

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTY RAY KENNEDY,

Defendant-Appellant.

UNPUBLISHED

May 20, 2021

No. 352308

St. Joseph Circuit Court

LC No. 18-022424-FC

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (sexual penetration of person under 13 years of age). The trial court sentenced defendant to 25 to 60 years’ imprisonment. On appeal, defendant argues that a polygraph-related waiver of his *Miranda*¹ rights was involuntary and that his subsequent confession to the crimes was also involuntary. We disagree and affirm.

The charges against defendant arose from multiple sexual assaults committed by defendant against his daughter, DK. The Michigan State Police (MSP) investigated the allegations of sexual abuse. During the investigation, Trooper Jason Mead asked defendant if he would be willing to take a polygraph exam. Defendant agreed and made an appointment to take the exam. Trooper Mead picked defendant up in Mead’s police cruiser and drove him the approximately 60 miles to where the polygraph exam would be conducted. Defendant did not have transportation at the time and voluntarily rode with Trooper Mead. During the road trip, defendant was not handcuffed, and he sat in the front passenger seat of the cruiser.

MSP Detective Sergeant Kyle Gorham was a polygraph examiner and conducted defendant’s exam. The polygraph process consisted of a pre-exam interview, the polygraph exam, and a post-exam interview. During the pre-exam interview, Detective Gorham discussed a polygraph waiver with defendant. The waiver form contained a list of defendant’s rights relative

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

to the polygraph exam, his *Miranda* rights and warnings, a waiver section, an acknowledgment portion, and defendant's signature. Both Trooper Mead and Detective Gorham testified that defendant was read his rights, that he indicated that he understood his rights, and that defendant signed the polygraph waiver. During the post-exam interview, defendant admitted to having sexually penetrated DK. Defendant wrote an apology letter to DK at the end of the interview.

The evidence discussed above was elicited and presented at a *Walker*² hearing on defendant's motion to suppress. The trial court concluded that defendant's waiver of his *Miranda* rights and his confession were voluntary and constitutionally sound. At the subsequent trial, DK testified that defendant sexually penetrated her on multiple occasions. Detective Gorham testified about defendant's exam-related confession and read defendant's apology letter to the jury.

On appeal, defendant argues that the waiver of his *Miranda* rights was not voluntary and that his confession was also not voluntary because it resulted from police coercion. Both the Michigan Constitution and the United States Constitution protect a defendant's right against compelled self-incrimination. US Const, Am V; Const 1963, art 1, § 17. In *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010), this Court observed as follows regarding the nature of our review:

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination. But we review a trial court's factual findings for clear error and will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made. Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses. [Citations omitted.]

In *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), our Supreme Court set forth the analysis that governs a determination whether a confession was voluntary:

The test of voluntariness should be 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. The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the

² *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Quotation marks and citations omitted.]

“The legal analysis is essentially the same with respect to examining the ‘voluntary’ prong of a *Miranda* waiver.” *People v Ryan*, 295 Mich App 388, 397; 819 NW2d 55 (2012). Quoting *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000), the *Ryan* panel explained:

Determining whether a waiver of *Miranda* rights was voluntary involves the same inquiry as in the due process context. There is no reason to require more in the way of a voluntariness inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context. Thus, whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. [Quotation marks, ellipses, and citations omitted.]

A prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). The language used to inform a defendant of his or her *Miranda* rights is adequate if it reasonably conveys the essential information of the four *Miranda* warnings. *Florida v Powell*, 559 US 50, 60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010). A defendant may be advised of his *Miranda* rights orally or in written form. *People v Brannon*, 194 Mich App 121, 130; 486 NW2d 83 (1992). An admission or confession is not rendered involuntary simply because a defendant was not advised of his *Miranda* rights both before and after a polygraph exam was conducted. See *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990).

On consideration of the totality of the circumstances, we conclude that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. As noted earlier, defendant signed the polygraph waiver that listed his *Miranda* rights, and both Trooper Mead and Detective Gorham testified that the polygraph waiver was read and explained to defendant and that defendant understood the waiver. Defendant also initialed an acknowledgement-of-rights provision in the polygraph waiver, which provided: “This statement has been read to me and I understand each of my rights and I am willing to waive these rights” Additionally, Detective Gorham wrote notes on the polygraph waiver, clarifying defendant’s answers. For instance, Detective Gorham wrote “stop” next to the word “halt,” thereby emphasizing that defendant had the right to stop the exam at any time. Defendant testified that he did not understand his *Miranda* rights, but the waiver

form and the testimony of the two officers indicated otherwise. We, however, defer to the trial court's assessment of credibility. *Gipson*, 287 Mich App at 264. We conclude that the prosecution met its burden of proof in establishing the waiver of *Miranda* rights, and we hold that the trial court did not err by finding a valid and voluntary waiver.

With respect to the voluntariness of the confession itself, we also note that the trial court analyzed the various *Cipriano* factors, stating as follows:

To determine whether a statement is voluntary you look at 11 factors; the age of the accused, the age here wouldn't affect his ability to make it a voluntary statement, the accused life and education or intelligence. He is a high school graduate with some college. The extent of the person's—accused person's previous experience with police. He indicates he had only been arrested for child support so he's gone through that process. Repeated or prolonged nature of the questioning. Here in this specific issue it's a polygraph that lasted—the entire thing lasted 3 hours. The beginning—the real questioning here lasted approximately 30 to 40 minutes. That's what's at issue here out of a 3 hour statement. The length of detention before the accused gave the statement. There was no detention. Lack of any advice to the accused regarding his constitutional rights. He was advised of his constitutional rights. He signed the form acknowledging that he had done it. He states he doesn't remember it, but was testified to by the two officers and the defendant testified that's his signature. So there's no weight to be given to his statement that it didn't take place. He just doesn't remember it. So I do believe that it was given and I do believe that he signed it and understood it. He's a high school graduate with some college, he can read and he understands signing legal documents, so he wasn't misled as far as that goes. Then was there any unnecessary delay in bringing him before a Magistrate before the accused gave a confession. There was no arrest, there was no charges, this was all pre-arrest. Was he injured, intoxicated, drugged or ill. No. Was he deprived of food, sleep or medical attention? He wasn't deprived of it. He may have not been able to sleep well the night before, that's understood, but it's not that the police kept him up or kept him away from food or medical attention. He was allowed to take a break before the second interview started even. Was he abused? No. Was he threatened with abuse? No.

So, all those factors would suggest that the statements were voluntary and understandingly given after advice of rights. He doesn't suffer from any mental incompetence.

We agree with the trial court's factual findings on the *Cipriano* voluntariness factors, and agree there was certainly no clear error in regard to the findings. We also conclude that the findings fully support the determination that defendant's confession was voluntary. We shall briefly engage in our own review of the factors.

Defendant's date of birth is August 17, 1980, so he was 37 years old at the time of the polygraph exam and accompanying police interview. He was thus not saddled with youth or agedness that may have made him susceptible to police compulsion, constrained decision-making, or having his will overborne. We therefore conclude that the age factor weighed in favor of

voluntariness. See *Cipriano*, 431 Mich at 333-334. Next, defendant testified that he graduated from high school and had completed “some college” courses. We therefore conclude that the education factor weighed in favor of voluntariness. See *id.* at 334. Moving on, although defendant did not have a significant history dealing with the police before the interview, he nonetheless had previously been arrested. We therefore conclude that the police-involvement factor weighed in favor of voluntariness. See *id.*

With respect to whether defendant was subjected to repeated and prolonged questioning, see *id.*, we note defendant testified that Detective Gorham’s questioning lasted 40 minutes. Detective Gorham did not repeat many questions, and defendant was not initially giving clear answers, instead nodding and saying “mh-hm.” Although Detective Gorham did not accept some of defendant’s answers for lack of plausibility and pressed on, occasionally obtaining different responses, we cannot conclude that the questioning was so repetitious and prolonged that it weighed in favor of finding the confession involuntary.

Next, with respect to the length of the detention before defendant made the incriminating statements, see *id.*, we are not prepared to take into consideration the time spent driving to the polygraph exam, engaging in the pre-exam interview, and taking the polygraph examination. This was not truly time in *detention*; defendant volunteered to participate in the polygraph exam. Moreover, the exam interview was only about 40 minutes long. We therefore conclude that the length-of-detention factor weighed in favor of voluntariness. Next, as discussed earlier, the record is quite clear that defendant was advised of his constitutional rights. See *id.* We therefore conclude that this factor weighed in favor of voluntariness.

Further, there was nothing in the record even remotely suggesting that defendant was injured, intoxicated, drugged, or in ill health when he confessed. See *id.* We therefore conclude that this factor weighed in favor of voluntariness. With respect to whether defendant was deprived of food, sleep, or medical attention, see *id.*, we see that defendant testified that he was “in and out” of sleep the night before the interview but that he was not tired during the interview. Being “in and out” of sleep the night before a police interview does not automatically equate to being deprived of sleep. There is nothing in the record indicating that the MSP deprived defendant of food, sleep, or medical attention before he made the incriminating statements. We therefore conclude that the deprivation factor weighed in favor of voluntariness.

Next, with respect to whether defendant was abused or threatened with abuse, see *id.*, defendant explained that he was intimidated by Detective Gorham because every time defendant would answer a question the “wrong” way, Detective Gorham would sit on a chair and “get closer and closer.” But defendant admitted that Detective Gorham did not yell at or threaten him. Detective Gorham’s conduct did not rise to the level of abuse or threatened abuse, and there is nothing in the record to suggest that defendant was abused or threatened with abuse. We therefore conclude that the abuse factor weighed in favor of voluntariness. With regard to whether there was any unnecessary delay in bringing defendant before a magistrate before he gave the confession, see *id.*, this factor is not relevant because defendant was not under arrest and was taken home after his confession.

In sum, the *Cipriano* voluntariness factors weighed heavily in favor of finding that defendant voluntarily confessed to the charged offenses. We must, however, address defendant’s

assertions that Detective Gorham's questions were coercive and involved deception and that the detective would not stop badgering defendant until he got the answers he wanted. "[M]ere adjurations or exhortations to tell the truth, without more, are insufficient to vitiate the voluntariness of a confession." *People v Conte*, 421 Mich 704, 740; 365 NW2d 648 (1984). And the fact that the police make misrepresentations about the evidence against a defendant does not automatically render an otherwise voluntary statement involuntary. *Hicks*, 185 Mich App at 113.

In this case, each time Detective Gorham asked a question, defendant would open up a little bit more. Detective Gorham, seeing defendant's head nods and judging his answers, asked defendant to provide further explanation, elaboration, and clarification. It is true that defendant denied sexually assaulting DK approximately five times, but as the trial court observed, Detective Gorham moved forward slowly, taking "baby step[s]" with every little concession or admission defendant made, which understandably generated further questioning. Accordingly, we cannot conclude that defendant's confession was coerced. The *Miranda* waiver and the confession were the products of essentially free and unconstrained choices by defendant. Reversal is therefore unwarranted.

We affirm.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ Brock A. Swartzle