

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM B. MILLER, JR.,

Defendant-Appellant.

UNPUBLISHED

March 2, 1999

No. 201718

Antrim Circuit Court

LC No. 90-002492 FC

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

MEMORANDUM.

Defendant appeals of right from his conviction of criminal sexual conduct in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), entered after a jury trial. We affirm.

Defendant was charged with molesting his stepdaughter. At trial, the prosecutor attempted to call Tina Miller, defendant's fifteen-year-old daughter, as a witness. Complainant had testified that Tina witnessed defendant assaulting her. Initially, Tina nodded affirmatively when asked if she swore to tell the truth. When questioning began, Tina was unable to respond. With the jury out of the courtroom, the prosecutor indicated that Tina, described as a special needs child currently in foster care, was upset because she had not seen her father in several years, and was fearful that her father would not like her if she testified. The jury returned, and once again Tina indicated that she would attempt to tell the truth. She stated that she feared that her father would not like her if she testified truthfully. When Tina indicated that she could not promise to tell the truth, she was excused. Subsequently, the jury was instructed that it could not consider for any purpose Tina's appearance or her inability to testify.

The jury found defendant guilty as charged. The court sentenced defendant to fifteen to forty years in prison.

On appeal, defendant argues that he was denied his constitutional right to confrontation when the prosecutor elicited from Tina, an unsworn witness, a statement that she feared that her father would not like her if she testified truthfully. From that statement the jury could have inferred only that Tina's testimony would corroborate that of complainant.

The right to confrontation is guaranteed by both the federal and the state constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right insures that a witness who testifies under oath is available for cross-examination, and allows the jury to observe the demeanor of the witness. *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994). For the right of confrontation to apply, a witness must have testified. A defendant has no right to confront a witness who does not provide any evidence at trial. *People v Gearns*, 457 Mich 170, 185-187; 577 NW2d 422 (1998).

Here, Tina could not take the oath, and thus did not testify. Under the facts of this case, defendant was not denied his right of confrontation. The prosecutor's act of calling Tina to the stand knowing that she might be unable to testify did not violate defendant's right to due process. *Gearns*, *supra*, at 192. No constitutional error occurred.

While defendant was not denied his right of confrontation because Tina did not provide evidence, the jury did hear the prejudicial statement that Tina was fearful that her father would not like her if she testified truthfully. The court instructed the jury that it could not consider Tina's appearance for any purpose. Generally, a jury is presumed to follow the court's instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Assuming *arguendo* that the placing of Tina's statement regarding the basis of her fear before the jury was error, reversal is not required unless the error cannot be said to have been harmless. A nonconstitutional error is harmless if it is highly probable that it did not affect the verdict. *People v Graves*, 458 Mich 476, 482-485; 581 NW2d 229 (1998). We find that any error was harmless. Complainant's testimony was sufficient evidence on which to convict defendant.

Affirmed.

/s/ Gary R. McDonald
/s/ Harold Hood
/s/ Martin M. Doctoroff