

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE GABREAL SIMS, SR.,

Defendant-Appellant.

UNPUBLISHED

June 22, 1999

No. 208812

Detroit Recorder's Court

LC No. 97-001933

Before: Zahra, P.J., Saad and Collins, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of first-degree child abuse, MCL 750.136; MSA 28.331, and sentenced him to three to fifteen years' imprisonment. Defendant appeals as of right from his conviction, and we affirm.

Defendant argues that the trial court improperly considered inadmissible hearsay testimony when it considered evidence that the nine-month-old baby screamed every time he saw defendant. Defendant's argument lacks merit because the child's screaming was not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 801(a) further defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, *if it is intended by the person as an assertion.*" Here, the child's screaming was not a "statement" because the seven-month child obviously did not intend to make an assertion. Similarly, in *People v Davis*, 139 Mich App 811; 363 NW2d 35 (1984), the Court found that a child's conduct of bursting into tears after being asked about the defendant's actions was not a statement pursuant to MRE 801(a) because the child's crying was "so patently involuntary that it cannot by any stretch of the imagination be treated as a verbal assertion by the victim within the scope of MRE 801(a)(2)." *Id.*, 813. If an older child's crying in reaction to a question is a non-assertive, involuntary reaction, then the screaming nine-month-old child must also be deemed a non-assertive, involuntary reaction.

Defendant claims that the case at bar is distinguishable from *Davis* because the lower court specifically considered the child's out-of-court conduct as an assertion of fact both in its findings of fact and at sentencing. We find no merit to this distinction. The child's screaming was not hearsay, and the

trial court therefore was not precluded from considering it as evidence, regardless of how the trial court characterized the evidence.

Because the trial court did not consider hearsay evidence, there also is no merit to defendant's argument that the trial court's reliance on the inadmissible hearsay denied him due process of law because he was not allowed to cross examine the child at trial. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191; 579 NW2d 82 (1998), stating "[w]hen a declarant does not intend to communicate anything . . . his sincerity is not in question and the need for cross-examination is sharply diminished." *Id.*, 218 (quoting *United States v Long*, 284 US App DC 405, 412-413; 905 F2d 1572 (1990)).

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins