

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE FREDERICK KILL,

Defendant-Appellant.

UNPUBLISHED

July 12, 1996

No. 174529

LC No. 93-049652

Before: Jansen, P.J., and Hoekstra and D. Langford Morris,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC 1st), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct (CSC 2nd), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant also pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to 10 to 25 years' imprisonment for each of his CSC 1st convictions and 7 to 22 ½ years' imprisonment for his CSC 2nd conviction. Defendant now appeals as of right, and we affirm.

Defendant first argues that the trial court destroyed his presumption of innocence by a comment made to the jury during voir dire. However, defendant did not object to the allegedly prejudicial remark below. Absent manifest and serious error, this Court generally will not review allegations of error based upon the trial court's conduct where the conduct was not objected to below. *People v Burgess*, 153 Mich App 715, 719-720; 396 NW2d 814 (1986). After reviewing the trial court's comment and the context in which it was made, we conclude that although the comment was erroneous, it was not of such a nature as to unduly influence the jury and thereby deprive defendant of a fair and impartial trial and it does not rise to the level of a manifest and serious error warranting further review. See *People v Romano*, 181 Mich App 204, 220-221; 448 NW2d 795 (1989). The comment was very brief and occurred during a dialogue between the court and a prospective juror, who was subsequently removed from the panel. It was not made in a context from which the panel could have construed the comment as an instruction, and a subsequent instruction correctly stated the law on the issue.

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

Defendant next argues that the trial court violated his right to a fair trial by failing to give preliminary jury instructions in accordance with MCR 2.516(B)(1) and MCR 6.414(F). Again, defendant failed to object to the absence of preliminary instructions below, and appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). We find no manifest injustice because the court rules do not require that preliminary instructions be given and, here, the instructions as a whole adequately presented the case to the jury. Furthermore, even if the trial court's failure to give the preliminary instructions constituted error, we believe it was not decisive to the outcome of the case and that defendant has failed to establish the necessary prejudice to raise this issue on appeal. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Defendant next argues that the trial court violated his constitutional rights in denying his motion to suppress inculpatory statements made to the police. Although defendant characterizes the environment in which the statements were made as coercive and custodial, we disagree. Here, the trial court's determination that defendant's confession was voluntary was not clearly erroneous. See *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). After reviewing the totality of the circumstances surrounding the giving of the inculpatory statements, we agree with the trial court that the statements were freely and voluntarily made. *Id.* Furthermore, after reviewing the record we also agree with the trial court that defendant was not in custody at the time the statements were given and therefore *Miranda*¹ warnings were not required.

Defendant also argues that the trial court deprived him of a fair trial by informing the jury that the court had previously determined that defendant's statements to the police were admissible and had not been given in violation of *Miranda*. Again, defendant failed to object to the court's allegedly improper instruction, and thus, this issue is reviewed for manifest injustice. *Ferguson, supra*. Here, manifest injustice will not result from our failure to review this issue because, contrary to defendant's claims, the allegedly improper instruction did not inform the jury that defendant's confession was voluntary, but rather informed the jury that the police had not violated the *Miranda* requirement. Issues of credibility and truthfulness were still left to the jury.

Finally, defendant argues that he was deprived of the right to confrontation and the right to a fair trial by the trial court's denial of his motion to discover the victim's school counseling records. We disagree. Defendant apparently sought the records in an effort to prove that the victim was not competent to be a witness. However, the competency of witnesses is a matter for the trial court and every person is competent to be a witness unless the court finds, after questioning, that the person is not competent. MRE 601; *People v Jensen*, 183 Mich App 305, 307; 454 NW2d 250 (1990). Thus, the use of the records to challenge the victim's competency to testify would have been improper, and defendant has failed to establish a reasonable probability that the records are likely to contain any material relevant to his defense. Defendant's generalized assertion of a need to attack the credibility of his accuser with information which might be contained in her counseling records does not meet the threshold showing of a reasonable

probability that the records contain material information sufficient to overcome the various statutory privileges. *People v Stanaway*, 446 Mich 643; 682; 521 NW2d 557 (1994).

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Denise Langford Morris

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