down the drain also. There was a breach of contract. I told him that I told him my whole case—see, Mr. Baker here has got a lot of friends all over.

THE COURT: Yes.

DEFENDANT STOUDEMIRE: He got [sic] a lot of friends all over. I told him that I was not going to reveal everything to him because he did something that I thought was bad. He told the police to go analyze the beer bottles and the napkin. And the police asked him was he the one—was that their job. I mean, he put it in a letter to me. So, I

asked him why did he do that. He said I don't know. I just thought maybe I should ask them, you know. And other things—

THE COURT: When did you know about all of these things?

DEFENDANT STOUDEMIRE: I've been knowing about all of these. I've been talking—

THE COURT: How long ago?

DEFENDANT STOUDEMIRE: About telling about or trying to get another lawyer?

THE COURT: Apparently you have been dissatisfied with the representation that you've been getting for a long time.

DEFENDANT STOUDEMIRE: I've been to his boss three times, Mr. Blake. I've been to—

THE COURT: So, you've been dissatisfied a long time, Mr. Stoudemire?

DEFENDANT STOUDEMIRE: Yeah. I've even asked him to file motions.

THE COURT: All right. We've been in court on this case on a number of occasions, at least five different times that you've been here for one reason or another, either a motion, either a conference, one or the other. And this is the first time that you've raised any question about whether or not this attorney should stay in the case, whether or not there should be a continuance.

Why is that?

DEFENDANT STOUDEMIRE: Sir, I've been trying to. I ain't got no money. I'm on a $50,000 cash bond. This is not the first time that I've been trying to get a lawyer. I done talked to Lumumba. They won't take the case unless you come up with a good retainer.

THE COURT: All right. Thank you. You may be seated.

Anything you want to say? Anything else you want to say, Mr. O'Donnell?

DEFENDANT STOUDEMIRE: Can I just say this? If it satisfies the prosecutor, 10 days, three weeks adjournment. I'm not trying to ask for a year or nothing like that.

THE COURT: Okay. You may be seated. Anything further anybody wants to say?

MR. BAKER: No.

MR. O'DONNELL: No.

THE COURT: After reviewing this file and listening to Mr. Stoudemire it appears to me that there is no legitimate reason, no legitimate reason for continuing with this case from the scheduled trial date on Monday.

All of the matters that were brought up today could have very easily been brought up before. We've been in this court on this case on a number of occasions. It only appears to me that Mr. Stoudemire is using this as an occasion to prolong or delay the prosecution in this case. And I will not join in and be a participant in that.

Now, do you want to bring in another attorney who will—who can take over your case on Monday that is fine. But this case is going to go on Monday. The trial will begin on Monday promptly at 9:00 A.M. I expect you to be here.

Mr. O'Donnell, I expect you to be here and ready to go.[4]

A letter in the lower court record dated November 6, 1992, from attorney Georgia Manzie to the court states in pertinent part:

Please be informed that Mr. Ernest Stoudemire contacted this office regarding the possibility of either myself or Attorney Chokwe Lumumba representing him in the above referenced cause. On Monday November 3, 1992 Mr. Stoudemire paid a deposit towards a retainer for me to represent him. However, I advised him that the amount paid was insufficient for me to file an Appearance and also that if his trial date was not adjourned I would refund that deposit to him. Subsequently, I was contacted by his brother . . . and his sister . . . who have stated that they will assist in making the required payment.

I believe that satisfactory arrangements could be made with Mr. Stoudemire's family. However, it would be impossible for me to be prepared to represent him on his existing trial date, Monday November 9, 1992. If you are inclined to grant his request for an adjournment I could appear in your courtroom on Monday November 9, 1992 for a new trial date to be scheduled within the next four weeks, provided the police witnesses would be available then.

On November 9, 1992, Manzie filed an appearance and stated at the outset of the trial:

MS. MANZIE: Good morning, Your Honor. Georgia D. Manzie on behalf of Mr. Stoudemire. Your Honor, I would like to indicate to the Court that I was formally retained this weekend, and I was able to get some information from Mr. Stoudemire,

it's the only information he apparently has some duplicate copies of. However, I was not able to get in contact with counsel over the weekend to receive the file that Mr. McDonald, excuse me, Mr. O'Donnell has, and frankly until this weekend there was really no need for it because I had sent a letter here to the Court and indicated to the Court that although there had been some communication from Mr. Stoudemire regarding retaining me, I had not formally been retained. In light of the fact that he has taken it upon himself to formally retain counsel to represent him in this case, I would like to renew Mr. Stoudemire's motion to –I understand that he had requested an adjournment this past Friday, and in light of that I would strenuously request an adjournment because I understand it would be inconvenient to the Court, but there are some other factors which should be considered particularly under People v. Charles Williams [386 Mich 565; 194 NW2d 337 (1972)].

The prosecutor argued that defendant's tactic from the beginning had been to delay proceedings, and referred the court to defendant's request for a two-week adjournment at the April 27, 1992 preliminary examination. The prosecutor argued that O'Donnell was "obviously ready to go," and opposed an adjournment.

Manzie responded:

MS. MANZIE: Your Honor, if I may briefly. First of all, I requested whether or not, and Mr. O'Connell, excuse me, O'Donnell is here and he can, you know say whether he feels that he's adequately prepared in light of the fact that there is a breakdown of the attorney-client relationship, and to the extent that the defendant did not feel comfortable with disclosing information to him that should have been used to prepare for trial.

Let me respond to Mr. Baker's assertion that the defendant has in some way manipulated myself to come down here. Your Honor, I personally attest to the fact that Mr. Stoudemire did intend to retain an attorney back in April. In fact, I was contacted then. It was April or May. Prior to, I believe it was April because when Mr. Stoudemire contacted me, at that time my father was on life support. He had a heart attack and a surgery, and he wanted Mr. Lumumba or myself, and I called Mr. Lumumba in Mississippi and inquired about the possibility of Mr. Stoudemire retaining him. I told Mr. Stoudemire that I was not available even if he paid me. I was not available for the preliminary examination and you know, if he could go to court and request an adjournment perhaps, you know, one of us could come down there then. He did not know where to contact Mr. Lumumba, but I did speak to Mr. Lumumba in Mississippi, and the reason subsequent to the preliminary examination that neither of use [sic] were retained is because during the interim Mr. Stoudemire's bond was increased to $50,000 cash bond, and the money that he had intended to use as a retainer for one of us was used for his bond because he felt that he could better assist with his

representation if he was released and, in fact, after my father died I paid a visit to Mr. Stoudemire at the Wayne County Jail. At that time I didn't realize his bond was increased, and I was following up on it. The jail records verified that he in fact did what he could do at that time to try to retain an attorney. So he ended up having to reimburse relatives for posting a $50,000 cash bond once he was released. The $5,000 that was posted is not money he'll be getting back due to the fact that it was a cash bond. This money is just lost. So he had, in a sense, to start all over again.

Mr. Stoudemire began calling me again the first week in October, and at that time he indicated that he was still interested in retaining either Mr. Lumumba or myself and that he was trying to work with relatives to see if they would assist in retaining one of us. Unfortunately due to him being indigent that did not materialize until this weekend.

THE COURT: Thank you. Let me just say to you, Ms. Manzie that we had a hearing on Friday. This question was examined at that time. We've had a number of hearings as a matter of fact. During which time Mr. Stoudemire has been able to come before the Court . . . .

This is not a question here of trying to do something that would be convenient for the Court. I strongly believe that the rights of an accused is far more important than having the docket flow neatly and all of that. My concern is about the rights of the defendant.

On the other hand I'm also concerned about the rights of the victim. We've had this case before the Court on a number of occasions. Mr. Stoudemire had the right, if he wanted to exercise it, to make the request for the substitution of the attorney. He never did that. He waits until the very last moment, the very last moment and then comes in and makes the request. He has a chance to speak on Friday and nothing was said on Friday that convinced me that there was a need for an adjournment. Nothing that you've said today, as a matter of fact, convinces me that there's a need for an adjournment.

I indicated on Friday that we are going to have a trial to start today, and that is what we will do. It appears to me that what Mr. Stoudemire is trying to do is simply to delay and frustrate this prosecution and I indicated Friday that I was not going to participate in this, and that is still my position.

Now, insofar as your representation is concerned, Mr. O'Donnell is here if you want to share the representation of Mr. Stoudemire, that's fine with me or if one of you wants to do it by yourself, but we are going to go to trial today.

O'Donnell stated to the court that he did not think he was prepared to represent defendant because there were witnesses that need to be called that he did not know about, about whom defendant had spoken only to Manzie. Manzie stated that she had just received information about certain witnesses

from defendant during the weekend and that they needed to be subpoenaed. The court questioned her about each of the seven potential witnesses, most of whom were ex-boyfriends of complainant who defendant had told Manzie were sexually active with complainant during the time frame of the alleged incident. Manzie stated that she had had an opportunity to interview only one of these potential witnesses. The following colloquy occurred:

> THE COURT: Well, with those handicaps that you have described, with the understanding that we will be proceeding to trial this morning, are you—do you feel competent to represent this individual?
>
> MS. MANZIE: Yes, I feel confidence in terms of the circumstances and the law which would be applicable but I feel that it would be an insurmountable hindrance to not have sufficient time to interview my witnesses, you know, take written statements from them in the event that they don't remember what was said or in the event I need to use it for impeachment purposes. You know, even if we could get a week.
>
> * * *
>
> THE COURT: Here's what we're going to do. We're going to go with the trial. And these will be rebuttal witnesses anyway, is that correct?
>
> MS. MANZIE: The boyfriends, yes.
>
> THE COURT: Before we use any of those people we will have an in-camera hearing to determine whether or not their testimony should be used, and it will be heard outside the presence of the jury to review that but we're now going to proceed. Mr. O'Donnell and Ms. Manzie, you are representing the defendant. The jury is here. We'll be ready in five minutes.

Manzie then placed on the record that defendant did not want co-counsel O'Donnell representing him, and the court stated that the request was granted but O'Donnell should remain as a resource. Jury selection occupied the remainder of the first day of trial, and the start of the second day of trial, Tuesday, November 10, 1992.

B

We review the trial court's denial of defendant's request for a continuance for abuse of discretion, applying the four factors of *Williams, supra:* 1) whether defendant was asserting a constitutional right; 2) whether he had a legitimate reason for asserting the right; 3) whether he was negligent; 4) and whether prior adjournments of trial were at defendant's behest. *People v Roy Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976), citing *Williams.* Additionally, defendant must demonstrate prejudice resulting from the court's abuse of discretion. *Id*., citing MCL 769.26; MSA 28.1096.

Applying the *Williams* factors, defendant asserted his constitutional right to counsel. Defendant argues that he asserted his right to counsel to preserve his right to effective counsel, because he disagreed over defense strategy and the calling of witnesses, did not trust appointed counsel and, as a result, had not been able to discuss defense strategy. It appears that defendant unilaterally chose not to disclose to counsel his defense theory or the names of some witnesses. Regarding whether defendant was negligent, defendant's dissatisfaction with appointed counsel was first raised on the record at the October 23, 1992 motion hearing, when counsel advised that he was having difficulty communicating with defendant. The following week, defense counsel filed a motion to withdraw, which was heard on November 6, 1992, three days before trial was scheduled to begin. Although the record supports that defendant was dissatisfied with his two appointed attorneys and had tried to retain counsel, apparently as far back as April, when, according to Manzie, defendant contacted her about representation but was unable to gather a sufficient retainer, the trial court was not made aware of defendant's dissatisfaction with appointed counsel until October 23, 1992. Further, it was not until the Friday before the Monday trial was to begin that the court was presented with defendant's request for substitute counsel. We therefore conclude there was sufficient basis for the trial court's conclusion that defendant was dilatory in raising the matter. As to factor four, although the defense had requested prior adjournments[5] the motions were denied. Thus, there had not been prior adjournments attributable to defendant.

We conclude the trial court did not abuse its discretion in weighing the factors and concluding that a continuance was not warranted. Further, defendant has failed to show the required prejudice. Defendant argues he was prejudiced by the court's refusal to grant a continuance because both attorneys, Manzie and O'Donnell, advised the court that they were unprepared to start trial. He argues that Manzie did not have a copy of the preliminary examination transcript when she cross-examined complainant and, despite having reserved the right to recall the complainant, the court did not allow her to. Defendant argues that because counsel was not prepared and did not have the necessary tools to conduct cross-examination, he was denied his right of confrontation and effective assistance of counsel. Defendant notes that his counsel was able to cross-examine complainant when the prosecution was allowed to recall her as a rebuttal witness, but argues that the court severely restricted cross-examination by not giving defense counsel any latitude, by sustaining numerous objections posed by the prosecution, and by instructing defense counsel to stay within the scope of direct examination. He further asserts that counsel was unable to interview witnesses.

We have reviewed the record and have not found any prejudice to defendant from the court's denial of the continuance. Defense counsel was able to cross-examine the complainant a second time after having reviewed the preliminary examination transcript and, although the court limited defense counsel's questions to the scope of the direct examination, defendant has not identified how he was prejudiced by this limitation. More important, defendant has not identified any disallowed questions that came to light only after the preliminary examination transcript was reviewed, and, other than making a general assertion, has not explained how he was prejudiced by counsel's failure to obtain the transcript before cross-examining complainant. Our review of the trial and the preliminary examination transcript leads us to conclude that defendant's confrontation of the witness was not hampered by counsel's belated review of the examination transcript.

Further, defendant has not explained which witnesses defense counsel was unable to interview and how he was prejudiced.

II

Defendant next asserts that the trial court erred in refusing to permit defendant to recall complainant and then restricting cross-examination when complainant was recalled by the prosecutor, in denying defense counsel's request for a two-minute recess near the end of the defense case so that counsel could telephone a witness who was needed to rebut portions of the prosecution's case, and in refusing defendant's request that a witness be picked up and brought to court. Regarding the first contention, we reiterate that defendant was permitted to cross-examine complainant when she was recalled by the prosecutor and that defendant has shown no prejudice resulting from the limitation of the scope of that cross-examination.

As to the second contention, we also find no reversible error. Defense counsel did not identify to the court who the witness would be, but on appeal argues that it was Barbara Brown, and that her testimony could have been crucial to the defense, in that she could have refuted complainant's suggestion that Brown had told defendant details of complainant's life. Defendant argues that the prosecutor in closing argument asserted that Brown was the "pipeline" that allowed defendant to learn things about complainant's life. Because defense counsel had apparently arrived late for trial that morning, the trial court denied her request for "two minutes" to make the call, stating that counsel could have someone else make the call. It was revealed two days later by defense counsel, after the jury returned a verdict, that the call to Brown had in fact been made by O'Donnell, and that Brown did not recognize O'Donnell's voice, and thought it may be the prosecution, or a trick, so she did not appear. Defense counsel did not bring this information to the attention of the trial court when the call was made, but waited until the jury returned a verdict two days later. Under these circumstances, we cannot conclude that the trial court abused its discretion or that the court deprived defendant of the opportunity to present a witness in his defense.

Nor do we find an abuse of discretion in the trial court's refusal to issue a bench warrant for subpoenaed witness Sovarinski to secure his testimony regarding the property where the alleged incident occurred. The court reasonably concluded that Sovarinski's testimony would have been cumulative. MRE 403.

III

Defendant next argues that he was denied a fair trial by the prosecutor's misconduct during closing argument. Because no objection to the prosecution's closing argument was made at trial, we review only to determine: (1) whether the prejudicial effect could not have been cured by a timely objection, or (2) whether failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The prosecutor's remarks in closing argument included referring to the complainant as:

> . . . an upstanding citizen like yourselves who's come in here. And the only reason she's here is because she's been violated. . . And if we can't convince her fellow citizens that this has happened, then Lord help us. I don't know how we can convince anybody else. If I can't walk into a court with somebody like Linda Williams and get across some simple truths, then we got a problem.
>
> The prosecutor also stated:
>
> So what does [defendant] say to convince you that he's known her. He's just rattled off names . . .
>
> And it reminds me of—You know, to digress a moment, you know, Hitler before he took over Germany, he said, "Great masses of the people will more easily fall victim to a great lie than a small one." And that led to the phrase, "Big lie, big lie." Sometimes big lie is an easier one to sell than a small lie. That's what you have here. You have a big lie.
>
> The prosecutor continued:
>
> You know, he was false to her. He was Larry. He came by. . . And everything about him was false as to her and it led to that assault. And he's been false in this defense in what he has put together.
>
> And it reminds one of the, you know, saying from Matthew, "Beware of false prophets." You know, they'll come to you in sheep's clothing but inwardly they are ravenous wolves. And how shall we know them? We shall know them by their deeds. That's how we get to know him. That's how she got to know what he really was, by his deeds and what he really revealed himself to be to her. And he's revealing it again here. This is a guy that's made this thing a project; getting into her life as much as he can, patching together the big lie defense. And it's all false.
>
> On rebuttal, the prosecutor argued:
>
> Just let me say to you that I think that Mr. Stoudemire has been guilty in fact of this case since last September. And I believe that it remains up to you to find him guilty in law. And I hope that you do that after your deliberation on the facts in this case.

The prosecution's remarks were clearly improper. Nonetheless, we conclude that they do not constitute error that could not have been rectified by a timely curative instruction, *Stanaway, supra*, and that, although improper, it is unlikely that they affected the outcome of the trial.

IV

In a supplemental brief in pro per, defendant argues that his appointed counsel were ineffective in their representation. Defendant argues that O'Donnell failed to establish an effective attorney-client relationship, and that he failed to timely file his motion to withdraw, when he knew that attorney-client communications had broken down, and that the motion was therefore heard three days before trial. Defendant also argues that the Chief Defender wrongly refused to remove O'Donnell as counsel. On the record before us, we cannot agree that O'Donnell rendered ineffective assistance to defendant. Further, defendant has not established that he asked O'Donnell to file a motion to withdraw at an earlier date. We further conclude that the Chief Defender was not obliged to accommodate defendant's request for different counsel.

Defendant also argues that O'Donnell committed serious error by requesting that the police analyze pieces of evidence detrimental to defendant's case, i.e., the Corona bottles and the tissue complainant threw out the car window. As there was no evidence presented that the police did any such analysis, and indeed, trial testimony established that the police could not locate this evidence, we find defendant's argument without merit. Nor can we address defendant's allegation that O'Donnell was working in concert with the prosecution and provided the prosecution with non-discoverable issues and strategies of the defense. There is no evidence in the record before us substantiating such a claim, and defendant's bare allegations do not warrant remand for a *Ginther* [6] hearing.

Defendant next argues that the trial court abused its discretion in allowing the late endorsement of the prosecution's expert witness without a showing of good cause. As defendant does not argue he was prejudiced by the endorsement, we find no reversible error.

Defendant next argues the prosecutor deliberately misrepresented to the trial court what the scientific evidence would show. Defendant points to the prosecutor's statement that "there was sperm and semen on the swab," and states that the statement is false. However, while there was evidence that one slide tested negative for sperm, there was also evidence that a vaginal swab from complainant was wiped on a microscope slide, which was analyzed and found to contain sperm.

Lastly, defendant argues that the prosecutor's failure to recuse himself deprived defendant of due process and a fair trial, in light of the prosecutor having previously prosecuted defendant, and the case having been overturned on appeal, with two retrials, one of which ended in the dismissal of charges. Defendant argues that the prosecutor's attacks and misconduct at trial were fueled not by zealous ambition but by vindictive animosity directed at defendant. We have considered defendant's claims of prosecutorial misconduct, *supra*. Defendant presents no new argument here warranting our revisiting our determination above.

V

Defendant's last issue, raised through counsel, concerns sentencing. Defendant argues that the sentencing court erroneously scored defendant's prior record score at 100, when it should have been 0,

and thus the resulting twenty- to thirty-year sentence was erroneous and violated the principle of proportionality.

Under the prior criminal record section, defendant's Presentence Investigation Report (PSIR) listed:

> 01/27/82 Allen Park, MI; 6/23/82, found guilty of 1 Ct RA and 1 Ct. CSC 1st degree and 2 Cts. FF and sentenced to 30-50 years, 40-60 years and 2 years respectively; released 1/9/86.

However, this conviction had apparently been vacated and the changes eventually dismissed. The guidelines were nevertheless scored as through the convictions had not been vacated.

At sentencing, defense counsel objected to the scoring of ten points for PRV 5, prior misdemeanors, stating that defendant had no misdemeanor convictions in the last ten years. Defendant did not specifically object to PRV 1 (prior high severity felony convictions) or PRV 2 (prior low severity felony convictions), which were scored at fifty and forty points, respectively. However, defendant filed a motion to remand in this Court, which was denied for failure to persuade "of the necessity of a remand at this time."

Although defendant has an extensive prior record, he was conviction-free between his release from prison in 1980 and the commission of the instant offense in September 1991. According to the Michigan Sentencing Guidelines, (2d Ed, 1988), p 3, when a defendant has a conviction-free period of ten years or more, none of the convictions preceding that ten-year period may be included in the calculation of a prior record score. Here, all defendant's prior convictions preceded his ten-year conviction-free period. Thus, the guidelines were improperly scored.

However, the twenty-to thirty-year sentence defendant challenges was imposed on his third habitual offender conviction, after the underlying ten-to fifteen-year sentence was vacated,[7] and the sentencing guidelines do not apply to habitual offender sentences. *People v Cervantes*, 448 Mich 620, 622, 625, 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Our review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourne*, 435 Mich 630; 461 NW2d 1 (1990); *Gatewood*, at 560. However, a defendant must be sentenced based on accurate information. *People v Malkowski*, 385 Mich 244, 249; 188 NW2d 559 (1971).

At sentencing, the trial court stated:

> I have reviewed this presentence report prepared by the Probation Department. And the defendant here has a very long record of similar offenses. And it would appear to me to be appropriate to give him, sentence him to a period of time that would assure some protection to the community and further, to provide him with some opportunity for rehabilitation which apparently has not occurred notwithstanding the number of times

> that he's been in the system. Accordingly, Mr. Stoudemire, you are sentenced to a period of 10 to 15 years with the Michigan Corrections Department on the charge of criminal sexual conduct third agree [sic]. That sentence will be set aside and you will be sentenced on the habitual third to a period of 20 to 30 years with the Michigan Corrections Department.

On the record before us, it is unclear whether the trial court relied on the 1982 convictions erroneously listed in the PSIR (one count of armed robbery, one count of CSC, first degree, and two counts of felony firearm) in fashioning its sentence. We therefore remand. On remand, the court shall correct the SIR, and defendant shall be permitted to respond to the statements made to the court by complainant and her daughters at sentencing.[8] The court shall then decide whether resentencing is warranted in light of defendant's response and the information that the 1982 convictions had been reversed and the charges dismissed. See *People v Polus*, 197 Mich App 197, 201-202; 495 NW2d 402 (1992)..

Affirmed but remanded for further proceedings regarding sentence. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Helene N. White
/s/ Patrick J. Conlin

[1] Defendant's ten to fifteen sentence on the CSC third degree conviction was set aside.

[2] Counsel had indeed stated, after cross-examining complainant, that she reserved the right to recall the witness.

[3] O'Donnell requested the progress report of the officer in charge, police reports pertaining to any prior charges of criminal sexual conduct complainant made, complainant's adult criminal history, preliminary complaint reports by four officers present at the scene, the 911 tape of complainant's call, any record made by the person receiving the 911 call, names and ages of the individuals used in the photo lineup, names and addresses of all persons interviewed by the police at the store from where complainant made her 911 call, interview notes pertinent to the latter, any photographs, a single list of all the evidence that might be used at trial, and a typed transcription of the notes of the physician who treated complainant at the hospital (the notes being unreadable).

[4] The colloquy continued:

> MR. O'DONNELL: May I address one more matter?
>
> THE COURT: Yes.

MR. O'DONNELL: My client has asked me to take this case to Judge Roberson and request an adjournment.

THE COURT: This is not Judge Roberson's case. I don't mind if you want to go and make a request. You're free to do that. I don't have any control over that. And if he wants to take this case and adjourn it he can very well do that. But then the case is his case. I do not want this case back.

Do you understand that?

MR. O'DONNELL: Yes.

THE COURT: Okay. We're all done.

MR. O'DONNELL: Thank you, your Honor.

(Hearing concluded)

[5] At the preliminary examination, at the October 23, 1992 hearing on defendant's motion for discovery, and at the November 6, 1992 hearing on defense counsel's motion to withdraw.

[6] *People v Ginther*, 390 Mich 436; 213 NW2d 922 (1973).

[7] The ten- to fifteen-year sentence was within the guidelines as erroneously calculated, but would not be within the corrected range.

[8] These statements were made after defense counsel and defendant addressed the court, and defendant was not permitted to challenge their accuracy. Nor did the court state that it would disregard the statements.