

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC RANARD BURKETT,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2005

No. 254996

Calhoun Circuit Court

LC No. 03-002889-FC

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

I. Introduction

Defendant was charged with first-degree home invasion, MCL 750.110a(2), kidnapping, MCL 750.349, felonious assault, MCL 750.82, and first-degree criminal sexual conduct (CSC), MCL 750.520b (multiple bases). The kidnapping charge was dismissed before the end of defendant's first trial. After defendant's first jury trial, he was convicted of first-degree home invasion, acquitted of the felonious assault charge, and the jury deadlocked on the CSC charge. Defendant was retried on the CSC charge, and a jury found him guilty. He was sentenced on March 26, 2004, to seventeen to thirty years' imprisonment for his CSC conviction and five to twenty years' imprisonment for his home invasion conviction, to be served consecutively. Defendant appeals as of right from the trial court's March 26, 2004, judgment of sentence. We affirm.

II. Facts

During the pretrial proceedings, defendant filed a motion to suppress evidence of the statements he made to police. The trial court held a hearing on defendant's motion to suppress on November 23, 2003. Testimony revealed that defendant was arrested and booked in jail at approximately 2:00 p.m. on July 3, 2003. During his booking, defendant was asked a series of questions, and the booking officer, Deputy Aaron Wiersma, also made his own observations. Defendant complained of no illness, only an allergy to dairy products, appeared to be in good physical condition, responded appropriately to the questions asked, was not intoxicated, and did not complain of being hungry or thirsty.

After defendant was arrested, the police wanted to collect defendant's clothing and bodily fluid samples, particularly a penile swab, to analyze in connection with the CSC charge, but a

search warrant needed to be prepared and approved first. There was a concern that defendant would wash off or remove any trace evidence from his clothing or person if he was in a cell with other inmates or had access to water. Therefore, defendant was placed in a cell alone and the water to the cell was turned off.

An assistant prosecuting attorney instructed Sergeant Everett to turn off defendant's water, but did not instruct her to withhold food. Sergeant Everett did not instruct any of her staff to withhold food from defendant, only water. Deputy Wiersma testified that he was instructed not to allow defendant access to water and thought that the afternoon shift supervisor, Sergeant Draper, also told him to withhold food from defendant, which was the 4:00 p.m. meal, because it was believed that defendant would be taken to the hospital soon to execute the search warrant. Therefore, defendant was not given the late afternoon meal, but it was set aside for him to eat after the search warrant had been executed. Deputy Wiersma was close to the cell in which defendant was held and testified that defendant never asked for anything.

The prosecutor's office prepared and approved the search warrant by around 4:45 p.m. that day. By 6:30 p.m., a magistrate had approved the search warrant. Officer Pence and Officer Mikolajczyk picked up defendant from the jail and transported him to the hospital around 8:30 p.m. Once at the hospital, they waited in the lobby for about one hour before being brought to an examining room. They then waited another 1 or 1-1/2 hours to be seen by a doctor. Officer Pence observed defendant during the entire time. He seemed fine and did not ask for any food, but might have asked for a drink. Officer Pence could not recall if he did.

Officer Pence, with Office Mikolaczyk present, questioned defendant at the hospital about the CSC charge during the wait in the examination room. Defendant was read his *Miranda*<sup>1</sup> rights and waived them. Defendant gave no indication to Officer Pence that he was unable to waive his rights and appeared to voluntarily answer all the questions. Officer Pence stated that defendant was not offered any promises, threatened, or coerced in any way. The questioning lasted for about one-half hour and occurred sometime between 9:30 and 10:30 p.m. Apparently, Officer Pence allowed defendant to drink at the time or close to the time of questioning. Defendant was returned to the jail around 11:00 p.m. that evening, but definitely by 11:30 p.m.

Defendant testified that he did not have anything to drink during the evening before his arrest, and was very thirsty by the time he was booked in the jail. Defendant testified that he was very thirsty and hungry, but his requests for food and water were denied.

According to defendant, Officer Pence, in the presence of Officer Mikolajczyk, read defendant his *Miranda* rights and questioned him before they got to the examination room. Defendant told Officer Pence that he understood his rights and had nothing to say to him. He made the same statement when he was booked in the jail and read his rights. Officer Pence coaxed him into answering questions by saying that he was just trying to help defendant.

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

The trial court found that defendant was in custody and that he had been denied water from the time of his arrest to sometime at the hospital. The trial court stated:

It is my belief that under Michigan law the desire to preserve forensic evidence does justify a no drink, no food restriction. The issue really becomes the length of time that Mr. Burkett did not have anything to eat or drink and the interrogation techniques utilized by Mr. Pence. Even Mr. Burkett testified that the *Miranda* rights were explained to him twice, once by Battle Creek and again by Mr. Pence. Now, Mr. Burkett, at the time statements apparently were made, was at Battle Creek Health System waiting the medical examination and the execution of the search warrant. Apparently at that time or close to the time of the questions he had been allowed to drink by Mr. Pence. Mr. Burkett testified he only had a few hours sleep, but there's been no evidence in this record about being sleepy or so tired that he did not understand the questions.

What it really boils down to is what I would term interrogation techniques and the thing that struck me in Mr. Burkett's answer was that when he learned of the life penalty it evoked anger in him. Now, I'm not persuaded, frankly, that Mr. Pence's recitation of everything was or was not stated by him is entirely accurate. People sometimes testify honestly but may simply be wrong about what they thought they saw or remembered. I think there probably is some credence to Mr. Burkett's recollection of what occurred and what was said and not said.

But the point of it is in spite of saying well, I don't want to answer questions, apparently Mr. Burkett continued to answer questions. This is after *Miranda* has been explained twice to him. And after some delay—and I will say that it was at least a six-hour delay, perhaps more than seven while he was being detained by the police. He was angry at being advised what the charges were, and did not request a[n] attorney. There is nothing in the record to indicate he requested an attorney while he was there at the hospital. And in spite of apparently saying he didn't want to answer it, he moved forward and did answer. There is nothing in the record to indicate any promises were made, any specific promises. There may have been some statements by Mr. Pence, why don't you just talk to me, we'll see what we can do, I can help, or something along those lines.

In the context of the case law in Michigan and other cases this court has to resolve there was no specific promises made. So I find that the statement will be admissible, Mr. Webb.

### III. Analysis

#### A. Motion to Suppress

Defendant first argues that the trial court erred in concluding that his statements were voluntary. Defendant asserts that the denial of water, the fact that he was under arrest, and Officer Pence's questioning after he invoked his right to remain silent, when combined, show that his statements were involuntary. We review the trial court's findings for clear error, while

its ultimate conclusion is reviewed de novo. *People v Echavarría*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Id.*

In determining voluntariness, the court should consider the totality of the circumstances, including such factors as: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; and whether the defendant was threatened or abused. *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000). No single factor is determinative. *Id.* at 753. Compulsion proscribed by the right to remain silent is that resulting from circumstances in which a person is unable to remain silent because of threats or violence, improper influence, or direct or implied promises, however slight, *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489; 12 L Ed 2d 653 (1964), unless he chooses to speak in the unfettered exercise of his own will, *id.*; *In re Stricklin*, 148 Mich App 659, 664; 384 NW2d 833 (1986).

We conclude that the trial court's findings of fact were not clearly erroneous. The trial court found, and the parties do not dispute, that defendant was in custody at the time of the questioning, had been read his *Miranda* rights, and understood them. There is also no dispute that defendant was not offered food or drink during the time he was in jail, six to seven hours. If defendant's testimony is believed, he was given water while at the hospital at some point in time close to the questioning.

As to whether defendant asserted his right to remain silent, the trial court appeared to find credence in both defendant's and Officer Pence's recollection of events. The trial court found that despite apparently asserting his right to remain silent, defendant did answer questions. The trial court also found that no promises or threats were made to defendant. The trial court was in the better position to assess Officer Pence's and defendant's credibility. *Sexton (After Remand)*, *supra* at 752. The trial court's finding that even if defendant stated that he did not want to talk, he did so anyway without compulsion from the police, was not clearly erroneous.

In light of the trial court's findings, we conclude on de novo review that the trial court did not err in admitting defendant's statements. Defendant was provided *Miranda* warnings, and was not forced or coerced into speaking to the police. Defendant was competent, and was not in any condition such that his ability to understand his actions after being given the warnings would be put into question. See, e.g., *Everett v Barnett*, 162 F3d 498, 501 (CA 7, 1998) (neither confession nor waiver was involuntary, even though defendant was denied food and water until just prior to an inculpatory statement made some twelve hours after arrest). We therefore affirm the trial court's ruling.

#### B. Expert Testimony

Defendant next asserts that the trial court should not have admitted Randall Haugen's "post-rape behavior" testimony into evidence because he improperly vouched for the victim's

credibility. A trial court's decision to allow a witness' testimony is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

In *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857, amended 450 Mich 1212 (1995), our Supreme Court held that testimony by an expert regarding typical behaviors common in abuse victims was admissible in the prosecution's case-in-chief for the sole purpose of explaining a victim's specific behavior that a jury might construe to be inconsistent with an abuse victim. The Court held that an expert may testify about the consistencies between the behavior of the case's particular victim and other victims for the purpose of rebutting an attack on the victim's credibility.<sup>2</sup> *Id.* Additionally, the *Peterson* Court reaffirmed the principles it established in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990): "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *Peterson*, *supra* at 352.

Although *Peterson* and *Beckley* both involved child sexual abuse accommodation syndrome, the holdings in these cases properly encompass expert testimony regarding rape trauma syndrome in adults. Haugen stated that his testimony was based on studies and his experience with adult sexual assault victims. His testimony paralleled that which was deemed admissible in *Peterson*, albeit in the context of sexually abused children. Additionally, years before our Supreme Court's decisions in *Beckley* and *Peterson*, this Court held admissible a rape counselor's statement that "based on her training and observations of complainant, that she saw nothing in complainant which was inconsistent with the profile of a rape victim." *People v Stull*, 127 Mich App 14, 19; 338 NW2d 403 (1983). Although the case did not explicitly state that the complainant was an adult, the fact can be inferred because she had her own apartment and was old enough to go to a bar. *Id.* at 16. Therefore, we conclude that the *Beckley* and *Peterson* cases identify the parameters within which such testimony is admissible.<sup>3</sup>

Here, Haugen initially discussed some common behavioral traits of trauma victims, which included rape victims. He was careful to point out that the presence or absence of a behavior was not conclusive of trauma, that many factors were considered, which included the individual's constitution, and that psychology had no check-list that could be completed that would definitively indicate whether a person was reacting to a traumatic experience. Haugen did respond to questions regarding the victim's behavior and gave his opinion whether that behavior was consistent with that of a trauma victim. This testimony was presented to rebut defendant's assertion that the sex was consensual and that the victim's behavior, such as refusing medical treatment, acting normally in the days after the incident, telling other people she met about the incident, not leaving her apartment when she obtained a cloth for her face, and not immediately

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<sup>2</sup> These rules were reaffirmed in *People v Lukity*, 460 Mich 484, 500-501; 596 NW2d 607 (1999).

<sup>3</sup> Notably, the trial court in *Beckley* qualified the expert pursuant to this Court's decision in *Stull*, *supra*. *Beckley*, *supra* at 699. Moreover, our Supreme Court has applied the holding in *Beckley* to allow "expert testimony of the battered woman syndrome so that the expert may, when appropriate, explain the generalities or characteristics of the syndrome." *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995).

reporting the incident to the police, whose station was next door to the victim's apartment, was inconsistent with a sexual assault victim. Therefore, Haugen's testimony fell within the parameters outlined in *Peterson*. Additionally, Haugen never gave an opinion regarding the victim's veracity, defendant's guilt, or that a sexual assault actually occurred. Therefore, Haugen's testimony was also in accord with the principles set forth in *Beckley*. Thus, the trial court did not abuse its discretion in admitting Haugen's testimony because the testimony was proper under *Peterson*, *Beckley* and *Stull*.<sup>4</sup>

Defendant also argues that the trial court erred in not giving a modified version of jury instruction CJI2d 20.29, which states:

(1) You have heard [*name expert*]'s opinion about the behavior of sexually abused children.

(2) You should consider that evidence only for the limited purpose of deciding whether [*name complainant*]'s acts and words after the alleged crime were consistent with those of sexually abused children.

(3) That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by [*name expert*] that [*name complainant*] is telling the truth. [Italics in original.]

This limiting instruction was crafted in response to the Court's decisions in *Peterson* and *Beckley*. See Note and Commentary to CJI2d 20.29. The applicability of jury instructions is reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

The trial court's ruling on this issue was as follows:

I'm going to overrule your objection to using the 20.29. The reason I do so is that instruction is specifically crafted to relate to children's behavior.

Secondly, no modified instruction was presented to me. But more importantly – even if it was modified the only person it could have affected was Randall Haugen, and he really did not testify as it relates to any profile or any kind of child's complainant behavior. I did not think it could be modified.

In addition, there was the element of mental anguish, mental abuse, so on, related to this. And all Dr. Haugen did was to testify then in his experience in the field of psychology it would not be unusual for a person who's undergone trauma to do certain things. And for that reason it was not given.

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<sup>4</sup> Because the testimony was properly admitted, the fact that the trial court admitted it pursuant to a local "first-out" rule is irrelevant.

Although we agree with defendant that the language of CJI2d 20.29<sup>5</sup> could easily have been adapted to apply to adult post-rape behavior, this does not automatically mean that defendant is entitled to a new trial.

“Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant’s rights.” *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). A preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002). The analysis focuses on whether the error undermined reliability in the verdict. *Id.* at 364.

The trial court did give the jury a cautionary instruction regarding expert witness testimony:

Experts are allowed to give opinion in court about matters they are experts on. However, you do not have to believe an expert’s opinion. Instead, you should decide whether you believe it and how important it is to you. When you decide whether you believe an expert’s opinion, think carefully about the reasons and facts he or she gave for his or her opinion and whether those facts are true. You should think about the expert’s qualifications and whether his or her opinion make when you think about all the other evidence in the case.

The purpose of the limiting instruction that defendant requested was to guard against a jury concluding that an expert’s testimony regarding certain behaviors by the complainant indicated that the expert was giving an opinion that the sexual abuse in fact occurred. *Beckley, supra* at 725. The *Beckley* Court stated that “generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request.” *Id.*

In this case, defense counsel did not ask Haugen the obvious question whether he was rendering an opinion whether the assault actually occurred. But Haugen was very specific in his direct testimony to say that the presence or absence of any typical behaviors did not indicate that the victim was or was not sexually assaulted. Moreover, the physical evidence, coupled with the victim’s testimony, was significant. This evidence of guilt, along with the general limiting expert witness instruction and Haugen’s own limiting testimony, does not undermine our confidence in the jury’s verdict.

### C. Resentencing

Defendant’s final issue, an unpreserved one, is that the trial court improperly used factors at sentencing that were not proven beyond a reasonable doubt at trial. *Blakely v Washington*, 542

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<sup>5</sup> Michigan’s jury instructions can be modified because the court is not required to give a criminal jury instruction as it is written as long as the court adequately informs the jury of its duty. See *People v Borney*, 110 Mich App 490, 497; 313 NW2d 329 (1981).

US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). A trial court's interpretation of the sentencing guidelines is reviewed de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

Our Supreme Court has held that *Blakely* is inapplicable to Michigan's guideline scoring system, which determines recommended minimum sentence ranges. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004); see also *People v Morson*, 471 Mich 1201; 683 NW2d 678 (2004). Defendant acknowledges the current state of the law in this area, yet asks this Court to change that law.

In *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), the defendant argued that *Blakely* was applicable to Michigan's sentencing scheme, contending that our Supreme Court's statement in a footnote in *Claypool* was dicta and, therefore, not binding. *Id.* The *Drohan* Court rejected that argument, but asked our Supreme Court to address whether its footnote was binding precedent. Leave was in fact granted in March 2005, limited to the question whether *Blakely*, and another recent United States Supreme Court case, *United States v Booker*, 543 US \_\_\_; 125 S Ct 738; 160 L Ed 2d 621 (2005), affect Michigan's sentencing scheme. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005). Therefore, a direct decision on the issue is forthcoming from our Supreme Court. In the meantime, this Court is bound by its decision in *Drohan*, in which we held that this Court was bound by our Supreme Court's decision in *Claypool*. MCR 7.215(J)(1).

Affirmed.

/s/ Patrick M. Meter  
/s/ Christopher M. Murray  
/s/ Bill Schuette