

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVAN JAY VANDYKE,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 236300

Clinton Circuit Court

LC No. 00-006904-FC

Before: Talbot, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant Evan Jay VanDyke appeals as of his right his jury trial conviction of first-degree criminal sexual conduct (CSC I) (person under thirteen years of age), MCL 750.520b(1)(a). The trial court sentenced defendant to a term of six to seventeen years’ imprisonment. We affirm.

Defendant first argues that he was deprived of the effective assistance of counsel because his trial counsel failed to move to suppress defendant’s confession, which defendant claims was coerced. Defendant did not move for a *Ginther*¹ hearing or a new trial. Therefore, our review is limited to mistakes apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In determining whether defendant’s confession was knowing, voluntary and intelligent, this Court applies an objective standard and examines the totality of the circumstances. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Such circumstances may include age, education, the defendant’s intelligence level, the duration of the defendant’s detention and questioning, the defendant’s mental and physical state, and whether the defendant was threatened or abused. *Id.* at 181-182. No single factor is determinative. *Id.* at 182.

In this case, the interrogating officer and the officer in charge of the case both testified that defendant had initially denied that he had digitally penetrated his step-daughter’s vagina. Each testified that, after the interrogating officer told defendant that his body language indicated that he was not being “one hundred percent truthful,” defendant broke down and cried, and

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

admitted that he performed the digital penetration on his step-daughter no more than five times. Each officer denied any improper behavior toward defendant. Conversely, defendant testified that he felt pressured in the interrogation because the interrogating officer asked him whether he wanted to walk out of the police station without handcuffs. Defendant testified that he only agreed with the “scenario” of the alleged incident that the interrogating officer had described so that he could leave the police station. However, defendant also testified that he was not threatened or physically abused by either officer, that he fully understood his *Miranda*² rights, and that he was aware of his right to end the interrogation and leave at any time. Defendant’s testimony, which conflicted with the testimony of the complainant and the police officers, created a question of witness credibility. Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). On the basis of the record before us, we cannot conclude that defendant’s confession was involuntary. Therefore, counsel was not deficient for failing to move to suppress the confession. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant next argues that his rights under the Due Process Clause of the Michigan Constitution were violated because the police failed to make an audio or video recording of his interview. This Court has squarely addressed this issue and has firmly concluded that this question rests with the Michigan Legislature. *Fike, supra* at 183-186. We decline defendant’s invitation to revisit this issue.

Defendant next argues that the trial court abused its discretion by denying defendant’s motion for a mistrial when the jury heard a reference to a polygraph examination. A trial court’s decision to grant or deny a mistrial is reviewed for abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

Normally, reference to a polygraph examination is not admissible before a jury. *Nash, supra* at 97. Although it is a bright-line rule that reference to taking or passing a polygraph examination is error, merely referencing a polygraph examination does not always constitute error requiring reversal. *Id.* at 97-98. For example, when the mention of a polygraph examination was brief, inadvertent, and isolated, it may not require reversal. *Id.* at 98. To determine if reversal is required, the following factors may be considered: (1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness’ credibility; and (5) whether the results of the examination were admitted rather than merely the fact that an examination had been conducted. *Id.* (citations omitted).

Here, the record shows that the reference to the polygraph examination was made during the testimony of the officer in charge of the case. The officer was questioned about the time he spent at the police station where defendant was being interrogated. The officer attempted to clarify his understanding of the question by asking, “[f]rom the time I arrived [at the police station] to the time I left, or from the time the polygraph started, the interview started?” The record shows that the officer referred to the polygraph examination only once. From our review of the record, we conclude that the trial court did not abuse its discretion in denying the motion

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

for a mistrial because the reference to the polygraph examination was inadvertent and the results of the polygraph examination were not revealed to the jury.

Defendant finally argues that the prosecutor improperly vouched for the credibility of a police officer during closing argument. Specifically, defendant challenges the prosecutor's assertion that there was no reason for the interrogating officer to lie under the circumstances of this case. Because defendant did not object at trial, our review is limited to plain error that affected defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant's theory of the case was that the interrogating officer had coerced defendant into admitting to the alleged crime, and that the officer falsely testified that defendant admitted to having digitally penetrated his step-daughter's vagina no more than five times. In closing argument, the prosecutor told the jury that it was faced with a credibility question, and asserted that the evidence in this case did not support defendant's suggestion that the officer may have lied. The prosecutor then proceeded to explain that there was nothing in the evidence to show that the interrogating officer had any "personal ax to grind" with defendant.

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to those of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995). There is nothing in the record to suggest that the prosecutor had some special knowledge concerning the truthfulness of the interrogating officer. The record does not show that the prosecutor urged the jury to suspend its own judgment powers. A review of the prosecutor's remarks in context reveals that the prosecutor was not vouching for the officer's credibility, but instead was merely reviewing the evidence in the case and responding to defendant's theory of the case which necessarily attacked the officer's credibility. See *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Therefore, there was no prosecutorial misconduct.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell