

STATE OF MICHIGAN
COURT OF APPEALS

STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FRANKLIN MULLINS, JR.,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 192195

Van Buren Probate Court

LC No. 93-7945

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

In a bench trial in the Juvenile Division of the Van Buren Probate Court, defendant was adjudicated delinquent based on a finding that he perpetrated criminal sexual conduct in the first degree, digital anal sexual penetration, of his six-year old stepsister.

After ascertaining, without objection, that the victim was competent to testify as a witness despite her tender years, the victim was sworn and the prosecutor began his direct examination. Eventually, the prosecutor asked if the victim knew why she was in court. The victim requested time to think about that, and then responded that she was there because defendant had stuck his finger in her “pee-pee.” On further questioning, she stated that first defendant’s father (who had already been convicted and sentenced to prison for the offense), and then defendant, on different occasions, defendant having done so twice, stuck their fingers in her “poo-poo.”

Defendant contends such testimony violates MRE 701 as lay testimony on an ultimate issue of law or lay opinion testimony by an unqualified witness. Although no such objection appears to have been presented in the trial court, even if this issue were properly preserved, it would be without merit. Such testimony is simply factual testimony and not opinion testimony at all; indeed, it is testimony of the facts constituting the gravamen of the offense and was admissible. *People v Tucker*, 19 Mich App 320; 172 NW2d 712 (1969), *aff’d* 385 Mich 594; 189 NW2d 290 (1971).

Defendant next contends that he was deprived of the effective assistance of counsel because (1) counsel failed to inform him of his right to a trial by jury (2) counsel failed to assert an alibi defense, and (3) counsel failed to subpoena witnesses to support an alibi defense. A hearing on these claims was

held in the trial court, which found as fact, first, that defendant was informed of his right to trial by jury and participated in the decision to opt for a bench trial. Trial counsel, on being advised by defendant that he had an alibi, investigated the defense, and determined that other witnesses would contradict it. Further, the trial court noted that time was not of the essence of this offense, and given the time frame charged in the petition, it would be nearly impossible to establish an alibi. Counsel's decision not to subpoena alibi witnesses was valid in light of the fact that the known witnesses would have contradicted defendant's claim of being elsewhere at the time of the crime. Furthermore, defendant testified at trial and claimed to be elsewhere, and the trier of fact did not find his testimony credible. Defendant has accordingly failed to establish the prejudice prerequisite to appellate relief on this issue. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Hilda R. Gage

/s/ Maureen Pulte Reilly

/s/ Joel P. Hoekstra