STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **Michigan Supreme Court No. 157465**

KELVIN WILLIS,
Defendant-Appellant.

Court of Appeals No. 334398
Wayne County Circuit Court No. 15-010530-01-FH

PLAINTIFF-APPELLEE'S ANSWER OPPOSING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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The People of the State of Michigan – through Kym L. Worthy, Prosecuting Attorney, County of Wayne, Jason W. Williams, Chief of Research, Training, and Appeals, Deborah K. Blair, Assistant Prosecuting Attorney – ask this Honorable Court to deny the Defendant's Application for Leave to Appeal.

1. The Defendant's application for leave to appeal relies on two of the same arguments that he made in his brief on appeal to the Michigan Court of Appeals (the Defendant has abandoned the third issue he previously raised on appeal).

2. The People's brief on appeal in the Michigan Court of Appeals adequately addresses these particular issues, and is incorporated in this answer.[1]

3. The Michigan Court of Appeals did not clearly err in rejecting the Defendant's arguments and denying relief.[2]

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[1] Please see Appendix A.
[2] MCR 7.305(B)(5)(a).

4. The Defendant's application for leave to appeal does not demonstrate any of the other grounds for granting leave to appeal.[3]

5. In sum, the Defendant's application for leave to appeal raises no issue worthy of this Honorable Court's review, and it should be denied.

[3] MCR 7.305(B)(1)-(4).

RELIEF REQUESTED

THEREFORE, the People request that this Honorable Court deny the Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

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Dated: April 16, 2018

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KELVIN WILLIS,
Defendant-Appellant.

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Third Circuit Court No. 15-010530-01-FH

Appendix A
The People's Brief on Appeal to the Michigan Court of Appeals

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **Court of Appeals No. 334398**

KELVIN WILLIS,
Defendant-Appellant.

Wayne County Circuit Court No. 15-040530-01-FH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with the Defendant's statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A defendant commits child sexually abusive activity when he attempts or prepares to make or arrange to have a child engage in sexually abusive activity. Here, there was evidence that the Defendant showed a pornographic video to the sixteen- year-old victim and then offered the victim money if the victim would allow the Defendant to have intercourse with him. Was this evidence sufficient to satisfy the elements of child sexually abusive activity?

The trial court would answer this question, "Yes."

The People answer, "Yes."

The Defendant would answer, "No."

II.

A judge's conduct does not pierce the veil of judicial impartiality or violate the right to a fair trial unless, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. Here, the judge did not show partiality to either side but was merely controlling the proceedings and making appropriate rulings. Has the Defendant shown that the veil of judicial impartiality was pierced?

The trial court did not answer this question.

The People answer, "No."

The Defendant would answer, "Yes."

COUNTERSTATEMENT OF QUESTIONS PRESENTED (CONT.)

III.

A sentence that falls within the guidelines is legally valid and there is no basis upon which to disturb a valid sentence. Here, the sentence of 15-40 years fell within the calculated sentence guidelines because the Defendant was a habitual third offender. Therefore, does the Defendant have a right to resentencing?

The trial court did not answer this question.

The People answer, "No."

The Defendant would answer, "Yes."

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. The Defendant was convicted of one count of child sexually abusive activity, one count of possession of cocaine less than 25 grams, and one count of distributing sexually obscene matter to a minor.

On August 12, 2015, at around 11 p.m., the sixteen year-old victim, Ali Aoun, was walking to the house that he shares with his grandmother, located at 4031 Calhoun Street in Dearborn, Michigan.[1] There is an apartment complex across the street. He knew the Defendant as someone who lived at the apartment complex.[2] The Defendant talked to him and asked the victim how old he was and the victim told him that he was sixteen years old.[3] The Defendant asked for the victim's cell phone number, so the Defendant gave him his cellular telephone number and the victim called him so that the Defendant would have his cellular telephone number.[4] The Defendant invited the victim into his apartment and the victim complied.[5] When they got inside the apartment, the Defendant told him to sit on the couch. It was dark inside the apartment. A woman named Tonya (later identified as Tonya Battle) sat next to him on the couch and the Defendant sat on the other side of him.[6] Ms. Battle was smoking marijuana and drinking alcohol.[7] Ms. Battle began to argue with the Defendant and then she left the apartment.[8] The Defendant left the apartment also but he returned soon after. When he returned to the apartment, the Defendant put his arm around the victim and used his cellular telephone to

[1] 6/14/2016, 63.
[2] 6/14/2016, 65.
[3] 6/14/2016, 66.
[4] 6/14/2016, 66.
[5] 6/14/2016, 67.
[6] 6/14/2016, 68.
[7] 6/14/2016, 68.
[8] 6/14/2016, 68.

show the victim a video of two men having sexual intercourse with each other.[9] When he was showing the victim the video, the Defendant said, "this is what I like to do."[10] The Defendant then told the victim that he would give him $25 if he allowed the Defendant to put his fingers in his butt hole and masturbate on him.[11] The victim said no and was going to get up off the couch but the Defendant grabbed his shoulders and forced him back on the couch. The Defendant then offered him $100 to have sexual intercourse.[12] The victim told him no. The Defendant left the apartment to find Tonya. At that point the victim tried to climb out a window but it would not open, so he opened the door of the apartment and. not seeing either the Defendant or Tonya, he ran out of the back door and escaped the apartment complex.[13] The victim saw a person that he knew outside named Randy (Randy Ferguson).[14] He told Mr. Ferguson that he had just been molested so Mr. Ferguson called the police and told them what was happening.[15]

The Dearborn police arrived and the Defendant was arrested.[16] As his property was being inventoried, a packet of cocaine was found in his right front pocket of his shorts.[17] The Defendant gave a statement to police where he denied the allegations.[18] The Defendant's cellular telephone was placed into evidence and an extraction report was made of the phone.[19] The officer in charge remarked that there were teenage boys depicted in a video saved on the

[9] 6/14/2016, 69.
[10] 6/14/2016, 70.
[11] 6/14/2016, 70.
[12] 6/14/2016, 70.
[13] 6/14/2016, 70.
[14] 6/14/2016, 125.
[15] 6/14/2016, 126-127.
[16] 6/15/2016, 120.
[17] 6/15/2016, 123.
[18] 6/14/2016, 139-140.
[19] 6/15/2016, 125; 141.

cellular phone.[20] It could not be verified if the males in the video files of the phone were actually juveniles.[21]

Other facts will be referenced as necessary within the brief.

[20] 6/14/2016, 159.
[21] 6/14/2016, 159.

ARGUMENT

I. A defendant commits child sexually abusive activity when he attempts or prepares to make or arrange to have a child engage in sexually abusive activity. Here, there was evidence that the Defendant showed a pornographic video to the sixteen-year-old victim and then offered the victim money if the victim would allow the Defendant to have intercourse with him. This evidence was sufficient to satisfy the elements of child sexually abusive activity.

Standard of Review

The People agree with the Defendant's statement of the standard of review. In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[22] The reviewing court must make all reasonable inferences and credibility choices which will support the trier of fact's verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[23] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[24] An issue involving the interpretation of a statute is reviewed de novo.[25]

Discussion

The Defendant claims that there was insufficient evidence of child sexual abusive activity to convict the Defendant. MCL 750.145c(2), Child Sexual Abusive Activity, provides the following:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of

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22 *People v Nowack*, 462 Mich 392, 399 (2000)*; People* v *Petrell*a, 424 Mich 221 (1985).
23 *People v Wolfe*, 440 Mich 508, 526 (1992).
24 *People v Nowack*, 462 Mich at 399 (citing *People v Carines*, 460 Mich 750, 757 (1999).
25 *People v Riggs*, 237 Mich App 584, 588 (1999).

> producing any child sexually abusive material, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.[26]

In this case, the Defendant met the victim outside of his apartment building and started a conversation with the victim. The Defendant asked for the victim's telephone number and the victim called him so that he would have the number. The Defendant asked the victim how old he was and the victim told him that he was only sixteen years old. The Defendant invited the victim inside of his apartment to "hang out" with him.[27] The victim went inside the apartment and the Defendant told the victim to sit on the couch and the victim complied.[28] While he was seated on the couch, the Defendant showed the sixteen-year-old victim a pornographic video on his cellular telephone and told him that is what he liked to do.[29] He then offered the victim $25 if he would touch the Defendant's anus with his fingers and let the Defendant masturbate on him, or $100 if he could have sexual intercourse with the victim.[30] The Defendant then left the apartment to look for Tonya Battle and the victim was able to escape out the back door of the apartment

[26] MCL 750.145c(2).
[27] 6/14/2016, 67.
[28] 6/14/2016, 67.
[29] 6/14/2016, 69-70.
[30] 6/14/2016, 70.

building.[31] These actions by the Defendant satisfy the elements of the child sexual abusive activity statute.

The Court gave a non-standard jury instruction on child sexual abusive activity. The court instructed the jury as follows:

> …To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt, and there are two elements.
> First, that the Defendant attempted, prepared, or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was [sic under] eighteen years of age.
>
> Okay. On a separate page I've defined sexually abusive activity, but I didn't do it on the same page as Count 1. So if you need to look it up again it's another page, okay.
>
> In Count II, the defendant is charged with a second count of child sexually abusive activity. So in Count II the Defendant is charged with a crime known as child sexually abusive activity. The Defendant has pled not guilty to this charge. To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt and there are two elements for Count II.
> First that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second that this person was under eighteen years of age.
>
> So on the next page I've defined – I have the definition of child sexually abusive activity that applies to Count I and Count II. Sexually abusive activity is defined by law as a child engaging in any of the following sexual acts. A, sexual intercourse whether genital, anal, or oral. B, fondling of a person's clothed or unclothed genitals, pubic area, buttocks, or female breasts for the purpose of sexual gratification. C, masturbation.
>
> And then below that I have a cautionary instruction which reads, mere desire to commit those acts is not a crime. The Defendant must have either one, actually attempted to commit those acts or, two, have made preparation for committing those acts.[32]

This jury instruction was complete and properly described the crime of child sexual abusive activity because the child sexual abusive activity statute only requires that the defendant

[31] 6/17/2016, 72.
[32] 6/17/2016, 136.

prepare to arrange for child sexually abusive activity. It does not require that those preparations actually proceed to the point of involving or actually touching the child. Here we have the Defendant approaching the victim, inviting him into the apartment, offering him $25 if he allowed the Defendant to insert his fingers into his anus, and another $100 if he allowed the Defendant to have intercourse with the victim. *People v Aspy*,[33] held that MCL 750.145c(2) does not actually require conduct involving a minor, rather it only requires that the defendant prepares to arrange for child sexually abusive activity. In *People v Aspy*,[34] the defendant arranged over the internet with a girl he believed to be fourteen years old to meet and engage in sexual activity. He traveled to the place he believed to be the child's home, but the child was actually an adult pretending to be a child. The defendant was arrested as he got to the home, his car was searched, and it contained alcohol, specifically the type of alcohol the person pretending to be the teenager told him she wanted, Mike's Hard Lemonade. The court ruled that the evidence supported the conviction for child sexually abusive activity, even though the defendant did not produce a videotape, photograph, or computer generated image or picture of an under-age girl. The same reasoning should apply in the instant case. The Defendant attempted or prepared to arrange for child sexually abusive activity with the victim. Child sexual abusive activity means a child engaging in a listed sexual act. A "listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.[35] Passive sexual involvement means an act, real or simulated, that exposes another person to or draws another person's attention to an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any

[33] *People v Aspy*, 292 Mich App 36 (2011).
[34] *People v Aspy*, 292 Mich App 36 (2011).
[35] MCL 750.145c(1)(i).

of these acts or because of the proximity of the act to that person for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved.[36]

In this case the Defendant put his arm around the victim and then exposed the child victim to a video of two men having sexual intercourse and stated, "this is what I like to do."[37] Showing the victim a video of two men having sexual intercourse was passive sexual involvement as described in MCL 750.145c. His further offering to pay the victim for sexual activity was further inducement or enticement to get the child to engage in a sexually abusive activity. Therefore, the Defendant could be found guilty of child sexually abusive activity and the evidence was sufficient.

Similarly, in *People v Adkins*, the defendant was found guilty of child sexual abusive activity contrary to MCL 750.145c. In that case the defendant engaged in sexually explicit internet dialogue with and arranged to meet an undercover police officer posing as a fourteen-year-old boy. The court in *Adkins* held that the child sexually abusive activity statute, MCL 750.145c(2), applied to this conduct because the statute includes "a person who *attempts or prepares* or conspires to arrange for, produce, make, or finance any child sexually abusive activity *or* child sexually abusive material."[38] The court ruled that the statute divided offenders into three groups, one group that produces child sexual abusive material, a second group that arranges, produces, or finances the child sexual abusive material, and a third group that merely attempts or prepares or conspires to arrange for, produce, make, or finance child sexual abusive activity or child sexual abusive material. The disjunctive "or" signifies that the second and third

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[36] MCL 750.145c(1)(l).
[37] 6/14/2016, 69-70.
[38] *People v Adkins*, 272 Mich App 37, 41 (2006), quoting MCL 750.145c. The statute was amended in 2013, but the amendment did not change the relevant language.

groups of persons face criminal liability for participation in the arrangement for or production, making, or financing of *either* child sexually abusive activity *or* child sexually abusive material. The language of the statute defining the groups of criminal actors eliminates the requirement applicable in the first group that the proscribed actions must have been taken for the purpose of creating child sexually abusive material. The Legislature thus omitted from the second and third groups subject to criminal liability any requirement that the individuals therein must have acted for the ultimate purpose of creating any child sexually abusive material, a specific requirement applicable to the first group of criminals.[39] Therefore, the actual production of child sexually abusive material is not necessary in order to violate the act, contrary to the argument of the Defendant. In summary, the Defendant was properly convicted of child sexually abusive activity contrary to MCL 750.145c(2).

The Defendant also argues that the child sexual abusive activity statute is ambiguous because the statute makes certain sexual conduct with a person under the age of eighteen a crime whereas the age of consent in Michigan (for purposes of MCL 750.520a et seq.) is sixteen years old.[40] The Defendant did not argue this point at the trial court level so the claim is unpreserved and review is limited to plain error affecting defendant's substantial rights.[41]

There is no doubt that the conduct proscribed by the child sexual abusive activity statute applies to anyone under the age of eighteen. The statute "focuses on protecting children from sexual exploitation, assaultive or otherwise."[42] The fact that the legislature has proscribed certain conduct for persons under the age of eighteen whereas in other statutes the age limit is

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[39] *People v Adkins*, 272 Mich App 37, 41–42 (2006).
[40] Defendant-appellant's brief on appeal, p. 22.
[41] *People v Carines*, 460 Mich 750, 752-753 (1999).
[42] *People v Ward*, 206 Mich App 38, 42 (1994).

sixteen years of age is of no moment. The legislature is free to proscribe different ages for different types of conduct as it seems fit. For example, the drinking age is 21, but people can legally smoke cigarettes at age 18. Perhaps more applicable to the instant case, there are different punishments proscribed for the perpetration of criminal sexual conduct in the first degree for an offense perpetrated against someone under the age of 13 than if the victim was not under 13 years of age.[43] Moreover, there is a substantial difference between consensual sexual activity between a person sixteen years of age and the instant conduct.

The Defendant cites the rule of lenity which has no application to the instant case. The rule of lenity provides that courts should mitigate punishment when the punishment in a statute is unclear.[44] Here, the punishment provided for in MCL 750.145c is very clear. The penalty portion of the statute is explained in MCL 750c(2); it is a felony punishable by imprisonment of not more than 20 years, or a fine of not more than $100,000.00, or both. The Defendant does not explain how that language is ambiguous. Therefore, the Defendant's claim must fail.

[43] MCL 750.520b(2).
[44] *People v Johnson*, 302 Mich App 450, 462 (2013).

II. A judge's conduct does not pierce the veil of judicial impartiality or violate the right to a fair trial unless, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. Here, the judge did not show partiality to either side but was merely controlling the proceedings and make appropriate rulings. The Defendant has not shown that the veil of judicial impartiality was pierced.

Standard of Review

The People do not dispute Defendant's statement of the standard of review. The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that the Court reviews *de novo*. [45]

Discussion

The Defendant argues that he was denied a fair trial due to the trial court's denigration of defense counsel and partiality to the prosecution. Case law provides that a trial judge has wide discretion and power in matters of trial conduct.[46] This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed.[47] The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.[48] A fact-specific inquiry is required.[49] "A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a

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[45] *People v Stevens*, 498 Mich 162, 168 (2015).
[46] *People v Conley*, 270 Mich App 301, 308 (2006), citing *People v Collier*, 168 Mich App 687, 698 (1988) and *People v Cole*, 349 Mich 175 (1957).
[47] *People v Stevens*, 498 Mich 162 (2015).
[48] *Id.* at 164.
[49] *Id.* at 171.

single instance of misconduct may be so egregious that it pierces the veil of impartiality."[50] In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions.[51] This list of factors is not intended to be exhaustive.[52] Furthermore, the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality.[53]

In this case the Defendant has not established that any of the trial court's challenged comments or conduct pierced the veil of impartiality. The Defendant points to a discussion with the judge at the final conference, but this conversation would have been outside the presence of the jury and, therefore, could not possibly have influenced the jury in any way.[54] Also, it is clear that in the passages selectively quoted by the Defendant, the trial counsel is indicating her frustration with the court's ruling against her position on the admission of other acts evidence. It shows no partiality on the part of the trial judge. Indeed, even where a trial judge repeatedly rules against an attorney this usually is insufficient to show partiality that would deprive a defendant of a fair trial.[55] Moreover, the pretrial ruling that was the subject of the final

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[50] *Id.*
[51] *People v Stevens*, 498 Mich 162 (2015).
[52] *Id.* at 172 (citations omitted).
[53] *Cain v Michigan Dept of Corr*, 451 Mich 470, 497 (1996).
[54] Defense counsel did file, prior to trial, a motion to remove the trial judge which was denied by the trial judge and denied by the presiding judge, Judge Kenny.
[55] "The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment." *In re Contempt of Henry*, 282 Mich App 656, 680 (2009).

conference, that is, whether or not previous assaults on children could be admitted as other acts evidence, was completely correct according to the applicable statute, MCL 768.27a (the Defendant does not even raise this as an issue on appeal).[56]

Next, the Defendant points out a passage where the trial judge restricted further cross-examination of the witness, Sergeant Brian Kapanowski, about whether he believed that the Defendant could be around children as part of the sex offender registry act. Sergeant Kapanowski was one of the officers who responded to the scene and spoke to the victim, Ali Aoun. Sergeant Kapanowski testified that he thought that the Defendant could not be around schools due to the sexual offender registry, but that was not true, a point that was previously explained in the questioning of Detective Bronson.[57] The trial court prevented further exploration on this point because it was irrelevant to the proceedings and repetitive. The Defendant was not charged with violating SORA.

Contrary to the Defendant's assertion, there was nothing belittling about how the judge treated defense counsel. Citing the court rule that the court is operating under is hardly belittling, even if it occurs in front of the jury. To advocate otherwise is simply an absurd position. Defense counsel's actions necessitated the judge's reaction.

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[56] MCL 768.27a(1) states the following:

> Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer other evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

[57] 6/16/2016, 29.

Examining the record as a whole, the trial court's remarks were not of such a nature as to unduly influence the jury and thereby deprive defendant of a fair and impartial trial.[58] The judge properly instructed the jury that his comments should not be considered in their decision. At the end of the trial the judge gave the following instruction to the jury:

> My comments, rulings, questions, summary of the evidence and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case you must pay no attention to that opinion. You are the only judges of the facts and you decide this case from the evidence.[59]

Therefore, the jury was properly instructed to disregard the comments made by the judge. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.[60] Moreover, *People v Stevens* ruled that the presence of a curative instruction is a factor to be considered when determining whether the trial judge's conduct deprived the defendant of a fair trial and that a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct.[61] That case also ruled that the totality of the circumstances should be considered to determine whether the judge demonstrated the appearance of advocacy or partiality on the whole.[62] Upon a reading of the record as a whole, reversal in this case is not required.

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[58] "Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340, lv den 453 Mich 977 (1996).

[59] 6/17/2016, 128.

[60] *People v Abraham*, 256 Mich App 265, 279 (2003).

[61] *People v Stevens*, 498 Mich 162, 177 (2015).

[62] Id at 172.

III. A sentence that falls within the guidelines is legally valid and there is no basis upon which to disturb a valid sentence. Here, the sentence of 15-40 years fell within the calculated sentence guidelines because the Defendant was a habitual third offender. Therefore, the Defendant has no right to resentencing.

Standard of Review

The People dispute the Defendant's statement of the standard of review. The proper interpretation and application of the statutory sentencing guidelines are both legal questions that are reviewed de novo.[63]

Discussion

The Defendant argues that he is entitled to be resentenced based on an upward departure from the guidelines; the Defendant does not, however, argue that the sentence guidelines were wrongly computed. The Defendant was sentenced to 15 to 40 years incarceration for one count of child sexual abusive activity as a habitual third offender.[64] This sentence was within the calculated sentence guideline range of 78 months (6.5 years) to 195 months (16.25 years); the Defendant was in the F2 grid and was a habitual third offender. Judge Talon explained the sentence as follows:

> THE COURT: …Criminal sexual conduct in the first degree involving a person under 13 years of age. And the record indicates that or the Presentence Investigation Report indicates he was first – he was sentenced to 7 to 15 years in the Michigan Department of Corrections. He was sentenced on August 9, 2002. After being first paroled on March 30 of 2010, he was eventually returned to prison, paroled on January 10 of 2013, with parole being closed on July 10 of 2015, and this incident occurring on August 12 of 2015. So according to the records here, parole was closed on July 10 of 2015, and this incident occurred on August 12 of 2015. We're talking about less than two months later.

[63] *People v Franciso*, 474 Mich 82 (2006).
[64] 7/15/2016, 15.

Now the complainant – there is no allegation of criminal sexual conduct one, two, three, four, and the Court is not going to speculate as to what might have happened had the complaining witness not left the – or fled from the location at the time that he did. But he was 16 years of age, and the thing that – one of the issue that the Court is concerned with is the danger that the defendant presents to the community.

Now, Mr. Willis has always been a, here in front of me, mild mannered, pleasant, polite, and sometimes, you know, it's always difficult to reconcile different decisions that people make or activities or actions that people make, and I don't think – I don't have any reason to believe that he's putting on an act just because he's here in front of me. I think this is the type of person – the type of person he is, but he was convicted previously in his criminal history of a very serious crime, and the convictions here indicate to the Court that the defendant remains a danger to the community.

And so the Court does believe that the recommendation of the People is a reasonable one, and the Court will adopt that recommendation. Recognizing that the guidelines are advisory, the Court still believes that considering all the facts and circumstances of Mr. Willis's prior criminal convictions and the offenses for which he was convicted in this particular case and the close proximity in time between his discharge from parole and his date of the criminal activities here, that is a reasonable and appropriate sentence.[65]

So for Count 1, the violation of 750.145c(2), it is the sentence of this court that Mr. Willis be sentenced to serve a minimum of 15 years, maximum of 40 years in the Michigan Department of Corrections. Get credit for 342 days that you've already served. For Count 2, and that's as a habitual third offense as well under 769.11. And for Count 2, possession of less than 25 grams of a controlled substance and being a habitual third offender under 769.11, it is the sentence of this Court that you be sentenced to serve a minimum of two years, maximum of eight years in the Michigan Department of Corrections.

For Count 3, distributing obscene visual, et cetera, matter to a minor is a violation of 722.675, and a habitual third, 769.11, it's the sentence of this Court that he serve a minimum of 30 months, I'm sorry, a maximum – that's right, 30 months to four years in the Michigan Department of Corrections. The sentences, and for each sentence he receives credit of 343 days that he's already served. The sentences will run concurrent pursuant to law…[66]

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[65] 7/15/2016, 13-15.
[66] 7/15/2016, 15-16.

> The sentence imposed was within the correctly calculated guidelines.
>
> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. In other words, if a minimum sentence falls with the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon.[67]

The Defendant raises no error in the scoring, and the scoring was agreed upon as accurate at the sentencing hearing. Therefore, the Defendant's claim is without merit and should be rejected.

[67] *People v Francisco*, 474 Mich 82, 89 (2006).

RELIEF REQUESTED

THEREFORE, the People request that this Honorable Court affirm the Defendant's convictions and sentence.

Respectfully submitted,

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