

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 22, 2013

v

DANIEL ROGER CORDER, II,

Defendant-Appellant.

No. 307027
Ionia Circuit Court
LC No. 2010-014984-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant, Daniel Roger Corder, II, appeals as of right his conviction, following a jury trial, of third-degree criminal sexual conduct (CSC III).¹ Corder contends that the Michigan State Police violated his Sixth Amendment rights by impermissibly depriving him of counsel during a polygraph examination. We affirm because Corder (1) waived his right to have counsel present in the examination room at his polygraph examination and (2) has not shown that the police deprived him of the right to have counsel present in the observation room at the examination.

I. FACTS

A. BACKGROUND FACTS

On November 13, 2010, Corder, the complainant, and mutual friends and acquaintances went to a local bar to celebrate the complainant's birthday. The complainant testified that she became extremely intoxicated and, after returning from the bar, passed out on a couch at her friend's house. According to the complainant, when she woke up, Corder was touching her vagina. She pushed his hand away, turned her back to him, and passed out again. When she next woke, she discovered that Corder was having sex with her. The next day, the complainant reported the incident to the police.

¹ MCL 750.520d(1)(c) (physically helpless victim).

Ionia County Sheriff's Deputy Frederick Straubel testified that the day after the incident, he interviewed Corder. According to Deputy Straubel, Corder initially denied the incident, but when he informed Corder that the police had found semen on a blanket, Corder admitted that he had sex with the complainant. When Deputy Straubel asked Corder if the complainant had consented, Corder told him that she made noises that seemed to indicate consent.

At trial, Michigan State Police Detective Specialist Lieutenant Harris Edwards testified that he interviewed Corder again in August 2011. The jury was not made aware that his interview was related to a polygraph examination. Lieutenant Edwards testified that he gave Corder *Miranda*² warnings and that Corder waived his rights. According to Lieutenant Edwards, Corder stated to him that he began to "kiss on" the complainant and asked her if she wanted to "mess around." Corder told him that he asked the complainant if she wanted to have sex, and she responded, "I don't know." Lieutenant Edwards testified that Corder eventually told him that he was aware that the complainant was intoxicated, that she was slipping in and out of consciousness, and that she could not give consent.

Corder testified that the complainant did not verbally consent to having sex, but consented through physical actions by returning kisses and touching him intimately. Corder testified that he told Lieutenant Edwards only that he and the complainant were both drunk and that they probably would not have had sex if they were not drunk, not that the complaint was too intoxicated to give consent.

B. POLYGRAPH EXAMINATION

Before trial, Corder requested to take a polygraph examination. During pretrial motions, the prosecutor noted that a polygraph examination included a pre-examination interview. The prosecutor stated that Lieutenant Edwards decided that he could not conduct the polygraph examination after Corder told him the complainant was too intoxicated to give consent during the pre-examination interview.

Corder's trial counsel argued that Lieutenant Edwards had distorted the context of his statements. Counsel contended that the trial court should allow Corder to testify that he had wanted to take a polygraph but not allowed to do so. The trial court ruled that neither party could refer to the polygraph examination. Counsel did not challenge Lieutenant Edwards's testimony on Sixth-Amendment grounds.

C. POST-TRIAL MOTION

Corder moved for a new trial, contending in part that he was denied his right to have counsel present at the polygraph examination and that the police had violated his right to counsel by conditioning his access to a polygraph examination on his waiver of that right.

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

At the hearing on the motion, Lieutenant Edwards acknowledged that the Michigan State Police security policy prohibits private consultants and outside experts from examination areas without the division director's approval. Lieutenant Edwards testified that defense counsel would need to get permission to observe the polygraph examination from the observation room. He testified that he was aware of at least one instance where an attorney received permission to observe an examination.

According to Lieutenant Edwards, when Corder arrived for the examination, he gave Corder a polygraph waiver form that explained his rights and then left him alone in a room for about ten minutes. When he returned to the room, he read the waiver form to Corder, who stated that he understood the form and signed it. Lieutenant Edwards testified that Corder did not ask to speak with his attorney during the examination.

The polygraph waiver form states, "You have the right to talk to a lawyer and have him/her present with you before or during any questioning[.]" and "[i]f you waive your right to have a lawyer present and later change your mind, the questioning will stop until you have talked with a lawyer." It asks whether the defendant is "willing to give up these rights and answer [the officer's] questions at this time?" The form further provides that

I understand that the polygraph test and the questioning, before and after, cannot be conducted *with a lawyer actually present in the examination room, and I am willing to waive his/her presence.* However, I fully understand that I have the right to talk with and have the assistance of a lawyer at any time during the polygraph test or questioning and that I may stop the test or questioning at any time and exercise that right.

The polygraph waiver form that Corder signed was admitted into evidence at the hearing.

The trial court ruled that Corder waived his right to have his attorney present at the polygraph examination and, therefore, he had not been denied the effective assistance of counsel at the pre-examination interview.

II. WAIVER OF THE RIGHT TO COUNSEL

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo whether a defendant has waived his or her Sixth Amendment right to be represented by counsel, reviews de novo issues of voluntariness, and reviews for clear error the trial court's factual findings.³ A finding is clearly erroneous if this Court is definitely and firmly convinced that the trial court made a mistake.⁴

³ *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004); *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010).

⁴ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

As an initial matter, we note that the prosecution contends that Corder waived appellate review of this issue by waiving his right to counsel at the polygraph examination. A defendant waives appellate review of a legal issue by intentionally relinquishing or abandoning the issue.⁵ The prosecution is confusing *issue* waiver with whether Corder gave an *effective* waiver of his right to counsel. Here, Corder did not intentionally abandon the *legal issues* concerning the voluntariness of his waiver or whether he was entitled to have counsel present at his polygraph examination, in either the examination room or the observation room. Therefore, he is entitled to appellate review.

However, because Corder did not timely raise whether he was deprived of counsel at the interview during a motion to suppress,⁶ we will review the issue for plain error affecting his substantial rights.⁷ Thus, while our review is for plain error, we will nonetheless review the legal issues concerning the voluntariness of Corder's waiver and whether he was entitled to have counsel present in the examination room or observation room during his polygraph examination.

B. LEGAL STANDARDS

The Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, gives a defendant the right to be represented by counsel at all critical stages in a criminal proceeding.⁸ A defendant has been denied this right if he or she has been completely denied counsel at a critical stage.⁹ "The right to counsel attaches and represents a critical stage 'only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment.'"¹⁰ A defendant has a right to counsel at a polygraph examination after his or her Sixth Amendment rights have attached.¹¹

Once a defendant has invoked his or her right to counsel, police may not question the defendant without counsel present unless the defendant initiates further communications.¹²

⁵ *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

⁶ See *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

⁷ See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁸ *Williams*, 470 Mich at 641; US Const, Am VI.

⁹ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *United States v Cronin*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

¹⁰ *People v Anderson*, 446 Mich 392, 402; 521 NW2d 538 (1994), quoting *People v Bladel*, 421 Mich 39, 52; 365 NW2d 56 (1984).

¹¹ See *McElhaney*, 215 Mich App at 276; *People v Leonard*, 421 Mich 207, 224; 364 NW2d 625 (1984).

¹² *People v Bladel (After Remand)*, 421 Mich 39, 66; 365 NW2d 56 (1984); *McElhaney*, 215 Mich App at 273-274.

When a defendant requests a polygraph, he or she initiates an interrogation.¹³ But even when the defendant initiates further communications, the police must make the defendant aware of his or her Fifth and Sixth Amendment rights and acquire a knowing, intelligent, and voluntary waiver of those rights.¹⁴ A defendant may waive the right to have counsel present at a polygraph examination.¹⁵

C. COUNSEL'S PRESENCE IN THE EXAMINATION ROOM

Corder's primary contention on appeal is that his waiver was involuntary because the police forced him to choose between his right to a polygraph examination and his right to have counsel present. Considering the circumstances of this case, we conclude that the trial court did not clearly err when it found that Corder voluntarily waived his Sixth Amendment right to have counsel present in the examination room during the polygraph examination.

When a defendant is given *Miranda* warnings prior to his or her waiver of the right to counsel at a polygraph examination, it is usually sufficient to effectuate a knowing and intelligent waiver of that defendant's right to counsel.¹⁶ However, compliance with *Miranda* is not dispositive of whether a defendant's waiver was actually voluntary.¹⁷ A waiver is voluntary if "the relinquishment of the right . . . was the product of a free and deliberate choice rather than intimidation, coercion, or deception"¹⁸

We conclude that conditioning Corder's polygraph examination on his waiver of his right to have counsel present did not render his waiver involuntary. A defendant's waiver is not valid if the waiver itself was coerced.¹⁹ A waiver is coerced if the defendant's "will [was] overborne and his capacity for self determination critically impaired because of police conduct."²⁰ To determine whether a waiver was coerced, the trial court should consider

the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary

¹³ *Wyrick v Fields*, 459 US 42, 47; 103 S Ct 394; 74 L Ed 2d 214 (1982).

¹⁴ *Bladel*, 421 Mich at 66; *McElhaney*, 215 Mich App at 274.

¹⁵ *Wyrick*, 459 US at 44, 47; *McElhaney*, 215 Mich App at 274-275.

¹⁶ *McElhaney*, 215 Mich App at 275.

¹⁷ *People v Ray*, 431 Mich 260, 272; 430 NW2d 626 (1988).

¹⁸ *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000), quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986) (additional quotation marks and citations omitted).

¹⁹ *Colorado v Spring*, 479 US 564, 573; 107 S Ct 851; 93 L Ed 2d 954 (1987); *Gipson*, 287 Mich App at 264-265.

²⁰ *Spring*, 479 US at 574 (quotation marks and citation omitted).

delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency.^[21]

Here, there is no indication that Lieutenant Edwards intimidated, coerced, or deceived Corder into waiving his right to have an attorney present. Lieutenant Edwards testified that he left Corder alone in a room for about ten minutes to read the waiver form. Lieutenant Edwards testified that he then came into the room and went through the waiver form with Corder line by line, after which Corder initialed and signed the form. There is no evidence that Corder was detained and questioned for an extensive period, that his mental or physical state were affected, or that he was threatened or abused. There is no evidence in the record that Corder's age, education, or experience indicate that he might have been more susceptible to coercion. Further, Corder's trial counsel testified that she discussed the polygraph examination with Corder and advised him not to take it in part because he would have to waive his right to counsel, but he decided to take it anyway. In other words, the record is entirely devoid of any indication that Corder's waiver was involuntary.

Corder argues that the police coerced him by forcing him to choose between his right to counsel and his right to a polygraph examination. In Michigan, a defendant accused of certain types of criminal sexual conduct must be given a polygraph examination on his or her request.²² However, the results of the examination are not admissible at trial.²³ Therefore, a defendant's failure to receive a polygraph test is unlikely to be outcome determinative in any given case.²⁴

Here, Corder's trial counsel testified that she informed him that the results of the polygraph examination would not be admissible. Considering this and the totality of the other circumstances, we conclude that requiring Corder to waive the presence of counsel was not coercion. We recognize that Corder's other option under the circumstances was to forego his right to a polygraph examination. But under the facts of this case, the choice between these two alternatives remained the product of Corder's free will, and he was aware that even if he passed the polygraph examination, evidence of this would not be admissible at trial. On the sum of the circumstances in this case, we conclude that Corder voluntarily waived his right to have counsel present in the examination room at the polygraph examination. Thus we conclude that the police did not deprive Corder of counsel at a critical stage in his proceedings.

D. COUNSEL'S PRESENCE IN THE OBSERVATION ROOM

Corder contends on appeal that the police also deprived him of the effective assistance of counsel by preventing his counsel from being present in the observation room at the polygraph examination. Though the trial court did not specifically address this issue, we will do so. This

²¹ *Gipson*, 287 Mich App at 265.

²² MCL 776.21(5).

²³ *People v Phillips*, 469 Mich 390, 397; 666 NW2d 657 (2003).

²⁴ *Id.*

Court will not punish a party for the omission of the trial court when an issue was raised below and contested on appeal.²⁵ We conclude that Corder has not shown that trial counsel's absence from the observation room at the polygraph examination was a plain error that affected his Sixth Amendment right to counsel.

We note that nothing in the waiver form that Corder signed waived any right to have his trial counsel observe his polygraph examination. The Michigan State Police policies admitted at the hearing indicate that the police provide a means by which counsel can observe a polygraph examination. And at the hearing on the motion, Lieutenant Edwards testified that, had Corder indicated that he wanted his attorney to be present in the observation room, he would have informed Corder that "if you wanted [the defense attorney] to be in the observation room, then he would have to go through the standard protocol to make it happen."

Corder's trial counsel testified that she believed that she would not be allowed to observe the polygraph examination, and later clarified that she meant "in terms of sitting in the room with the examiner[.]" She also testified, "I can't recall someone coming forward with that request that they wanted to be either in the when [sic] the polygraph was being given or in a room observing it. . . . I've actually never had it come up." She further testified that no one from the prosecutor's office or law enforcement told her that she could not be present for the examination.

An error is plain if it is clear or obvious.²⁶ Here, even presuming—without deciding—that Corder's right to have an attorney present at a polygraph examination extends to that attorney's presence in the observation room, there was no clear or obvious deprivation of that right. Counsel could have sought permission to observe the polygraph examination from the observation room, but did not. To the extent that Corder's trial counsel may have misunderstood her right to be present in the observation room, this does not amount to a *police* deprivation of that right. Thus, there is no evidence that would clearly or obviously indicate that the police violated Corder's Sixth Amendment right to counsel. We conclude that Corder has failed to show plain error.

We affirm.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens

²⁵ *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

²⁶ *Carines*, 460 Mich at 764.