

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC D. BOYD,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 214097

Wayne Circuit Court

LC No. 97-005161

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.,

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to ten to fifteen years in prison. He appeals as of right. We affirm.

Defendant first contends that the court abused its discretion by refusing to suppress a portion of defendant's statement. Specifically, when questioned by police regarding how many times he had sex with the victim, defendant responded "I am taking the fifth on that one." The court's ruling was erroneous, because the prosecutor was not entitled to introduce evidence that defendant invoked his right to remain silent. *People v Rice (On Remand)*, 235 Mich App 429, 436-437; 597 NW2d 843 (1999). However, no reversal is warranted because defendant did not testify and the evidence was not admitted. See *People v Finley*, 431 Mich 506, 512; 431 NW2d 19 (1988). While defendant contends that the court's refusal to suppress the statement affected his decision whether to testify, this Court cannot assume that defendant decided not to testify out of fear of impeachment. *Id.* at 513. Moreover, in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Next, we reject defendant's contention that the court failed to adequately articulate, on the record, the reasons for the upward departure from the sentencing guidelines. The court's comments indicate that the departure was due to the seriousness of the offense and the victim's young age, both appropriate factors in determining whether to depart from the guidelines. *People v Houston*, 448 Mich

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

312, 321-322; 532 NW2d 508 (1995); *People v Kowalski*, 236 Mich App 470, 474; 601 NW2d 122 (1999). Moreover, while the court failed to indicate its reasons for departing on the sentencing information report, as required, *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999), no remand is required since there is no claim that the sentence is disproportionate and the court was clearly aware of the guidelines. *People v Kreger*, 214 Mich App 549, 554-555; 543 NW2d 55 (1995).

Finally, defendant contends that the trial court improperly vouched for a prosecution witness and for the prosecution's case. Defendant failed to object to the court's remarks, and this issue is reviewed for manifest injustice only. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). To avoid forfeiture of the issue, defendant must demonstrate plain error that was prejudicial. *Carines, supra*; *People v Mass*, 238 Mich App 333, 338; 605 NW2d 322 (1999).

While some of the court's remarks were improper, we do not believe that defendant is actually innocent, or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*. Therefore, we decline to reverse on this ground.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns