

Cite as 2019 Ark. App. 167
ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-18-645

JOSH M. BARRETT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 13, 2019

APPEAL FROM THE PIKE COUNTY
CIRCUIT COURT
[NO. 55CR-17-48]

HONORABLE TOM COOPER,
JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

Josh Barrett appeals his convictions for rape, arguing that the circuit court erred in admitting the results of a polygraph test. We affirm the circuit court's order.

In June 2017, Barrett was charged with rape.¹ He agreed to undergo a polygraph examination pursuant to a written stipulation, and the exam was administered on 30 August 2017. Before the exam was complete, however, the examiner stopped the test because he observed Barrett attempting to use physical countermeasures to affect the outcome of the test. Barrett admitted to biting his tongue, which is a known countermeasure.

Barrett underwent a second polygraph exam on 10 October 2017, again pursuant to written stipulation. On 18 December 2017, Barrett moved to exclude the results of the

¹The State amended the criminal information in January 2018 to include an additional five counts of rape.

second polygraph exam, asserting that the polygraph machine was defective and had rendered inaccurate readings.²

The circuit court convened a hearing on 2 April 2018. Officer Jake Bartlett, a licensed polygraph examiner, testified that he had administered the polygraph exam to Barrett on October 10 and that Barrett had been recorded on video while taking the exam. Bartlett explained that the polygraph results showed that Barrett had been deceptive. The State played a portion of a video of Barrett during the exam, and Bartlett agreed that the video was not “fluid.” However, he stated, the camera is independent of the polygraph instrument, and he had “never had any issues with the camera affecting the test.” On cross-examination, he disagreed that the video showed “spaces and breaks” but said that “maybe the pixels aren’t as good on this camera.” Bartlett disagreed that it looked like the voice and the lip movement in the video were not in sync, but also said that even if the video was out of sync, it was “only slight.” He reiterated that he had never had an issue with the polygraph software on his computer.

In arguments to the court, defense counsel asserted that there were “spaces and breaks” in the video and that the results of the polygraph exam should be excluded due to the possibility of an inaccurate reading. The State countered that any issues regarding the video would go to the weight of the evidence, not its admissibility. The circuit court found that the parties had entered a valid stipulation and that any problem with the video would

²Barrett styled this motion as a motion to suppress; however, a motion to suppress evidence presupposes that the evidence was illegally obtained. *Jenkins v. State*, 301 Ark. 20, 781 S.W.2d 461 (1989). Here, Barrett did not allege that the polygraph was illegally obtained or that it was not voluntary. So Barrett’s motion is more accurately described as a motion in limine challenging the admissibility of evidence.

go to the weight, not the admissibility, of the exam results. At trial, the jury found Barrett guilty of six counts of rape, and he was sentenced to twenty-five years' imprisonment on each count, to run consecutively. He now appeals the denial of his motion.

Arkansas law prohibits the admission of polygraph-test results except upon a written stipulation of the parties. *Hayes v. State*, 298 Ark. 356, 767 S.W.2d 525 (1989). We review allegations of evidentiary errors under the abuse-of-discretion standard. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). The circuit court has broad discretion in its evidentiary rulings; hence, the circuit court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Id.*

Barrett argues that his motion acted as a withdrawal of the stipulation that he signed regarding the second polygraph and that the circuit court abused its discretion in allowing the polygraph results. He contends that implicit in the stipulation was that "the test be done accurately and competently and that there be an accurate record of what happened." He asserts that the "defects" in the polygraph exam are evident from the video and that the circuit court erred in finding that any defects in the video went to the weight of the evidence and not its admissibility. In support of his argument, Barrett cites *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980) (reversing and remanding because the parties' written stipulation provided that the polygraph exam would be conducted by a qualified polygraph examiner, and the employee who had administered the exam admitted that he was not licensed by the State to conduct polygraphs).

In response, the State first contends that Barrett argues for the first time on appeal that his motion acted as a withdrawal of the stipulation. Addressing the merits of Barrett's

argument, the State disagrees that any problem with the video recording of Barrett during the exam invalidated the polygraph-exam results. The State argues that Bartlett's testimony demonstrated that the video was not part of the testing and could not physically have affected the results; and Barrett presented no evidence in response to Bartlett's testimony. Consequently, the circuit court did not abuse its discretion in allowing the polygraph-exam results into evidence.

The State is correct that Barrett argues for the first time on appeal that his motion acted as a withdrawal of the stipulation. We do not address new arguments raised for the first time on appeal. *Petty v. State*, 2017 Ark. App. 347, 526 S.W.3d 8. Moreover, *Holcomb* does not support Barrett's contention because in that case, the defendant filed a withdrawal of his stipulation *and* a motion to suppress.

The bottom line is that Barrett essentially asks this court to assume that any defect in the video of him undergoing the polygraph exam necessarily affected the polygraph exam itself, but he offered no proof to support that assumption. Even if we were to agree that the stipulation contained an "implied" provision that the exam would be performed accurately, Barrett presented no evidence that the exam was administered inaccurately. Therefore, we hold that the circuit court did not abuse its discretion in denying Barrett's motion.

Affirmed.

KLAPPENBACH and GLOVER, JJ., agree.

John Wesley Hall and *Sarah M. Pourhosseini*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.