

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES SCOTT ORTIZ,

Defendant-Appellant.

UNPUBLISHED

April 19, 1996

No. 173007

LC No. 93-000937-FC

Before: Hood, P.J., and Young and T.L. Brown,* JJ.

PER CURIAM.

Defendant appeals by right from his conviction of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). We affirm.

Defendant acknowledges that he anally penetrated with his thumb a twelve-year-old boy. However, whereas the victim testified that the defendant did so intentionally and ripped his underwear in order to accomplish the penetration, defendant contends that the penetration occurred accidentally as he was helping the victim get into the upper bunk of his bed.

I

A

Defendant waived his right to a jury trial, both on the record and by signing a jury waiver form. On the record, in instructing defendant of his rights regarding the waiver, the trial court stated:

Mr. Ortiz, you understand that if I dispense with the jury trial -- it is all subject to the prosecution's consent, but if I do accept your waiver, you understand that you will not have a jury trial *and that once you give up you can't get it back.* (Emphasis added.)

* Circuit Judge, sitting on the Court of Appeals by Assignment

Defendant contends that the highlighted portion of the trial court's statement is erroneous and warrants reversal of his conviction.

The general rule is that a jury waiver voluntarily made cannot be withdrawn except in the discretion of the court. *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982). It is clear that the trial court has discretion to allow withdrawal of a jury waiver. Consequently, the trial court's admonition to the defendant was incorrect. We find the error harmless beyond a reasonable doubt, though.

Defendant never sought leave from the trial court to withdraw his waiver. Because withdrawal of a jury waiver is not automatic, defendant would have been required to set forth to the trial court the grounds upon which such relief should be granted. Even on appeal defendant has not argued that, but for the court's instruction, he would have sought to withdraw his waiver. Indeed, defendant never articulates how any prejudice occurred as a result of the instruction he challenges.

Inasmuch as defendant has failed to establish prejudice from the court's instruction, we find no reversible error.

B

Defendant contends that the trial court failed to make adequate findings of fact, especially regarding his defense that the penetration was accidental. Defendant's argument is factually unfounded.

As required, the trial court made detailed findings on each of the elements of the crime sufficient to allow this Court to conduct an appellate review. *People v Porter*, 169 Mich App 190, 193; 425 NW2d 514 (1988). In fact, the trial court explicitly held: "While defendant claims this penetration was accidental, the court finds it was intentional." The trial court made additional findings on the witnesses' credibility which support this decision. We find no error.

C

Defendant challenges the admission of testimony by Troopers Simpson and Wood indicating that defendant took a polygraph test.¹ Defendant did not object, so the issue is waived. MRE 103. We note, however, that neither trooper testified defendant took a polygraph examination.

Even if we were to review the claim, we would find no error requiring reversal. During his testimony, defendant injected that he had taken the polygraph test. His attorney objected and the trial court sustained the objection, noting that such evidence was inadmissible. Unlike a jury, a judge is presumed to possess an understanding of the law, including the difference between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). The trial court acknowledged the proper evidentiary rule on the record, and therefore we are not persuaded that the court improperly considered the inadmissible testimony.

D

Defendant argues that the court erred by assessing five points for Offense Variable 13. A scoring of an offense variable is to be upheld if there is "any evidence" supporting it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986).

OV 13 provides that five points may be assessed when defendant's conduct caused serious psychological injury necessitating professional treatment. The record demonstrates that the victim has difficulty in trusting anyone following defendant's assault and has received counseling. This evidence is sufficient to support the scoring.

Affirmed.

/s/ Harold Hood

/s/ Robert P. Young, Jr.

/s/ Thomas L. Brown

¹ To be precise, although defendant characterized the evidence as stated in the text, there was no testimony by prosecution witnesses that defendant took a polygraph test. Actually, defense counsel elicited testimony from a prosecution witness about the date of a polygraph test and defendant testified that he took a polygraph test.