

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA PAUL O'CONNELL,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 199757

Calhoun Circuit Court

LC No. 96-001548 FC

Before: Sawyer, P.J., and Wahls and Hoekstra, JJ.

MEMORANDUM.

Defendant Dana Paul O'Connell appeals of right 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.

The victim in this case was defendant's former stepdaughter. She was five years old at the time of the charged incident. Prior to trial, defendant obtained a discovery order requiring disclosure of all medical reports pertaining to physical examination of the victim. A subsequent order required that a report prepared by Linda Hibst, a nurse practitioner, be submitted to the trial court for an in camera inspection. Hibst's report was submitted to the court, but was not provided to defendant.

Prior to trial, defense counsel indicated that he had not received a copy of the report. The court provided counsel with an opportunity to review the report and to discuss Hibst's testimony with her before she took the stand. Counsel did not request an adjournment. Hibst was qualified as an expert in pediatric genital examinations. She stated that the examination revealed that the victim had a scar-like adhesion in the hymeneal area; however, on cross-examination, she acknowledged that she could not determine from the examination what if anything had occurred.

The victim testified that on various occasions in 1993 defendant engaged in penile-vaginal penetration with her. The victim's mother testified that the victim reported the abuse in January, 1996. Defendant denied the accusations. His sister and her boyfriend testified that defendant and the victim got along well. The jury convicted defendant as charged. The court sentenced defendant to fifteen to thirty years in prison.

On appeal, defendant argues that the trial court abused its discretion by allowing Hibst to testify in light of plaintiff's violation of the discovery order requiring disclosure of medical reports. We disagree. Hibst's report was submitted to the court as ordered. Defense counsel was allowed to review the report and to interview Hibst before she testified. During cross-examination, counsel elicited the acknowledgment that Hibst could not determine from her examination what if anything had occurred. During closing argument, counsel strongly contended that Hibst's testimony did not support the victim's allegations. The trial court did not abuse its discretion by allowing Hibst to testify. *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995). Moreover, any error was harmless. Given that Hibst's testimony did not strongly support the victim's accusations, it cannot be said that any error contributed to the verdict. *People v Gearn*s, 457 Mich 170, 203; 577 NW2d 422 (1998).

Defendant also argues that if trial counsel was responsible for the failure to procure a copy of Hibst's report in time to obtain an independent evaluation, then counsel rendered ineffective assistance. We disagree. During cross-examination and closing argument, counsel pointed out the real weaknesses in Hibst's testimony. Given that Hibst's testimony did not strongly support the victim's allegations, defendant was not prejudiced or denied a fair trial by any failure to obtain the report. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ David H. Sawyer

/s/ Myron H. Wahls

/s/ Joel P. Hoekstra