STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DALE AMORE,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 190292
Detroit Recorder's Court
LC No. 95-001790

Before: Gribbs, P.J., and Holbrook, Jr., and J.L. Martlew*, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a); MSA 28.788(2), and one count of second-degree criminal sexual conduct, MCL 750.520(c)(1)(a); MSA 28.788(3). He was sentenced to serve four prison terms of twelve to twenty years, and one term of five to fifteen years, respectively. He appeals as of right and we affirm.

First, we find no merit to defendant's claim that he was denied a fair trial because of the admission of his statement "I'm not saying I did; and I'm not saying I didn't." The record contains no suggestion that the jury was aware that the statement was made in the context of a post-polygraph interview. Furthermore, we agree with the trial court that this statement was voluntary and not made while defendant was invoking his Fifth Amendment right to remain silent. Defendant was fully apprised of his rights and signed a waiver form before making the statement. A defendant who speaks following *Miranda*[1] warnings must affirmatively and unequivocally reassert the right to remain silent. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). We do not believe that defendant's statement before requesting an attorney was a clear and unequivocal reassertion of this right.

Defendant also argues that the trial court abused its discretion in ruling that defendant's contemporaneous statement denying the allegations was inadmissible hearsay. Hearsay is defined as "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). In general, hearsay statements are

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

not admissible at trial. MRE 802. This particular issue was addressed in *United States v Marin*, 669 F2d 73, 84 (CA 2, 1982):

> When the government offers in evidence the post-arrest statement of a defendant it commonly does so for either of two reasons. It may wish to use the statement to establish the truth of the matter stated. In these circumstances, under Rule 801(d)(2)(A) the statement is not hearsay, because it is simply a statement of the opposing party. On the other hand, the government may wish to offer the statement to show that the defendant made false representations to the authorities, from which the jury could infer a consciousness of guilt, and hence guilt. In these circumstances the statement obviously is not offered for the truth of the matter asserted, and therefore is non-hearsay under Rule 801(c), as well as non-hearsay under Rule 801(d)(2)(A) as the statement of an opposing party. Regardless of which purpose the government had in offering the defendant's statement, the statement as thus offered is not hearsay.
>
> When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible. When the defendant offers his own statement simply to show that it was made, rather than to establish the truth of the matter asserted, the fact that the statement was made must be relevant to the issues in the lawsuit.

See also *People v Jensen*, 222 Mich App 575, 580-583; ___ NW2d ___ (1997); *People v Perryman*, 89 Mich App 516, 520; 280 NW2d 579 (1979).

Here, defendant sought to admit evidence of his denial of the allegations during the post-polygraph interview merely to show that the denial was made contemporaneously with his "I'm not saying I did; and I'm not saying I didn't" statement, not to establish the truth of the matter asserted. Cf. *Perryman, supra*. Thus, the statement was not hearsay. Moreover, exclusion of defendant's denial on hearsay grounds was not justified where it was defendant himself who proffered the testimony, subjecting himself to cross-examination regarding the statement. Nonetheless, because the jury was made aware through other testimony that defendant had maintained his innocence from the outset of the investigation, we conclude that the trial court's exclusion of the statement was harmless error. See *Jensen, supra* at 583.

Defendant next argues that he is entitled to resentencing because the trial court erred in assessing fifty points for Offense Variable 12 (OV12) based on prior penetrations of the victim. Recently, the Michigan Supreme Court held that application of the sentencing guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Mitchell*, 454 Mich 145, 177; ___ NW2d ___ (1997). In a footnote, *id.* at 177, n 41, the Court explained further:

> To ask whether it is a misapplication of the guidelines to score points for criminal sexual conduct under OV 12, where prior penetrations were not part "of the same transaction," is to ask a question whose answer has no legal relevance on appeal. As an inquiry about what the guidelines committee had in mind regarding assessment measures that do not have the force of law, the inquiry, at best, asks for an opinion about how the majority of judges would have sentenced the defendant.

Thus, the trial court's scoring of the guidelines in this case is reviewable on appeal only in the context of whether the sentence is proportional under *Milbourn*. To the extent that defendant raises this argument, we conclude that the sentences are proportionate to the offender and the seriousness of the offenses.

Finally, the trial court did not err in admitting the preliminary examination testimony of the victim. The prior inconsistent statement of a witness is admissible if the declarant testifies at trial and is subject to cross-examination concerning the statement. MRE 801(d). The statement must have been given under oath subject to the penalty of perjury. MRE 801(d)(1)(A). Children under the age of 10 are not required to say an oath before testifying, but MCL 600.2163; MSA 27A.2163 directs courts to examine child witnesses to determine whether they have "sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify." Here, the trial court determined that the victim was competent to testify based upon an inquiry into his understanding of truthfulness and the importance of telling the truth. Thus, while not under "oath," the victim had indicated his willingness to testify truthfully. We believe, therefore, that the safeguard for the reliability of prior inconsistent statements in 801(d)(1)(A) has been satisfied. Also, we find that the trial court acted within its discretion to control trial proceedings when it refused to allow defense counsel to recross-examine the victim following the reading of his preliminary exam transcript.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).