

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD W. ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED

July 25, 2000

No. 212982

Oakland Circuit Court

LC Nos. 98-157628-FC

98-157629-FC

98-157630-FC

---

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a single jury trial involving the three separate cases joined in this appeal, defendant was convicted of twelve counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration with a person under thirteen years of age), and two counts of second-degree criminal sexual conduct, MCL 750.520(c)(1)(b); MSA 28.788(3)(1)(b) (sexual contact with a person at least 13 but less than 16 years of age who is a member of the same household). Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to thirty to sixty years in prison for each count of first-degree CSC and to 14 to 22½ years in prison for each count of second-degree CSC. Defendant appeals as of right, and we affirm.

Defendant first contends that the trial court erred in admitting evidence of his confession because his statements to the police were involuntary. We disagree. This Court reviews a trial court's ruling on the voluntariness of a defendant's statements while in police custody for clear error. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). A *Walker*<sup>1</sup> hearing was held before the trial court, during which testimony was given by defendant and by the two police officers involved in defendant's interview, Patrick Morin and Amado Arceo. Defendant contends that he made inculpatory statements involuntarily, after waiving his rights, due to police intimidation and coercion. A prosecutor may not introduce a suspect's statement as evidence at trial if it was involuntarily made through police coercion in

---

<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

violation of the suspect's Fourteenth Amendment due process rights. *Culombe v Connecticut*, 367 US 568, 601-602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961); *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999).

To determine whether a statement is voluntary or the result of police coercion, this Court examines the entire record and makes an independent determination of voluntariness by analyzing the totality of the circumstances. *Sexton, supra*, at 67-68. The following factors should be considered to determine whether the statement was made voluntarily:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

The totality of the circumstances surrounding defendant's confession suggest that his statements were voluntarily made. First, defendant was not questioned for an inordinate amount of time; the entire interview with Arceo during which defendant confessed took a total of two hours and his statement to Morin afterwards took twenty minutes. Further, defendant was not subjected to constant or repeated questioning while in police custody. He was initially questioned by Morin on January 9, 1998, and his examination and interview with Arceo and Morin did not occur until March 4, 1998.

Defendant also appears to have been in good health during the interview. The interview took place at 9:00 a.m. and defendant indicated that he slept well for 8½ hours the night before. Defendant indicated he ingested Zantac within the previous twenty-four hours, but he did not maintain that he was under the influence of drugs or alcohol or that he was deprived of food. Defendant did not appear to be upset or overly emotional and was described by Arceo and Morin as very quiet and calm during the interview.

Defendant indicated that he had a tenth or eleventh grade education and he was forty-eight years old at the time of the interview. The officers were aware that defendant had trouble reading, so they verbally advised him of his rights and defendant indicated he understood them and signed waivers to that effect. Moreover, defendant was advised of his rights multiple times throughout this process and had previous experience with police.

Arceo and Morin testified that defendant was never threatened or intimidated and that they had no physical contact with him. In fact, it appears that the only allegedly coercive action defendant can point to was that Arceo raised his voice and told defendant that he did not believe he was telling the truth. Specifically, defendant testified that Arceo raised his voice and accused defendant of lying until

defendant “just freaked out” and made an untruthful confession. Arceo admitted that he told defendant three times that he did not believe he was being truthful; however, Arceo and Morin both testified that Arceo did not raise his voice or speak in an intimidating or threatening manner. Further, the officers testified that defendant’s demeanor always remained calm and that there was no sign that defendant “freaked out” under any actual or imagined pressure.

Where testimony during a *Walker* hearing conflicts and depends on an evaluation of the credibility of a witness, this Court defers “to the findings of the lower court since it is in a better position to evaluate credibility.” *People v Shelson*, 150 Mich App 718, 724; 389 NW2d 159 (1986). Accordingly, the trial court’s finding that the testimony of Arceo and Morin was more credible than defendant’s will not be overturned here. Further, in view of the totality of the circumstances surrounding defendant’s interrogation, his statements were voluntarily made and there was no due process violation through any police coercion. Accordingly, the trial court did not clearly err in admitting those statements at trial after finding that they were freely made.

Next, defendant contends that his due process rights were violated by the police officers’ failure to electronically record his custodial interrogation. We disagree. To preserve an issue regarding the admissibility of evidence, the defendant must object below and must specify the same grounds for the objection as are raised on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 43-44; 597 NW2d 176 (1999). Defendant concedes that he did not preserve this issue by objecting on these grounds during the *Walker* hearing or during trial.

Review of an unpreserved challenge to a trial court’s decision to admit evidence is for plain error. MRE 103(d); *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999). This Court has previously held that the police are not required to electronically record a custodial interrogation under the Michigan Constitution. *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998). Therefore, defendant has failed to show plain error by the trial court in failing to suppress defendant’s confession on this ground and he is not entitled to reversal.

Lastly, defendant contends that he is entitled to reversal because the trial court erred in instructing the jury. We disagree. To preserve an issue regarding jury instructions given by the trial court, the defendant should make a timely objection at trial. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). In this case, defendant failed to object to the jury instructions below and, in fact, defense counsel expressed satisfaction with the trial court’s reading of the instructions. *Id.*

This Court reviews “jury instructions in their entirety to determine whether error requiring reversal exists.” *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999). “Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant’s rights.” *Id.* Defendant’s claim of error involves the trial court’s failure to instruct the jury on an element of the crime of second-degree CSC.

Second-degree CSC, MCL 750.520(c)(1)(b); MSA 28.788(3)(1)(b), in this case, required the prosecutor to prove, in pertinent part:

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

The jury instructions for second-degree CSC also provide that the trial court should instruct the jury that it must find that defendant and the victim lived in the same household. CJI2d 20.2, 20.4. The trial court erred in failing to instruct the jury on that factor. This error was plain because both the statute and the standard jury instruction specifically require a showing that the actor and victim resided in the same household to support a conviction. MCL 750.520(c)(1)(b); MSA 28.788(3)(1)(b).

Unpreserved, plain errors regarding jury instructions may require reversal if the error affected the defendant's substantial rights or if the error seriously affected "the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 771-772. Defendant has failed to make such a showing. As both the prosecutor and defendant note in their appellate briefs, the uncontested evidence at trial showed that the victim and defendant lived in the same household when defendant had sexual contact with her. Specifically, the victim testified that she was living in defendant's trailer when he touched her breasts. She further stated that the first touching occurred just after April 27, 1997, and another touching occurred a few days later. The victim and her twelve-year-old brother both testified that they lived with defendant from August 1996 to sometime in June 1997. Also, the victim's ten-year-old brother testified that they lived with defendant and that he saw defendant tickling her. Moreover, the victim's mother, who appeared on defendant's behalf, testified that the children lived with defendant, even though she did not testify regarding the date they moved out.

In short, it is apparent from the record that defendant's sexual contact with the victim occurred while she was living with him. There was no conflicting testimony regarding where she was living at the time and defendant did not contest that fact below or in his appellate brief. Because of this, the outcome of the trial would not have been different had the trial court correctly read the jury instruction and defendant has failed to show his substantial rights were affected by the error. *Carines, supra* at 763-764. Accordingly, he has forfeited this issue by not objecting below. *Id.* at 772.

Even had defendant established prejudice resulting from this plain instructional error, we would still not reverse defendant's conviction. The evidence that the victim resided in the same household as defendant was overwhelming and the issue was uncontroverted at trial and on appeal. *Id.* at 766. Accordingly, the complained-of error neither "resulted in the conviction of an actually innocent defendant" nor "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 763.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff