

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD SCOTT TRASK,

Defendant-Appellant.

UNPUBLISHED

September 18, 1998

No. 200399

Mecosta Circuit Court

LC No. 96-003734-FC

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and the trial court subsequently sentenced defendant to ten to twenty years' imprisonment. Defendant appeals as of right and we affirm.

Defendant's sole argument on appeal is that the trial court abused its discretion by admitting the handwritten notes of a police detective into evidence. The detective claimed that the notes were taken shortly after an interview with defendant and that defendant admitted that the notes were accurate. In response to defendant's hearsay objection, the prosecution argued that the notes corroborated the detective's testimony and amounted to an adoptive admission. The trial court admitted the evidence without making a preliminary determination that defendant had in fact adopted the detective's notes as his own statement. The jury was then instructed that it could consider the notes as evidence only if it found that defendant had in fact adopted them.

Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. MRE 801. The handwritten notes by the detective were hearsay. *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972). However, had defendant adopted the notes as his own statement, it would amount to an admission by a party opponent, which is not hearsay. MRE 801(d)(2)(B). Before the statement may be admitted into evidence, the trial court must first factually determine if the defendant had in fact "manifested his assent to the statement." *People v Lowe*, 71 Mich App 340, 346; 248 NW2d 263 (1976), quoting *Naples v United States*, 120 US App DC 123, 126-127; 344 F2d 508, 511-512 (1964). Unless the court so finds, the statement is excluded. *Lowe*,

supra, p 346. Here, the trial court erred by permitting the jury to determine whether defendant had in fact adopted the statement. This determination should have been made by the trial court.

However, we find that the erroneous admission of the police detective's notes was harmless error. Preserved nonconstitutional error requires reversal only if it is prejudicial. *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997); *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The inquiry regarding whether the error was prejudicial focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id.* In this case, defendant made an oral statement to the police detective, which the trial court ruled was voluntarily made. After the interview with defendant, the detective wrote some notes regarding the statement, and defendant acknowledged that the notes were accurate (according to the detective). At trial, the detective testified about the oral statement without relying on his notes. After the detective's testimony, the prosecution sought to introduce the detective's notes. Because the notes were merely cumulative of the testimony given by the detective from his own memory of the oral statement, no substantial rights of defendant were affected. MRE 103(a). Even if defendant did not adopt the written notes, the police detective had already testified from his own memory regarding the oral statement and the written notes did not inject any new testimony into the trial.

Thus, we conclude that the prosecution has proved that it is highly probable that, in light of the strength and weight of the untainted evidence, the erroneously admitted notes made by the detective did not contribute to the verdict. *People v Gearns*, 457 Mich 170, 204, 207; 577 NW2d 422 (1998) (opinions of Brickley, J. and Cavanagh, J.). Accordingly, the error in admitting the detective's notes was harmless and reversal is not required.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra