

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD EDWIN GREEN,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

Nos. 156303, 156304

LC Nos. 91-026411-FH,

91-026412-FH

Before: MacKenzie, P.J., and Markey and Batzer,* JJ.

PER CURIAM.

Pursuant to a jury trial, defendant was convicted of two counts third-degree criminal sexual conduct, MCL 750.520d(1)(a) and (b); MSA 28.788(4)(1)(a) and (b). In exchange for the dismissal of kidnapping and first-degree criminal sexual conduct charges, defendant also pleaded guilty to felonious assault, MCL 750.82; MSA 28.277, and another count of third degree criminal sexual conduct [CSC III], MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced defendant to seven to fifteen years' imprisonment for each CSC conviction and two to four years' imprisonment for the felonious assault conviction. Defendant appeals as of right. We vacate one of the jury's CSC III convictions and remand the case for clarification and articulation regarding defendant's sentences.

Defendant first argues that his conviction must be reversed because the prosecutor repeatedly asked defendant's witness questions regarding defendant's failure to specifically deny having had sexual relations with the complainant and then argued that defendant's silence on this point was substantive evidence of guilt. We disagree. Because defendant's nonresponsive conduct did not occur during a custodial interrogation and was not in reliance on *Miranda*¹ warnings, defendant's silence was not constitutionally protected. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Also, because defendant failed to properly preserve this issue for appeal by neglecting to raise an objection at trial, we will only review this issue if failure to do so would result in a miscarriage of justice. MRE 103(a)(1); see *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

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

Here, we find no miscarriage of justice absent appellate review because defendant called Mike Bailey as a witness and the prosecutor elicited testimony on cross-examination regarding a telephone conversation that Bailey overheard between defendant and the complainant during which defendant did not deny having sex with the complainant. According to Bailey's testimony, defendant confronted the complainant, challenged the truth of her allegations, and adamantly attempted to have her admit that he did not do "it." Unlike cases implicating the tacit admission rule, which permits a defendant's silence in the face of criminal accusations to be used against the defendant,² this case does not involve defendant's silence. Cf. *People v Bigge*, 288 Mich 417, 419-421; 285 NW 5 (1939); *Greenwood*, *supra* at 472-473. Defendant contacted the complainant by telephone and implicitly denied that he raped her, but, according to Bailey, defendant did not deny having sex with the complainant. While "[t]he unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant," *Bigge*, *supra* at 420, we have no such unanswered allegation present in this case. Accordingly, it was not improper for the prosecutor to question Bailey regarding defendant's statements during the telephone conversation and argue the implications of defendant's statements or omissions to the jury.

Next, defendant argues that the trial court's instructions to the jury regarding two counts of criminal sexual conduct violated double jeopardy principles because the instructions focused only on the aggravating circumstances of age and force rather than emphasizing the need for two separate penetrations. According to defendant, the jury's guilty verdict on both counts amounted to double punishment for a single wrong because the court did not make clear to the jury that each CSC count required a separate and distinct penetration. We agree.

After reviewing the jury instructions in their entirety, along with the prosecutor's arguments to the jury and the jurors' response on the verdict form, we believe that reversal is required because the instructions did not sufficiently protect defendant's rights, i.e., the instructions resulted in legal error that violated defendant's right to be free from double jeopardy. See *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995); *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). Defendant was charged with two counts of CSC, both alleging digital and/or penile penetration. Although the evidence supported the finding of two separate penetrations, both the prosecutor and the court spoke of penetration in general terms, often referred to a singular "sexual act," and failed to emphasize that a separate and distinct act of penetration was needed to support each CSC count. For example, in the jury instructions, the court differentiated between count one as involving third-degree CSC, or actual penetration of a female between the ages of thirteen and fifteen, and count two as involving vaginal penetration of a female by the use of force or coercion. The prosecutor used the same distinctions in her opening and closing statements, noting that penetration and age must be proven for count one and penetration plus force and coercion must be proven for count two. Finally, the jury returned its verdict form after marking only the box as to "Count II." When asked to explain the discrepancy between its verdict of guilty on both counts of CSC, the foreperson answered, "[I]t was our understanding that Count II implied guilt in Count I on that form."

Upon our de novo review, we find that the jury never understood the significance or necessity of finding two separate penetrations, one to support each of the two CSC convictions. Because the court perpetuated that confusion in failing to correctly or adequately instruct on the law, it is more probable than not that defendant's convictions were based on a single criminal act, as described by the trial court in its final jury instructions. Accordingly, we vacate one of defendant's convictions so as to protect his right to be free from double jeopardy. *People v Johnson*, 406 Mich 320, 323, 331; 279 NW2d 536 (1979).

Further, because defendant failed to timely and specifically object to alleged improper prosecutorial remarks and a cautionary instruction could have cured any alleged error, we will not review this issue on appeal. *Stanaway, supra*; *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

Defendant also argues that he is entitled to resentencing because the trial court denied him the opportunity to allocute at sentencing. We disagree. Our review of the record from the sentencing hearing reveals that the trial court complied with MCR 6.425(D)(2)(c) when it asked defendant whether he wished to address the court before sentencing but defendant failed to respond. We therefore find no error. Cf. *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980); *People v Lugo*, 214 Mich App 699, 711-712; 542 NW2d 921 (1995).

Finally, defendant argues that he is entitled to resentencing because the trial court failed to articulate its reasons for departing from the sentencing guidelines. Upon de novo review, we find that defendant's assertion is supported by the record. See *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995). The trial court sentenced defendant to seven to fifteen years' imprisonment as recommended in the presentence investigation report but exceeded the guideline range of thirty to seventy-two months' imprisonment in the sentencing information report. The trial court failed to articulate its reasons for doing so at the sentencing hearing or on the sentencing information report. *People v Barclay*, 208 Mich App 670, 676-677; 528 NW2d 842 (1995). On remand, the trial court must determine whether it intended to exceed the guidelines and, if so, it must articulate its reasons for doing so. *Id.* at 677. If the court had no intention of exceeding the guidelines, then defendant must be resentenced.

Should the court deem it necessary to resentence defendant upon remand, we believe that the court may consider the evidence adduced at trial concerning the second penetration even though we have vacated one of defendant's CSC III convictions for the reasons set forth above. Also, in light of the fact that defendant was free on bond regarding the two CSC III charges in Docket No. 91-026411-FH at the time he committed the felonious assault and additional CSC III offenses in Docket No. 91-026412-FH, the trial court should have consecutively sentenced defendant pursuant to MCL 768.7b(1); MSA 28.1030(2)(1). *People v Nantelle*, 215 Mich App 77, 79-81; 544 NW2d 667 (1996). All of these offenses occurred before December 31, 1991, and, therefore, require mandatory consecutive sentencing under MCL 768.7b(1); MSA 28.1030(2)(1). Accordingly, on remand, the court must amend its sentence to clarify that the sentences imposed for defendant's felonious assault and

CSC III convictions from Docket No. 91-026412 will be served consecutively to the CSC III sentences to be imposed in Docket No. 91-026411.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Jane E. Markey

/s/ James M. Batzer

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² The admission of a defendant's silence as a tacit admission of guilt is permissible where defendant has "manifested his adoption or belief in the truthfulness of the accusation" in accordance with MRE 801(d)(2)(B). *Greenwood, supra* at 472-473.