

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RAY GUSTER,

Defendant-Appellant.

UNPUBLISHED
September 8, 2005

No. 256196
Genesee Circuit Court
LC No. 04-013707-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and two counts of third-degree CSC, MCL 750.520d(1)(b), for the sexual assaults of his girlfriend of nine years, that allegedly occurred on November 8, 10, and 11, 2003. Defendant maintained that the acts were consensual. Following a jury trial, defendant was convicted of one count of third-degree CSC and acquitted of the other two charges. Defendant was sentenced to 95 months' to 15 years' imprisonment, and appeals as of right. We affirm.

Defendant first argues that his statutory right to a polygraph pursuant to MCL 776.21(5) was violated because the polygraph examiner went beyond the scope of questioning permitted by the trial court. We disagree. Whether defendant's statutory right to a polygraph examination was violated is a question of law subject to review de novo. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003).

MCL 776.21(5) provides that a person accused of criminal sexual conduct "shall be given a polygraph examination or lie detector test if the defendant requests it." Under MCL 776.21(5), a defendant has an "absolute right" to receive a polygraph exam upon request. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). In *Phillips*, our Supreme Court held that under the "clear and unambiguous language of MCL 776.21(5), the right [to a polygraph] is lost only when the presumption of innocence has been displaced by a finding of guilt." *Id.* The Court went on to say, however, that "[i]n cases involving preserved, nonconstitutional error, a defendant must demonstrate, 'after an examination of the entire cause,' that it 'is more probably that not that the error was outcome determinative.'" *Id.*, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant's contention that reversal is required is without merit. Nothing in MCL 776.21(5) requires reversal of a conviction based upon the results of the polygraph exam, or

upon the nature of the polygraph exam questions. More important, defendant was convicted without the use of any information from or reference to the polygraph. The trial court's refusal to order another polygraph exam was not outcome determinative.

Defendant next argues that the trial court erred when it denied his motion to suppress his statement given the night of his arrest. Defendant contends that he was too intoxicated to give a knowing, intelligent, and voluntary waiver of his *Miranda*¹ rights. In determining whether a defendant has knowingly and intelligently waived his *Miranda* rights, this Court reviews de novo the entire record, but gives deference to a trial court's findings at a suppression hearing and will not disturb a trial court's factual findings unless they are clearly erroneous. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999); *Cheatham*, *supra* at 29-30.

Whether a statement was voluntarily given and whether a waiver of *Miranda* rights was voluntary are distinct issues but involve the same inquiry. *People v Daoud*, 462 Mich 621, 635-639; 614 NW2d 152 (2000). This Court reviews the issue of voluntariness independent of the trial court, but will affirm the trial court's decision unless it is left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses. *Id.*

The record adequately supports that defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. While it is undisputed that defendant had been consuming alcohol and drugs, the record shows that the detective followed proper procedure to determine defendant's capacity to effectively waive his rights before interviewing defendant, and obtained defendant's waiver and statement absent coercion. The record also shows that defendant was able to give detailed testimony regarding the events that occurred the day of his arrest. Further, intoxication is only one aspect of the totality of the circumstances approach to assessing voluntariness, and is not dispositive of the issue of voluntariness. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). We decline to find that the trial court erred under these circumstances.

Defendant also claims error on the trial court's part because the interrogating officer's testimony at trial was contradictory to that at defendant's preliminary exam. We note that this argument does not have any bearing on the trial court's decision to deny defendant's motion to suppress his statement. Further, this issue is not properly before this Court because it was not raised in the statement of questions presented. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nor do the contradictions establish that defendant's statement was involuntary.

Defendant also argues that the trial court committed misconduct during the trial. We disagree. We review claims of judicial misconduct to determine whether the trial judge's statements evidenced partiality that could have prejudiced the jury against the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). This Court reviews the record as a

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

whole, and may not take portions of the record out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

A criminal defendant has the right to have his case heard by a "neutral and detached magistrate." *Cheeks, supra* at 480, quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). A trial judge pierces the veil of judicial impartiality where his conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Paquette, supra* at 340.

Defendant first argues that the trial court erred by referring to the complaining witness as "the victim," and contends that this expressed to the jury the trial court's belief that the complaining witness did not consent, and was indeed a victim of defendant. MCL 750.520a defines a "victim" as "the person alleging to have been subjected to criminal sexual conduct." The trial court referred to the complaining witness as "the victim," in this context. Further we note that before trial, the trial judge instructed the jury that her words were not meant to reflect her own personal opinions about the facts of the present case. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the trial court committed misconduct by making the following statements during voir dire: "this type of case involving criminal sexual conduct," and "we are dealing with criminal sexual conduct and it's gonna be involved (sic) graphic details unfortunately of what happened in this case." Defendant also objected to the trial court's remarks during voir dire that defendant's place of residence was for low-income people, some of whom may have a difficult time finding a place to live elsewhere, that it was close to downtown, and that it was close to services such as Community Mental Health. Defendant argues that these comments interject the possibility that defendant is mentally ill, which he contends is irrelevant and prejudicial, and may lead the jurors to believe that he is more likely to commit a sexual offense.

In *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996), this Court stated:

A defendant who chooses to be tried by a jury has a right to a fair and impartial trial. *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973). In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C). What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." *Id.* at 623. Rather, trial courts must be allowed "wide discretion in the *manner* they employ to achieve the goal of an impartial jury." *Id.* [Emphasis in original.]

The record shows that the trial court's comments were made to ascertain whether the potential jurors could be fair and impartial given the explicit nature of the allegations against

defendant, and whether any potential juror harbored any bias based upon the fact that the victim and defendant lived at the Berridge Hotel. The trial court's line of questioning included an inquiry into whether that information would affect the juror's ability to judge credibility, whether it caused them any concern, or affected their ability to be impartial. In addition, both the prosecutor and defense counsel also asked the same types of questions of the potential jurors. Further, at the close of the trial, the trial court instructed the jury that its comments did not constitute evidence, and stated, "[i]f you believe I have an opinion about how you should decide the case, you must pay no attention to that opinion. You and you alone, members of the jury, are the judges of the facts of the case and you should decide the case based upon the evidence." We find that the trial court's comments did not pierce the veil of impartiality or deprive defendant of a fair trial.

Because we have found no error, we need not address defendant's remaining argument, that he is entitled to reversal based upon the cumulative effect of errors.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder