# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HANS CHRISTIAN SMITH,

Defendant-Appellant.

UNPUBLISHED
November 15, 2007

No. 271214
Ottawa Circuit Court
LC No. 05-029337-FC

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced defendant to 81 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant claims on appeal that the trial court erred in admitting his postpolygraph confession because his confession was involuntary. According to defendant, his confession was the product of coercion because he was told that, if he did not write the expected answers and sign the confession, he would go to jail. Whether a defendant's confession was knowing, intelligent, and voluntary is a question of law, which we must determine under the totality of the circumstances. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). However, we give deference to the trial court's assessment of the weight of the evidence and the credibility of witnesses, and we will not reverse a trial court's factual findings unless they are clearly erroneous. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Whether a confession is voluntary involves looking at the conduct of the police. *Tierney*, *supra* at 707. Absent police coercion or misconduct, the issue whether a confession was voluntary cannot be resolved in a defendant's favor. *Howard*, *supra* at 543; *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). The test for whether a confession is voluntary is "whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Givans*, *supra* at 121; see also *People v Paintman*, 139 Mich App 161, 171; 361 NW2d 755 (1984) ("A confession is involuntary if obtained by any sort of threat or violence, by any promises, express or implied, or by the exertion of any improper influence."). In *People v Sexton (After Remand)*,

461 Mich 746, 752-754; 609 NW2d 822 (2000), the Supreme Court found that a confession made by the defendant immediately after a polygraph examination was freely and voluntarily made in a situation, comparable to the facts here, where the confession followed the polygraph examiner's assertion to the defendant that he had lied during the polygraph test.

In the present case, the trial court found that Sergeant Benjamin Escalante, while conducting the postpolygraph interview, engaged in no coercive or threatening behavior. Based on our review of the record, such a finding was not clearly erroneous. Escalante informed defendant of his *Miranda*[1] rights. In addition, Escalante informed defendant that the polygraph examination consisted of the actual polygraph test and pre- and post-test interviews. Defendant knew that the polygraph examination would last two to three hours, and it was approximately three hours after Escalante informed defendant of his *Miranda* rights when Detective Bruce Veltman thanked defendant for his cooperation and informed defendant that the polygraph examination was complete. Moreover, Escalante denied that he threatened defendant into confessing. He did not tell defendant, or even give defendant the impression, that, if defendant did not answer the questions with the expected answers and sign the confession, defendant would go to jail. Escalante further denied calling defendant a child-molesting ogre or telling defendant that he needed to give a written statement to create a gray area. Finally, defendant admitted that Escalante never told him that, if he did not confess, he would be arrested. Defendant merely believed that, based on Escalante's tone of voice and the way Escalante spoke to him, if he did not confess, he would go to jail. Based on this evidence, the trial court's finding that Escalante engaged in no coercive conduct is not clearly erroneous. Moreover, to the extent that there was conflicting testimony regarding the circumstances surrounding the confession, we defer to the trial court with respect to assessing the credibility of the witnesses, including its decision to believe the testimony of the police. Accordingly, the trial court did not err in denying defendant's motion to suppress.

Defendant next argues that the trial court erred in admitting hearsay testimony regarding his prior bad acts or, in the alternative, failing to take corrective action regarding this testimony. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). However, preliminary questions of law that are implicated in deciding whether to admit evidence, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

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); *McGhee, supra* at 639. Generally, hearsay is not admissible unless it falls within an enumerated exception. MRE 802; *McGhee, supra* at 639. However, a statement to show the effect of the out-of-court statement on the hearer is not hearsay. *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987).

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

During cross-examination, Beverly Hargrove testified that she heard from a friend of her son that defendant followed young girls around at work. She further testified that one of these young girls told her that she was uneasy about defendant following her around. When read in context, it is clear that Hargrove's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c). It was not offered to prove that defendant followed young girls around at work. Rather, Hargrove's testimony was offered to establish why, in part, her gut gave her an uneasy feeling toward defendant. It was given directly in response to defense counsel's question as to why she had an uneasy feeling toward defendant. Because the out-of-court statements were used to show their effect on Hargrove, the trial court did not err in admitting Hargrove's testimony.[2]

Moreover, after Hargrove testified that one of defendant's coworkers told her that she was uneasy with defendant following her around, the trial court permitted defendant to withdraw his question to Hargrove. Rather than withdrawing the question, defendant simply stated that he would keep going. Thus, even if Hargrove's testimony constituted hearsay, the trial court provided defendant with the opportunity to take corrective action. Defense counsel, by stating that he would keep going with his questioning of Hargrove, chose not to accept this opportunity. Error requiring reversal must be predicated on the trial court's action and not upon alleged error which the appealing party contributed by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Because defendant failed to accept the trial court's offer to withdraw his question to Hargrove, and because it was defendant's own questioning of the witness that resulted in eliciting the challenged testimony, any error in allowing the jury to consider Hargrove's testimony was caused by defendant, not the trial court, nor the prosecutor.[3]

---

[2] Because Hargrove's testimony was not hearsay, defendant's argument that he was denied his right to be confronted with the witnesses against him is without merit. The Sixth Amendment, US Const, Am VI, does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Even if Hargrove's testimony was hearsay, its admission would not violate the Sixth Amendment. The Confrontation Clause prohibits the use of "testimonial" statements by witnesses absent from trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). A witness provides a testimonial statement when she gives "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, *supra* at 51 (quotations omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* The record provides no support that the statements of defendant's young female coworkers were made to Hargrove as solemn declarations or affirmations for the purpose of establishing a past fact. Rather, the statements were casual remarks made to an acquaintance.

[3] To the extent that the testimony can be deemed unresponsive to counsel's questioning, reversal is still not warranted under harmless-error analysis, where the victim testified as to defendant's illegal conduct, defendant himself confessed to the crime, and the challenged testimony did not entail defendant inappropriately touching the young girls, nor specify any actual misconduct.
(continued…)

Defendant finally claims that the trial court erred in permitting Escalante to vouch for the reliability of polygraphs. Because defendant did not object to Escalante's testimony, we review defendant's claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

On redirect examination, Escalante testified that, once defendant failed the polygraph examination, he was convinced that defendant sexually assaulted the victim because he believed that polygraphs were reliable. In our state, the results of a polygraph are inadmissible because polygraphs are not generally accepted as reliable by the scientific community. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). As a result, it is a bright line rule that reference to a defendant taking a polygraph is error. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Nonetheless, the trial court did not commit plain error in allowing Escalante's testimony.

Defendant's theory of defense was that he falsely confessed to touching the victim's breast and penetrating her vagina with his finger during his postpolygraph interview. Accordingly, he elicited testimony from Veltman and Escalante that, up to and throughout the polygraph examination, defendant had always denied the victim's allegations. Defendant also elicited testimony from Escalante that, because he had failed the polygraph, Escalante began the postpolygraph interview with no doubt in his mind that defendant was not being truthful.[4] This testimony clearly implied that Escalante believed that polygraphs were reliable. Thus, the testimony of Escalante which defendant argues was improper was merely duplicative of the testimony elicited by defendant. The trial court, therefore, did not plainly and clearly err in allowing Escalante to testify on redirect examination that he believed polygraphs were reliable, nor was there any prejudice to defendant.

In addition, the trial court instructed the jury that the sole purpose for which it could consider the testimony regarding defendant's polygraph was to determine the facts and circumstances of defendant's confession. Accordingly, because juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), there is no probability that, even if the trial court erred in admitting Escalante's testimony, the trial court's error affected the outcome of defendant's trial, *Carines, supra* at 763.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

---

(…continued)

MCL 769.26; *Lukity, supra* at 495.

[4] Defendant did not attempt to preclude evidence of the polygraph examination. Indeed, it formed the basis for his arguments to the jury that no or little weight should be given to the confession.