

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE MOORE,

Defendant-Appellant.

UNPUBLISHED

July 18, 1997

No. 192363

Kalamazoo Circuit Court

LC No. 94-994 FH

Before: Saad, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

On this appeal of right, defendant claims that he was deprived of the effective assistance of trial counsel, and that the evidence was insufficient to support his conviction of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5) (incapacitated victim). This case is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant raises numerous grounds to support his claim of ineffective assistance. As to his claim that his counsel gave poor reasons for waiving jury trial, the record shows defendant was given the requisite advice, *People v Pasley*, 419 Mich 297; 353 NW2d 440 (1984), before acceptance of his jury waiver. Additionally, defendant neither sought a post-conviction hearing in the trial court on this issue, nor did he file a motion to remand in this Court for such a hearing. Our review is accordingly confined to the record, which provides no evidentiary support for this issue. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

As to the assertion that counsel was ineffective for failing to object to testimony supposedly violating the rule prohibiting one witness from commenting on another witness, *e.g.*, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), the witnesses permissibly testified concerning Nurse Sweet's reputation for truth and veracity. MRE 608(a); *People v Smith*, 90 Mich App 20; 282 NW2d 227 (1979). Furthermore, this was a bench trial, and the trial judge did not rely on any such testimony, so any error was harmless, *People v Jones*, 134 Mich App 371; 350 NW2d 885 (1984). Accordingly defendant can not show prejudice from the lack of objection. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant further contends that his trial counsel failed to object to testimony by Nurse Sweet which, in defendant's view, was conclusory as to the ultimate issue in the trial. We find no error because Nurse Sweet first gave the underlying facts on which such conclusions were based. See *People v Treichel*, 229 Mich 303; 200 NW 950 (1924).

The record also contradicts any contention that counsel was ineffective for failing to investigate his defense and to avail himself of the witnesses, theories, and evidence which separate civil counsel for defendant had marshaled. Further, because the trial judge did not find defendant guilty on the basis that defendant was in bed with the victim, and because prosecution witnesses conceded that such action might be appropriate by one in defendant's position, any error in this regard was not prejudicial.

The evidence was sufficient to permit a reasonable inference that the erect state of the victim's penis was the result of stimulation by defendant for some sexual purpose. *People v Schinella*, 160 Mich App 213, 216-217; 407 NW2d 621 (1987); *People v Petrella*, 424 Mich 221, 269; 380 NW2d 11 (1985).

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Gary R. McDonald