

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH EADDY,

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 177865

LC No. 93-013535

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(2)(1)(a). We affirm.

Defendant raises several arguments on appeal. First, defendant argues that the testimony presented at trial regarding his silence in the face of allegations of child abuse constituted an improper commentary on his right to remain silent. We disagree. The constitutions of the United States and the State of Michigan contain provisions which guarantee criminal defendants “the right to be free of governmentally compelled self-incrimination.” *People v Collier*, 426 Mich 23, 40; 393 NW2d 346 (1986) (Boyle, J. concurring) (*See also* US Const, Am V; Const 1963, art 1, § 17). Pursuant to these provisions, it is inappropriate for a prosecutor to elicit testimony regarding a criminal defendant’s silence or to comment on such silence. *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). However, because defendant’s silence in this case was neither the result of a police interrogation nor was it maintained in reliance on any *Miranda* warnings, it was not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992). Moreover, defendant apologized to the victim and indicated that he was going to seek help for himself. Thus, there was evidence that he adopted or believed in the truth of the victim’s allegations. Accordingly, defendant’s silence was properly admitted as a tacit admission pursuant to MRE 801(d)(2)(B). *People v Greenwood*, 209 Mich App 470, 473; 531 NW2d 771 (1995).

Next, defendant contends that the trial court erred in admitting hearsay comments made by the victim to her grandmother, Ruth Brown, regarding defendant's actions toward the victim. A careful review of the record shows that, although the trial court originally overruled defense counsel's objection to the hearsay testimony pursuant to MRE 803A, it subsequently changed its ruling and properly excluded the evidence. Thus, no error was committed.

In addition, any error was harmless. Although prior to reversing its decision, the trial court heard testimony that the victim told Brown that "daddy [had] done something to [her]," the presentation of that testimony caused no prejudice to defendant. Defendant was tried before a judge without a jury. Judges are presumed to possess an understanding of the law which allows them to ignore errors and to decide cases based solely on properly admitted evidence, *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Thus, the presentation of this single hearsay statement, which in no way indicated that defendant engaged in unlawful activities, was not prejudicial and any error was harmless.

Defendant also argues that the trial testimony of the victim's physician, Dr. Mansion, was irrelevant and that the trial court erred in admitting the testimony. Defendant failed to object to the admission of this evidence, thus this Court will review the issue only to determine if manifest injustice resulted. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). We find no manifest injustice in this case. Dr Mansion's testimony indicated that his examination of the victim, which occurred two years after the last alleged incident of sexual abuse, failed to yield physical evidence of penetration or sexual abuse. This evidence was in no way prejudicial to defendant. Accordingly, manifest injustice did not result from the admission of the evidence.

Lastly, defendant asserts that he was denied effective assistance of counsel. We disagree. Under Michigan law, there is a strong presumption that the assistance received from counsel was sound. *People v Stanaway* 446 Mich 643, 687; 521 NW2d 557 (1994). In order to overcome this presumption and establish ineffective assistance of counsel, defendant needed to show: (1) that counsel's performance was deficient; and (2) that the deficiency resulted in an unfair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

Nothing in the trial court record supports defendant's assertion that he was denied effective assistance of counsel. Contrary to defendant's allegations, defense counsel did object to Brown's testimony regarding what the victim told her that defendant had done. Although defense counsel did not object to Brown's testimony regarding her conversation with defendant and his silence in the face of allegations of sexual abuse, his failure to do so was appropriate. Brown's testimony was properly refreshed, and as previously discussed, her testimony regarding his silence was admissible. Further while defense counsel's failure to object to Dr. Mansion's testimony may arguably have been deficient, it did not result in an unfair trial as the testimony was not prejudicial. Lastly, because defendant expressly and without reservation stated on the record that he had decided not to call any witnesses, including himself, there is nothing in the record to

support his allegation that his trial counsel coerced him into giving up his right to take the stand and call witnesses on his own behalf.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald