

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND HURST,

Defendant-Appellant.

UNPUBLISHED

April 12, 2002

No. 230517

Wayne Circuit Court

LC No. 00-002153

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals his convictions as of right. We affirm.

I

Defendant argues first that the trial court erred in denying his motion to suppress his handwritten confession. Findings of fact made in connection with a defendant's waiver of *Miranda*¹ rights are reviewed for clear error, but the issue whether the waiver was knowing, intelligent, and voluntary is a question of law that is reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). Whether a waiver was voluntary "depends on the absence of police coercion," while whether it was made knowingly and intelligently "requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *Id.* at 635-636.

Three different police officers read defendant his *Miranda* rights three different times between his arrest and the time he wrote his confession approximately 32½ hours later. Each time, according to the cumulative testimony of the defendant and the officers, defendant waived those rights. After arrest and before penning his confession, defendant had slept eight hours and was provided ample food. Defendant maintains only that when he protested his innocence, the officers continued to question him. We conclude defendant's waivers were voluntary, knowing and intelligent under a preponderance of the evidence standard. *Daoud, supra* at 634. Simply

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

put, no coercion was used in obtaining from defendant the multiple waivers of his rights. Moreover, defendant testified he understood his rights. We further conclude that no conduct undertaken by the police subsequent to defendant's voluntary, knowing and intelligent waiver of his rights amounted to improper coercive activity. Defendant was not deprived of sleep, food or other needs. Defendant did not request the questioning to cease nor did he suggest in any way a desire to reassert his waived rights. Under these circumstances, the questioning of defendant by the police cannot be said to have been so aggressive as to render void defendant's valid waiver of rights.

II

Defendant next argues that the trial court erred in determining that the prosecution had exercised due diligence when it failed to produce an endorsed witness. We review the trial court's determination of due diligence for an abuse of discretion and its factual findings underlying that determination for clear error. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The prosecution is responsible for producing at trial the witnesses it has endorsed on its witness list. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). It may be relieved of that duty on a showing that a witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

The prosecution had searched for the witness in question by contacting his relatives, inquiring at his home and work addresses, and checking with local jails and morgues as well as with the Department of Corrections and Family Independence Agency. Defendant argued the prosecution should also have issued an arrest warrant for the witness and entered it into the Law Enforcement Information Network. We find no merit in defendant's argument. Due diligence is the attempt to do everything reasonable, not everything possible, to produce a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The trial court's conclusion that the prosecution's efforts constituted due diligence was rationally related to facts on the record. The trial court, therefore, did not abuse its discretion by determining the prosecutor exercised due diligence to procure the endorsed witness. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

III

Defendant next argues that there was insufficient evidence to support his murder conviction and that the verdict was against the great weight of the evidence. We review a challenge to the sufficiency of the evidence by considering the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). The trial court's grant or denial of a motion for new trial because the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

In addition to defendant's confession, there was evidence of a prior dispute between defendant and the victim during which defendant pointed a gun at the victim. Further, alibi testimony that defendant had driven his car to his aunt's house before the victim was killed was contradicted by a disinterested neighbor who claimed to have seen defendant's car parked on the

street immediately after hearing the fatal shots. Despite the absence of a murder weapon and eyewitnesses, this evidence viewed in the light most favorable to the prosecution, was sufficient for the court to find the elements of first-degree murder beyond a reasonable doubt. *Reid, supra*. Similarly, the court's denial of defendant's motion for a new trial was not perverse or without basis in reason and, therefore, did not constitute an abuse of discretion. *Daoust, supra; Ullah, supra*.

IV

Defendant next argues that when the police officer to whom he confessed failed to appear for trial, the court erred in denying his motion to dismiss and instead granting the prosecution two continuances and a six-day adjournment. We review decisions to grant continuances and adjournments for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown" MCL 768.2. Absence of a material witness is good cause if it appears probable the witness will be produced and will testify. *People v Buckner*, 144 Mich App 691, 694; 375 NW2d 794 (1985). A material witness is one "who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about those matters." Black's Law Dictionary (7th ed), p 1597. A defendant must show undue prejudice as a result of a continuance or adjournment. *Snider, supra*.

The police officer to whom defendant confessed was a material witness precisely because it was he whose questioning culminated in the most damning evidence against defendant - - his handwritten confession. The officer had been subpoenaed but was, inexplicably, at a polygraph seminar in Florida on the day he was to testify. However, the officer did appear and testify following the six-day adjournment. Defendant did not show any prejudice from the continuances and adjournment. Therefore, the court did not abuse its discretion in this regard.

V

Finally, defendant argues that the trial court erred in allowing the prosecution to continuously mention the fact that defendant was administered a polygraph examination. A court's evidentiary rulings are reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Errors in the admission of testimonial evidence are nonconstitutional in nature and subject to harmless error analysis. *People v Toma*, 462 Mich 281, 296-297; 613 NW2d 694 (2000). Defendant has the burden of showing that a preserved, nonconstitutional error caused a miscarriage of justice under a "more probable than not" standard. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The results of a polygraph examination are not admissible at trial. *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). However, a judge, unlike a juror, possesses an understanding of the law that allows her to ignore errors and to decide a case based solely on the evidence properly admitted at trial. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Nevertheless, if a case is a credibility contest between a polygraph examiner and a defendant-examinee, admission in a bench trial of testimony that reveals, even indirectly, the results of the polygraph examination is an error that warrants reversal. *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995).

The trial court erred in admitting the testimony of two police officers, the polygraph examiner and a second officer who observed the examination, because that testimony indirectly revealed that defendant's answers were not validated as truthful. *Ray, supra* at 265. However, this case is distinguishable from *Smith* because it was not a credibility contest between those two witnesses and defendant. The main evidence against defendant, as noted, was his uncoerced confession, supported by testimony recounting his prior, armed dispute with the victim and contradicting his alibi defense. As a result, defendant is unable to show that it was more probable than not that the verdict would have been different if the polygraph results had not been revealed. *Carines, supra* at 774. Therefore, although the court erred, its error was harmless, and defendant's conviction is affirmed.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad