

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT BASS,

Defendant-Appellant.

UNPUBLISHED

January 24, 1997

No. 190130

Detroit Recorder's Court

LC No. 95-002308

Before: Michael J. Kelly, P.J., and Saad and H.A. Beach,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of third-degree criminal sexual conduct involving forced or coerced sexual penetration, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced to concurrent terms of five to fifteen years' imprisonment. He now appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing statements made by the victim's sister, Tamika Fogle, to be admitted into evidence under the coconspirator's exception to the hearsay rule, MRE 801(d)(2)(E). Because there was scant independent evidence of a conspiracy, we find that the trial court abused its discretion in admitting Tamika's statements under MRE 801(d)(2)(E). *People v Crump*, 216 Mich App 210, 211; 549 NW2d 36 (1996). However, we also find that the error was harmless in light of the overwhelming evidence of defendant's guilt. *People v Cadle*, 204 Mich App 646, 653; 516 NW2d 520 (1994). See also MCR 2.613(A). The victim testified that defendant forced her to engage in sexual intercourse, the medical records confirmed that the victim had been forced to engage in sexual intercourse, and defendant admitted that he had engaged in sexual intercourse with the victim. Under these circumstances, the erroneous admission of Tamika's statements was harmless error.

Defendant next argues that the trial court erred in ruling that the prosecution exercised due diligence in its attempt to produce the victim's brother, Laron Fogle, as an endorsed witness. We

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

disagree. The record reveals that the prosecutor made a reasonable, good faith effort to procure Laron's presence at trial. Therefore, the trial court did not err in finding that the prosecutor had exercised due diligence to produce Laron. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991); *People v Phillips*, 61 Mich App 138, 147; 232 NW2d 333 (1975).

Lastly, defendant claims that his waiver of the right to a jury trial was not made orally on the record. We disagree. Contrary to defendant's claim, a review of the record reveals that defendant made an oral waiver of jury trial before Judge Thomas E. Jackson on August 8, 1995. Further, it appears that defendant's waiver of his right to a jury trial was knowingly and voluntarily made. The definition of a jury trial was given to defendant, the court ascertained that defendant understood that he had a right to a jury trial, and defendant affirmatively indicated that he wished to waive this right. Consequently, we conclude that defendant's waiver of his right to a jury trial was knowingly and voluntarily made. *People v Reddick*, 187 Mich App 547, 550; 468 NW2d 278 (1991).

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Harry A. Beach