STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2000
v	No. 212983 Oakland Circuit Court
DONALD NELSON BAILEY II, Defendant-Appellant.	LC No. 98-157251-FH

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for malicious destruction of property over $100, MCL 750.377a; MSA 28.609(1). Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to two years' probation with the first six months to be served in the county jail. We affirm.

The victim's vehicle was defaced while parked underground at the Southfield District Court. The words "slut" and "ho" were scratched into the hood and driver's side door. Defendant denied any involvement in defacing the victim's car. The victim and defendant were previously in a long-term relationship with one another, but had split up prior to the incident in question. Following their break up, the victim obtained a personal protection order (PPO) in the Wayne Circuit Court because defendant continued to leave items on her car such as cards, balloons and stuffed animals.

On appeal, defendant argues that the trial court erred in failing to suppress a statement defendant allegedly made after taking a court-ordered polygraph test. We disagree. This Court will not disturb a trial court's ruling on a motion to suppress a statement unless the ruling is clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

While the victim and defendant were in Wayne Circuit Court to determine whether defendant had violated the terms of the PPO, the Wayne Circuit Court Judge ordered defendant to submit to a polygraph test. Prior to the test, defendant was advised of his *Miranda* rights.[1] Following the test, defendant, after again being advised of his *Miranda* rights, allegedly told

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

police officers that he was responsible for the damage to the victim's car and offered to pay restitution.

Defendant admitted that the officers advised him that he had a right to remain silent, that any statement could be used against him, and that he had a right to an attorney. See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant also admitted that he understood these rights and that he waived them. Thus, there is no question that the waiver was knowing and intelligent. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The issue is whether defendant's waiver was voluntary. *Id.* Defendant contends that the alleged statement should be considered tainted by the fact that the Wayne Circuit Court Judge did not have the authority to order defendant to submit to a polygraph examination. Defendant appears to argue that the unlawful polygraph test compelled defendant to later make an incriminating statement. The prosecution, on the other hand, argues that, regardless of the impropriety of the court order compelling the polygraph examination, defendant was fully apprised of his rights *after* the polygraph test and any resulting statement was voluntary and should be admissible.

The trial court did not err in determining that the statement was voluntarily given. First, it should be noted that defendant denied making *any* statement to police. When a defendant claims that he did not make a statement, then the issue is not so much whether the waiver was voluntary but whether the defendant even made a statement. Such a determination is a question of fact and should be left for the jury to decide. See *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988). Second, the evidence demonstrated that defendant's alleged statement was not the result of a custodial interrogation, but was volunteered by defendant. Defendant had been advised that he was not in custody. Any alleged statement defendant may have made was not the result of police questioning. Instead, defendant initiated the interview with police and indicated to the officers that he wanted to make a statement. Statements which are volunteered by a defendant do not violate the Fifth Amendment and are admissible at trial. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Finally, defendant failed to present any evidence to support his contention that the alleged statement was involuntary. Defendant was fully advised of his rights and he admitted to waiving those rights.[2] There was nothing to indicate that defendant lacked the education or intelligence necessary to deal with the officers. Defendant was not detained, nor was he subjected to prolonged questioning. He was not threatened or abused in any way. Defendant's contention that the alleged statement should be excluded simply because the polygraph examination may have been inappropriate must fail because the evidence demonstrated that defendant was advised of his rights for a second time *after* the polygraph test.

Defendant next argues that the trial court erred in failing to instruct the jury as to specific intent. However, defendant expressed satisfaction with the jury instructions, did not object to the

[2] Detective Steven Schneider testified that defendant was fully advised of his rights before taking the polygraph and again before making a statement to the police. Defendant admitted that he waived his rights. It is clear from Detective Schneider's testimony and defendant's admissions, as well as from the highly detailed waiver forms that were produced at the preliminary examination, that defendant was advised of his right to an attorney and that he intentionally and voluntarily relinquished this right.

instructions, and did not request that an instruction on specific intent be given. Therefore, this issue is unpreserved, *People v Mass*, 238 Mich App 333, 338-339; 605 NW2d 322 (1999), lv gtd 462 Mich 877; 613 NW2d 722 (2000); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996), and, in order to merit reversing his conviction, defendant must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Mass, supra*, 238 Mich App at 338-339. Defendant has not demonstrated plain error that was outcome determinative. Therefore, is not entitled to have his conviction reversed on this basis.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Kelly
/s/ William C. Whitbeck