

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR CHARLES STANDLICK,

Defendant-Appellant.

UNPUBLISHED

October 5, 2004

No. 244713

Oakland Circuit Court

LC No. 02-182990-FH

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction on five counts of third-degree criminal sexual conduct, MCL 750.520d, for which the trial court sentenced him as a second habitual offender, MCL 769.10, to concurrent terms of seven to twenty-two and a half years imprisonment on each count. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I.

The thirteen-year-old victim testified that over an eight-day period in February 2002, defendant touched her breasts, digitally penetrated her, performed cunnilingus on her, and on one occasion engaged in penile penetration. These activities came to light when one of the victim's teachers found a note in the victim's school agenda book. The note indicated that the victim was afraid to go home and that the defendant had raped her. During trial, the prosecution introduced a videotape of defendant's statement to police, which the trial court had previously viewed at a *Walker*¹ hearing. Defendant did not testify or call any witnesses.

The trial court, finding that the victim was credible and defendant's version of events was unpersuasive, found defendant guilty as charged.

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2 87 (1965).

II.

Defendant first asserts that the trial court erred in denying his motion to suppress his statement, based on the failure of police to cease their interrogation when defendant requested a lawyer. We disagree. This Court reviews a trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda*² rights for clear error. Whether the waiver was knowing and intelligent is a question of law that we review de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *Id.* at 634.

In support of his position, defendant relies on *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981), which holds that when an accused invokes the right to have counsel present during a custodial interrogation, all interrogation must cease until counsel has been made available or the accused initiates further conversation with the police.³ But defendant's reliance on *Edwards* is misplaced because he was not in custody when he invoked his right to counsel.

After the victim was seen at Care House and medically examined, police officers contacted defendant for an interview. Defendant voluntarily came into the station with his ex-wife, with whom he maintained good relations. Detectives Miller and Wurtz conducted the videotaped interview. Defendant was initially informed that he was not under arrest, was free to leave at any time, was not in custody, and was not being kept there against his will. After denying the allegations, defendant agreed to take a polygraph test indicating that he felt he would pass and it would clear him immediately.

After defendant took the polygraph test, the detectives again questioned him, focusing on defendant's failure to "pass" the polygraph test. The following exchange took place:

Defendant: From the sound of this I think I'm going to need a lawyer.

Miller: Okay. That's your choice.

Defendant: No matter what you guys decide to do it's going to end up going to court.

Miller: Hold on a second. Depending on what you say I guess it's going to depend on what's going to happen to you down the road, okay. Now it you feel you need a lawyer you have absolutely every right in the world to have a lawyer,

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

³ Interrogation includes any words or actions on the part of police other than those normally attendant to arrest that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). But "[i]f a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right." *People v Bladel*, 421 Mich 39, 66; 365 NW2d 56 (1984).

no problem whatsoever. But I'm telling you this time and I am telling you from the last time this is your only chance to give us the why and to give us the truth. This is your only chance. After today, no further conversations, and that's the truth.

Defendant: I have to get a lawyer.

Miller: You're saying you want a lawyer?

Defendant: Yeah.

Miller: Okay, you're under arrest.

The detectives then began the booking process, during which, defendant asked about the process generally and, more specifically, asked: "What's it going to take to get me out of here tonight?" After more routine booking questions, defendant asked: "What would make the difference if I come out and tell you guys s--- happened?" Defendant also asked whether he could retract his request for a lawyer. In response, Detective Miller told him: "We're going to take a ten minute break. Have a cigarette, relax, think about stuff. We'll come back in in just a little bit. If you want to talk, fine, but we're going to have to go through some things first before we that that, with you, all right?"

After the break, the detectives informed defendant that he was now in custody, no longer free to leave, and was under arrest. Detective Miller read defendant the *Miranda* warnings and reiterated defendant's right to have an attorney. Defendant denied being coerced or threatened to make a statement in any way. Defendant then gave a detailed inculpatory statement after telling the detectives that he could get out of this with a good lawyer but that "my problem is I think I need some help. So I'm going to stick through it. I screwed up."

Although defendant is correct that *Edwards* is applicable in custodial situations, he cites no case, and we are unable to find one, that expands this holding to non-custodial questioning. Although both parties and the trial court assumed that defendant was in custody at the time defendant asserted his right to counsel, thereby invoking *Edwards*, the record contradicts this assumption. Because defendant was not in custody, *Edwards* is not applicable – defendant was free to refuse to talk and police were free to continue asking questions.

When defendant was arrested, he was properly given *Miranda* warnings after initial routine booking questions and a break. The statements defendant made between the arrest and *Miranda* warnings were not inculpatory. After being given *Miranda* warnings and making a valid waiver, defendant confessed. When defendant made his confession, he was "sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right," *People v Bladel*, 421 Mich 39, 66; 365 NW2d 56 (1984), and in fact did so. Therefore, trial court properly admitted defendant's confession.

III.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel allowed the admission of the unredacted police interview transcript that included

references to a polygraph test. To establish an ineffective assistance of counsel claim, defendant first must show that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

“Normally, reference to a polygraph test is not admissible before a jury.” *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). To determine whether the error requires reversal, the Court must look at a number of factors, including: (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 test were admitted rather than merely the fact that the test was conducted. *Id.* at 98. But in the case of a bench trial, the trial court possesses an understanding of the law that allows it to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

In this case, the polygraph test results were not admitted, and the trial court did not refer to the polygraph test in its findings of fact. Because the trial court is presumed to know that such evidence is inadmissible, and there is no indication in the record that the trial court relied on the polygraph test, we conclude that defense counsel's failure to seek redaction of the transcript did not affect the outcome of the case.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly