STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2001
v	No. 222700 Oakland Circuit Court
THOMAS WRIGHT, Defendant-Appellant.	LC No. 98-161698-FH

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), stemming from an incident in which he allegedly touched the breast of a fourteen-year-old girl who was spending the night with his daughters. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to sixteen to thirty-six months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by admitting statements that the police elicited from him in alleged violation of his Sixth Amendment right to counsel. Because defendant failed to preserve this issue for appellate review, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even then, we will exercise our discretion to reverse only where the plain error resulted in the conviction of an actually innocent defendant or where it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. We conclude that defendant has not shown plain error.

The prosecutor does not dispute that defendant's Sixth Amendment right to counsel had attached and been invoked. "[O]nce this right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective." *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991). In other words, once the right is properly invoked, the police may not conduct further interrogation of the accused relating to the charged offense, unless the accused initiates the communication. *People v Anderson (After Remand)*, 446 Mich 392, 402-403; 521 NW2d 538 (1994). In this case, the record indicates that the challenged statements were made by defendant immediately following a polygraph

examination that defendant requested. Thus, because defendant initiated the interview, his statements were not elicited in violation of his Sixth Amendment right to counsel. See *People v McElhaney*, 215 Mich App 269, 273-277; 545 NW2d 18 (1996) (holding that the trial court did not clearly err by admitting statements the defendant made after a polygraph examination that he had demanded). Defendant has not shown plain error affecting his substantial rights. *Carines, supra*.

Next, defendant argues that the trial court erred when it allowed the court clerk to play videotaped testimony to the jury without implementing procedures to ensure that the videotape was accurate. Again, because defendant failed to preserve this issue for appellate review, he must demonstrate plain error affecting his substantial rights. *Carines, supra* at 763. Defendant relies on *People v White*, 144 Mich App 698, 704; 376 NW2d 184 (1985), wherein this Court held that, "[u]nder circumstances where the accuracy of the tape recording has been assured, it is not grounds for reversal to play a tape recording of testimony to the jury in lieu of the official transcript or the reading of the testimony from the stenotype notes of the court reporter." Defendant argues that the trial court here failed to employ the same procedural protections that were present in *White*. However, reversal is not required where defendant does not argue that the tape was in fact inaccurate and where defendant did not seek to determine the tape's accuracy before it was played for the jury. See *People v Sullivan*, 167 Mich App 39, 49; 421 NW2d 551 (1988). Furthermore, defendant's reliance on *White* is misplaced. In *White, supra* at 705, this Court cautioned against the use of tape recordings until the procedure was specifically addressed by our Supreme Court. In 1991, our Supreme Court amended MCR 8.109(A) to specifically allow the use of videotaping devices to make the official record, as was done in this case. Therefore, where the videotape *was* the official record, no further procedural safeguards were necessary. Also, defendant has failed to show any error from his absence during the playing of the testimony, where he did not request to be present. See *White, supra* at 704.

Next, defendant argues the trial court erred by admitting hearsay statements that the victim made to various witnesses on the night of the alleged sexual assault. Again, because defendant failed to preserve this issue for appellate review, he must demonstrate plain error affecting his substantial rights. *Carines, supra* at 763.[1] The statements were all made within approximately one half-hour from the alleged sexual assault, and the evidence indicated that the victim was upset, even hysterical, when she made the statements. Thus, her statements relating to the assault were admissible as excited utterances under MRE 803(2). See *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998) (holding that a sexual-assault victim's statement, made over ten hours later in response to questioning by the victim's mother, was an excited utterance where the evidence showed that the victim "was still under the overwhelming influence of the assault."). Defendant has not shown plain error.

Defendant also challenges the proportionality of his sentence. We review a sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence must be "proportionate to the

[1] Although defendant objected to one of the statements, defendant concedes on appeal that it was admissible.

seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We conclude that defendant's sentence is proportionate to the offense and the offender. The trial court specified that its sentencing decision was based on defendant's criminal history, the facts of the instant case, and "all of the trouble and heartache that the victim was put through." These were all proper factors for the court to consider. See *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000) (criminal history); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999) (severity and nature of the crime); *People v Girardin*, 165 Mich App 264, 266-267; 418 NW2d 453 (1987) (psychological damage that sexual abuse can have on children). Defendant claims that the facts of this case are not particularly egregious. However, defendant was convicted of furtively approaching a fourteen-year-old girl—while she slept—and unfastening her bra and touching her breast. Defendant committed this assault while his own daughters were in the same room. The victim has suffered emotional harm from the assault and has undergone counseling. That the victim awoke and interrupted the assault before it progressed further does not entitle defendant to leniency. Defendant's habitual-offender sentence, which is within the statutory limits, was not an abuse of discretion. *Hansford, supra*.

Further, defendant's resort to the sentencing guidelines is unavailing. The judicial sentencing guidelines do not apply to habitual offenders. *Hansford, supra* at 323. Also, because the instant offense was committed before January 1, 1999, the legislative guidelines do not apply. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell