

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LEO GUEST,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 191215

Calhoun Circuit Court

LC No. 95-001444 FC

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

Defendant appeals by right his conviction by jury of two counts of first-degree criminal sexual conduct. MCL 750.5206; MSA 28.788(2). We affirm.

Defendant first contends that he was deprived of a fair trial where incriminating hearsay evidence was admitted into evidence over his objection. However, our review of the transcript reveals that defendant expressly stated that he had no objection to the introduction of the audiotape now in issue. Defense counsel did attempt, after the exhibit was admitted, to preserve a hearsay within hearsay objection, but defendant fails to advance such an argument on appeal. The arguments that are advanced by defendant on appeal in this context were not preserved below by timely objection. Further, to the extent defendant raised a hearsay objection by referring to earlier objections, the court ruled that the tape and officer Adams' oral account of defendant's wife's earlier statements were not hearsay because not offered for the truth of the matters asserted, but, rather, to impeach her trial testimony. The court gave a lengthy instruction cautioning the jury not to use such evidence as evidence of the truth of the earlier statements. Defendant has not shown that use of the evidence for impeachment was improper.

Moreover, to the extent any such evidence may have been inadmissible in the face of timely objection, this is a situation involving unpreserved, nonconstitutional error, on which appellate relief may be granted only if it could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). As the challenged evidence all emanated from defendant's wife, and the

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

prosecutor conceded in opening statement that defendant's wife was completely lacking in credibility by virtue of having changed her story at least three times to that point, any error in conjunction with this evidence could not have been outcome determinative, because the jury was well aware that the key question was the credibility of the child victim as against that of defendant, the sole witness for the defense.

Defendant's remaining argument is that the trial court erred in scoring offense variable two, but any error as to this variable is not so egregious as to come within the narrow class of cases in which review of a guideline scoring error presents a cognizable basis for appellate relief. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood