# Order

**Michigan Supreme Court**
**Lansing, Michigan**

December 15, 2023

Elizabeth T. Clement,
Chief Justice

163224

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163224
COA: 344834
Genesee CC: 16-039869-FC

KEVIN LIONEL THOMPSON, JR.,
Defendant-Appellant.

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On October 4, 2023, the Court heard oral argument on the application for leave to appeal the May 6, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REMAND this case to the Genesee Circuit Court for resentencing under *People v Parks*, 510 Mich 225 (2022). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*).

For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

WELCH, J. (*dissenting*).

I respectfully dissent from the Court's decision to deny leave to appeal. Instead, I would have granted leave and reversed the Court of Appeals majority holding. I believe that defendant can demonstrate prejudice due to his attorney's not being present for a polygraph exam and that defendant did not waive his Sixth Amendment and *Miranda*[1] rights by voluntarily reinitiating contact when he took the polygraph exam.

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[1] *Miranda v Arizona*, 384 US 436 (1966).

## I. SUMMARY OF RELEVANT FACTS

Defendant, who was 18 years old at the time, was charged with the murder of David Fuller. He claimed that he was innocent. As a result, prior to trial, defendant's trial counsel and the assistant prosecuting attorney orally agreed to have defendant submit to a polygraph examination. There is a dispute as to the parameters that were agreed upon for the examination. Defendant's trial attorney claims that the agreement provided that defendant would not be asked any questions after the polygraph examination concluded, trial counsel was to be present outside the examination room, and the charges would be dismissed if defendant passed the exam. The assistant prosecutor claims she would not have entered into such an arrangement. No written document memorialized the agreement. Both parties agree that the examination was scheduled to be held at the courthouse at 7:00 p.m. on July 15, 2015.

Despite the fact that the parties agreed that the polygraph would start at 7:00 p.m., the examination was moved up several hours by the polygraph examiner, Agent David Dwyre. Trial counsel was not notified of this change. Agent Dwyre, explaining to defendant why his attorney was not present, implied that trial counsel knew about the change, expressly stating, "[s]ometimes the attorneys forget about the scheduling and all that." But in fact, defendant's attorney did not know about the unilateral decision by Agent Dwyre to administer the polygraph earlier than 7:00 p.m.

Agent Dwyre additionally told defendant he would be his advocate, that defendant could use Agent Dwyre's cell phone to call his attorney, and that six times in the last year defendants who had passed the polygraph examination were released from custody. Shortly thereafter, Dwyre assured defendant, "if you didn't do anything wrong, I will boldly tell the world that you didn't do anything wrong. So, they—they have confidence in me on that. The State of Michigan does and the Genesee County Prosecutor's Office does, and your attorney does."

While Agent Dwyre provided defendant his *Miranda* rights and informed defendant at the start of the examination that he had the right to stop the questioning and call his attorney at any time during the examination, defendant did not know his attorney's phone number. The examination then commenced. Throughout the entire polygraph examination, defendant maintained his innocence. However, after the examination concluded, Agent Dwyre continued to interview defendant. It was at this point that defendant confessed to the robbery and subsequent murder. Initially, defendant stated that he shot the victim by accident when the victim attempted to grab the gun. After Agent Dwyre pressed the issue, defendant changed his story two more times and ultimately admitted to intentionally taking part in the robbery but accidentally shooting the victim.

Trial counsel moved to suppress the postpolygraph statement on the ground that the prosecution violated an oral agreement that counsel was to be present outside the polygraph

room and that there was to be no postpolygraph questioning. At that hearing, trial counsel let the court know that he had arrived at the agreed-upon time, 7:00 p.m., on the day of the examination only to find that the examination had been moved earlier and had already occurred. The trial court gave counsel the opportunity to testify about the agreement made with the prosecution, but trial counsel chose not to testify. The trial court then denied defendant's motion to suppress.

Defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison without the possibility of parole for the felony-murder conviction, concurrent terms of 225 months' to 40 years' imprisonment each for the armed robbery and conspiracy convictions, 24 to 60 months' imprisonment for carrying a concealed weapon, and a two-year consecutive term for the felony-firearm conviction.

## II. POSTCONVICTION PROCEEDINGS

Following defendant's conviction, the State Appellate Defender moved for a new trial and a *Ginther*[2] hearing, arguing that trial counsel had provided ineffective assistance by failing to memorialize the polygraph agreement in writing and then failing to testify regarding the terms of the oral agreement. At the *Ginther* hearing, trial counsel testified that he had agreed to the polygraph because there was to be no postpolygraph questioning and he was to be present outside the room. Defendant's trial attorney acknowledged that he did not obtain a written agreement but testified that he clearly instructed defendant not to answer any questions after the polygraph exam had concluded. The assistant prosecutor testified that she did not recall any agreement in the case and that she would not have agreed to consider dismissal or a better plea offer if no postpolygraph questioning had been a term of the agreement. The trial court denied defendant's motion for a new trial, opining that regardless of whether the agreement existed as defense counsel stated, defendant had voluntarily waived his right to counsel and his *Miranda* rights following a proper advice of rights from Agent Dwyre.

Defendant appealed, and in a split decision, the Court of Appeals majority affirmed the trial court's sentence. Defendant asked this Court to grant leave to appeal. This Court scheduled an oral argument on the application pursuant to MCR 7.305(H)(1) and asked the parties to address whether trial counsel was ineffective for initiating the polygraph examination by failing to memorialize the polygraph agreement, enforce the terms of the agreement, or testify to the existence of the agreement, and whether defendant had waived

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[2] *People v Ginther*, 390 Mich 436 (1973).

his right to counsel with respect to the polygraph examination or postpolygraph questioning.

After oral argument, the Court denied leave to appeal. However, I believe defendant has articulated potentially meritorious arguments that counsel provided ineffective assistance under *Strickland v Washington*, 466 US 668 (1984), and that defendant did not voluntarily or intelligently waive his right to counsel or *Miranda* rights during his polygraph examination.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his defense. Const 1963, art 1, § 20; US Const, Am VI. The right to counsel is the right to effective assistance of counsel. *Strickland*, 466 US at 686; *People v Pubrat*, 451 Mich 589, 594 (1996). To establish that trial counsel was ineffective, a defendant must first establish that counsel's performance was deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 687; *People v Trakhtenberg*, 493 Mich 38, 51 (2012). If a defendant can prove that counsel acted below an objective standard of reasonableness, they must then show that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 US at 694; *Trakhtenberg*, 493 Mich at 51; *Pubrat*, 451 Mich at 596.

In this case, counsel failed to enter into a written agreement memorializing the conditions of the polygraph examination. The importance of memorializing such agreements to ensure that the terms of a polygraph examination are clear between a prosecutor and defense attorney has been long established in Michigan caselaw. See *People v Leonard*, 421 Mich 207 (1984); *People v Strieter*, 119 Mich App 332 (1982).[3] Trial counsel also failed to outline the terms of the polygraph agreement on the record during a court hearing and at the subsequent hearing on the motion to suppress.

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[3] In *Leonard*, the Court held that the "defendant did not knowingly waive his right to counsel in view of the stipulation executed by the prosecution and defense whereby the results of the polygraph examination and opinions drawn therefrom would not be admissible in evidence." *Leonard*, 421 Mich at 228. In *Strieter*, the Court of Appeals held that the defendant's waiver of her right to counsel and waiver of her right to remain silent were invalid where the defendant was unaware of the misunderstanding between the prosecution and defense counsel regarding the use of her polygraph test answers and any other statements arising from the polygraph examination. *Strieter*, 119 Mich App at 340.

The troublesome nature of the lack of a written agreement is exacerbated by the fact that defendant was only 18 years old and had no experience in the criminal justice system. A defense attorney knows the risks inherent in a polygraph examination and a postpolygraph interview. In my view, defendant's trial attorney failed to adequately protect defendant and his representation of defendant fell below an objective standard of reasonableness.

Until the postpolygraph interview, defendant maintained his innocence. There is therefore merit to defendant's argument that had counsel memorialized the terms of the polygraph agreement as he understood it, either defendant would not have confessed or any confession would have been suppressed. In short, the prosecution would have been bound by the agreement terms, even if those terms were highly defense-favorable. See *People v Reagan*, 395 Mich 306 (1975).

Additionally, had an agreement existed that set forth the time for the polygraph and made clear that counsel had to be present outside the polygraph room, Agent Dwyre could not have moved the time without breaching the agreement. Further, defendant's attorney would have been present prior to the start of the examination to remind defendant to not answer any questions at the conclusion of the exam.

Finally, there was a lack of direct evidence linking defendant to the murder,[4] making the confession a powerful source of evidence in this matter. "A confession is like no other evidence." *Arizona v Fulminante*, 499 US 279, 296 (1991). Without a confession, I believe there is a strong likelihood the outcome of the proceeding would have been different. As a result, I would find that defendant is able to establish prejudice as required when a claim of ineffective assistance of counsel is made, *Strickland*, 466 US at 687, and therefore vacate his conviction and order a new trial.

## IV. WAIVER

Apart from ineffective assistance of counsel, I also have concerns that defendant's waiver of his rights was involuntary given the totality of the circumstances surrounding the polygraph examination.

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[4] The murder weapon was found in codefendant Ah'Quan Lay's car; defendant was excluded as the donor of DNA found on the victim's car door handle, a cartridge case, and the murder weapon; defendant was not matched to the murder weapon by fingerprint identification; and Lay had worked at the Cottage Inn with the victim. Defendant's phone records did, however, establish him in the area at the time of the crime, and a witness described seeing a Black man running from the scene in the direction of defendant's godmother's house where defendant was spending the night.

## A. *EDWARDS v ARIZONA*

I believe there is merit to defendant's claim that the unilateral change of time for the polygraph examination violated his right to counsel under *Edwards v Arizona*, 451 US 477 (1981). In *Edwards*, the United States Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id*. at 484. Further, when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations . . . ." *Id*. at 484-485.

In *Montego v Louisiana*, 556 US 778, 787 (2009), the United States Supreme Court further explained that

> [t]he *Edwards* rule is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights. It does this by presuming his postassertion statements to be involuntary, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This prophylactic rule thus protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence. [Citations and quotation marks omitted.]

Defendant here argues that Agent Dwyre's actions constituted police-initiated contact after defendant had expressed his desire to deal with law enforcement only through counsel, and he asserted a desire to have his counsel present outside the room during the examination. Thus, when Agent Dwyre moved the examination to an earlier time without notifying trial counsel and giving trial counsel an opportunity to be present before the examination, that constituted a police-initiated interrogation because the terms that the polygraph was conditioned on were not followed. It is my belief that defendant invoked his right to counsel and should have been effectively off-limits to the police and prosecution until the agreed-upon time for the polygraph examination. Because Agent Dwyre moved the time earlier without consulting trial counsel, I believe defendant has a potentially meritorious claim that any waiver of his right to counsel was merely in response to a police-initiated interrogation and therefore in violation of the protections afforded to defendant under *Edwards*.

## B. *MIRANDA* WAIVER

Even if there was no *Edwards* violation, I am still troubled by the lower courts' determination that defendant voluntarily waived his *Miranda* rights by engaging in the polygraph examination.

An individual's right to be free from compelled self-incrimination is guaranteed by the state and federal Constitutions. US Const, Ams V and XIV; Const 1963, art 1, § 17. "To protect a defendant's Fifth Amendment privilege against self-incrimination, custodial interrogation must be preceded by advice to the accused that 'he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.' " *People v Cortez (On Remand)*, 299 Mich App 679, 691 (2013), quoting *Miranda*, 384 US at 444. "A suspect's waiver of his *Miranda* rights must be made 'voluntarily, knowingly, and intelligently.' " *People v Tanner*, 496 Mich 199, 209 (2014), quoting *Miranda*, 384 US at 444. To determine whether a waiver is valid, the United States Supreme Court has articulated a two-part inquiry:

> First, 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. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*Tanner*, 496 Mich at 209, quoting *Moran v Burbine*, 475 US 412, 421 (1986).]

The trial court and Court of Appeals majority concluded that defendant voluntarily waived his Sixth Amendment and *Miranda* rights. The majority summarized the trial court's findings that

> regardless of the terms of the polygraph agreement, the record reflects that defendant was fully aware that counsel would not be present during questioning, defendant was advised of his rights and understood that he could request counsel or contact his attorney at any time during questioning but never did so, and that counsel had instructed defendant not to answer any questions after the polygraph examination but defendant disregarded counsel's instructions and knowingly and voluntarily waived his rights and proceeded to respond to further questioning. [*People v Thompson*, unpublished per curiam opinion of the Court of Appeals, issued May 6, 2021 (Docket No. 344834), p 7.]

As set forth by Judge RONAYNE KRAUSE in her dissent in this case, a *Miranda* waiver alone does not end the analysis as to whether defendant's waiver is valid. While the prosecution argues that there can be no polygraph without a *Miranda* waiver and that

suspects can invoke their right to counsel or stop being questioned whenever they would like, Judge RONAYNE KRAUSE correctly noted that while those are factors to be considered, they must be weighed against the totality of the circumstances.

Looking to the circumstances as a whole, defendant was supposed to meet counsel before his polygraph examination, the examination was moved by several hours to an earlier time, defendant was only 18 years old and had no experience with the criminal justice system, defendant allegedly did not have a lot of sleep and did not know his attorney's phone number, any call defendant made to his attorney would not have been confidential and would have been made on Agent Dwyre's phone, defendant was under the impression that there was an agreement that would protect some of his rights, and defendant claims that he was misled into believing that defense counsel had approved of the change to his examination conditions and time. Furthermore, there is added confusion due to Agent Dwyre's telling defendant that he would be his advocate, that trial counsel knew what he was doing, and that the examination was not being recorded.

The Court of Appeals made distinctions between this case and *People v Strieter*. In *Streiter*, there was a misunderstanding between the defense attorney and the prosecutor regarding the admissibility of the defendant's statements during a polygraph examination. *Streiter*, 119 Mich App at 334-336. The Court of Appeals held that the defendant's waiver of her right to counsel was not voluntarily, intelligently, and knowingly made where "[a]t the time the interrogation occurred defendant believed that her attorney approved of the procedure and that she would be allowed to take a polygraph examination." *Id*. at 338. When comparing the two cases, the Court of Appeals majority here stated:

> [T]he defense attorney in *Strieter* had not advised his client against speaking to the officer, except for answering questions during the polygraph examination. The attorney in *Strieter* effectively disapproved of a polygraph examination under conditions to which the prosecutor did not agree. In contrast, defense counsel in this case instructed defendant not to consent to an interview after the examination. Defendant disregarded these instructions against counsel's advice, even after Agent Dwyre specifically informed him that he could call his attorney and Agent Dwyre offered defendant the use [of] his cell phone to do so. *Strieter* does not stand for the proposition that a prosecutor's deviation from a polygraph agreement negates a defendant's subsequent knowing and voluntary waiver of his rights. [*Thompson*, unpub op at 6.]

I find this approach too narrow given the totality of circumstances in this case. While it is true that trial counsel had warned defendant against speaking after the examination, trial counsel was not at the actual examination, as agreed upon, to reiterate that warning or to be easily accessible should defendant have questions. Furthermore, the Court of Appeals states that defendant could have called his attorney, relying on Agent Dwyre's offer to use his cell phone, which of course would not have been confidential and disregarded the fact that defendant did not know his attorney's phone number. All of these factors support defendant's argument that the waiver of his *Miranda* rights during the postpolygraph interview was not in fact voluntary and that the resulting confession should have therefore been suppressed.

For the foregoing reasons, I respectfully dissent.

CAVANAGH, J., did not participate due to a staff conflict.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 15, 2023

Clerk

*If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.*

# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LIONEL THOMPSON, JR,

Defendant-Appellant.

UNPUBLISHED
May 6, 2021

No. 344834
Genesee Circuit Court
LC No. 16-039869-FC

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, and concurrent prison terms of 225 months to 40 years each for the armed robbery and conspiracy convictions, and 24 to 60 months for CCW conviction, which were to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

## I. FACTS AND PROCEEDINGS

Defendant's convictions arise from the April 21, 2015 robbery and homicide of David Fuller on West Genesee Street in Flint. A codefendant, Ah'Quan Lay, and the victim both worked as delivery drivers for Cottage Inn Pizza on Miller Road in Flint. The victim sold his vehicle to Lay, but Lay had not fully paid the purchase price before the victim's death. Lay's employer terminated him because of unreliability. Defendant, who resided in Ohio, came with his mother to visit family and friends in Flint in April 2015, during which defendant became acquainted with Lay.

At trial, the prosecution presented the theory that Lay conceived a plan to rob the victim, recruited defendant to participate in the offense, and then, during the offense, defendant shot the victim using a gun supplied by Lay. The prosecution presented evidence that Lay called Cottage Inn using a cell phone application that concealed the caller's number. He ordered delivery of

pizzas to 1813 West Genesee, an abandoned and vacant house, and requested delivery by the "white boy" who closed the store, which was a description that fit only the victim. When the victim arrived at the abandoned house, defendant approached his car with a gun, shot the victim multiple times, and then ran away. After the offense, Lay told Preston Walker, another former Cottage Inn employee, that he planned the robbery and that defendant shot the victim. Walker disclosed this information to his parents, who reported the information to the police.

After defendant learned that he had been charged in relation to the robbery and homicide, his family retained an attorney to represent him, and defendant turned himself in to the police. Defense counsel and the assistant prosecutor orally agreed that defendant would submit to a polygraph examination and, if he "passed," the prosecutor would dismiss the charges. Defense counsel planned to be present during the administration of the polygraph examination. The examination was scheduled to be held at the courthouse at 7:00 p.m. on July 15, 2015, after the courthouse was closed to the public. Another assistant prosecutor agreed to admit defense counsel into the courthouse. Defense counsel stated that he and the prosecutor also agreed that defendant would not be questioned after the examination, and he similarly advised defendant not to answer any other questions after the examination.

Agent David Dwyre administered the polygraph examination earlier in the day than scheduled, without notifying defense counsel. Before and after the examination, Agent Dwyre advised defendant that he had the right to stop the questioning at any time and the right to contact his attorney. Agent Dwyre offered his phone to defendant to call his attorney if he wanted. Agent Dwyre interviewed defendant after the polygraph examination concluded. Defendant initially stated that he shot the victim by accident when the victim tried to grab the gun. He then recanted this admission and stated that he merely rode in Lay's car without knowing that Lay had planned to rob the victim. In a third statement, defendant reiterated his admission that he took part in the robbery, but accidentally shot the victim.

Defendant moved to suppress his statements on the ground that Agent Dwyre violated the polygraph agreement, which negated defendant's waiver of rights. The trial court denied the motion. Defendant and Lay were tried jointly, before separate juries.[1] Over defendant's objection, the trial court admitted Walker's testimony regarding Lay's statements about defendant's involvement in the homicide. The trial court denied defendant's motion to permit testimony from a proposed alibi witness, Terrance Boone, because defendant failed to give timely notice of the alibi testimony. The jury convicted defendant of felony murder, armed robbery, conspiracy to commit armed robbery, CCW, and felony-firearm.

[1] Codefendant Lay was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, CCW, felon in possession of a firearm, felon in possession of ammunition, and felony-firearm. This Court affirmed his convictions in *People v Lay*, unpublished per curiam opinion of the Michigan Court of Appeals, issued November 26, 2019 (Docket No. 345202), lv den ___ Mich ___ (2020) (Docket No. 160841).

Defendant moved for a new trial and requested a *Ginther*[2] hearing. He argued that defense counsel provided ineffective assistance by failing to procure a written polygraph agreement and failing to testify regarding the terms of the polygraph agreement at the evidentiary hearing on the motion to suppress. After conducting a *Ginther* hearing, the trial court denied defendant's motion for a new trial.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the prosecutor and Agent Dwyre violated an oral agreement that Agent Dwyre would not question defendant after the polygraph examination. Defendant argues that defense counsel was ineffective for failing to establish the terms of the polygraph agreement, which in turn caused the trial court to deny defendant's motion to suppress his incriminating statements made in the post-polygraph interview.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. To establish ineffective assistance of counsel, a defendant first must demonstrate that trial counsel's performance fell below an objective standard of reasonableness. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Id.* "[T]he defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *Id*. at 290.

The crux of defendant's ineffective-assistance claim is that trial counsel's failure to establish or present competent evidence of the terms of the polygraph agreement, through either a written document or sworn testimony, prejudiced defendant by leaving him unable to prove that the prosecutor violated the agreement, and thereby caused the trial court to deny his motion to suppress his incriminating statements made in the post-polygraph interview. We disagree because, considering the ground for the trial court's decision on the suppression motion, there is no reasonable probability that the evidence that defendant claims should have been compiled or presented would have led to a different outcome of the motion. Accordingly, defendant has not established that he was prejudiced by counsel's alleged deficiencies.

The Sixth Amendment right to counsel attaches at the initiation of adversary judicial criminal proceedings. *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). "Once a suspect invokes his right to remain silent or requests counsel, police questioning must cease unless the suspect affirmatively reinitiates contact." *People v Tanner*, 496 Mich 199, 208; 853 NW2d 653 (2014), citing *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In *Tanner*, our Supreme Court noted the "additional safeguards" created by the United States Supreme Court in *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Under those safeguards, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-

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

initiated custodial interrogation even if he has been advised of his rights." *Tanner*, 496 Mich at 208, quoting *Edwards*, 451 US at 484. As observed in *Tanner*, when an accused has "expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Tanner*, 496 Mich at 208-209, quoting *Edwards*, 451 US at 484. The Court in *Tanner* further stated:

> However, when a suspect has been afforded *Miranda* warnings and affirmatively waives his *Miranda* rights, subsequent incriminating statements may be used against him. *Miranda*, 384 US at 444, 479. A suspect's waiver of his *Miranda* rights must be made "voluntarily, knowingly, and intelligently." *Id*. at 444. The United States Supreme Court has articulated a two-part inquiry to determine whether a waiver is valid:
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> > First, 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. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*Tanner*, 496 Mich at 209, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).]

Whether a defendant waived his Sixth Amendment right to counsel by initiating communications with the police depends upon the circumstances of the case, including the defendant's background, experience, and conduct. *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996). The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000).

When deciding both defendant's motion to suppress and motion for a new trial, the trial court found that defendant's post-polygraph examination statements were admissible because defendant knowingly and voluntarily waived his rights, in disregard of his trial counsel's advice. In its opinion and order denying defendant's motion for a new trial, the trial court found that, regardless of the terms of the polygraph agreement, suppression of defendant's statements was not warranted because the evidence showed that Agent Dwyre reviewed defendant's rights with him in "painstaking detail," defendant acknowledged his understanding of his right to an attorney at any time, defendant signed two written waivers, and defendant knowingly and intentionally waived his right to an attorney and proceeded with the questioning. The trial court explained that it was immaterial whether counsel was present outside the room when the exam took place because defendant understood that counsel would not be present in the room during questioning and defendant never asked for counsel. The trial court also noted that defense counsel had advised defendant not to make any statements other than answering the polygraph questions, but defendant chose not to follow that advice after waiving his right to counsel.

In reviewing a trial court's decision on a motion to suppress, we review the trial court's factual findings for clear error. *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). Defendant does not argue that the trial court's findings were erroneous. Indeed, he does not substantively challenge the trial court's suppression ruling. Although he cites principles of law concerning law enforcement's violation of a defendant's Sixth Amendment rights by resuming interrogation after the defendant has asserted his right to counsel, he does not state that he did not initiate the post-polygraph interrogation or that Agent Dwyre continued to question him in violation of his right to counsel. His argument is instead premised on defense counsel's alleged deficiencies that prejudiced his ability to establish a violation of the polygraph agreement. The pertinent question is whether any deviation from the polygraph agreement negated defendant's later waiver of rights.

In *People v Strieter*, 119 Mich App 332; 326 NW2d 502 (1982), the prosecutor and defense attorney agreed that a polygraph examination would be held at a scheduled time. The agreement also stated that the defense attorney would not be permitted to attend, but the defendant could stop the questioning at any time. *Id.* at 334. The defendant and her attorney signed the waiver form, but the attorney wrote this addendum on the form:

> NOTE: I expect our agreement above to be for the purposes of a polygraph only, and that the questions and answers are not to be used against her in a court of law, or in any other way used against her. [*Id*. at 335.]

The prosecutor responded by sending defense counsel a signed waiver form, an unsigned waiver form, and a letter that stated, in pertinent part:

> I am enclosing another copy of a request for polygraph examination which you and Mrs. Strieter can sign if you so desire. I do not wish to mislead you in any way concerning the questions and answers of the polygraph examination. Incriminating statements made by Mrs. Strieter will be used against her in a court of law. It was my understanding that it was your position that Mrs. Strieter is innocent of these charges and would have nothing to fear from the polygraph examination. If this is not the case, please inform me immediately as we will have to cancel this examination. Otherwise, I would expect that the request be signed and delivered to our office or to the Michigan State Police Post prior to February 12, 1981, so that the examination may be run. [*Id*.]

The defendant and her attorney did not sign or return the second waiver form. *Id*. at 336. The following events ensued:

> On February 12, 1981, defendant was taken to the state police post for the polygraph examination. While defense counsel had failed to inform defendant of the rejected waiver transaction, State Police Detective Lowthian, who was scheduled to conduct the examination, was aware of the waiver transaction between defense counsel and the prosecutor. Prior to commencing the "pre-test interview," Lowthian informed defendant of her *Miranda* rights and had her execute a waiver

> which explained her *Miranda* rights and special warnings pertaining to polygraph examinations. Officer Lowthian testified that during the pre-test interview, which lasted for 1¼ hours, defendant made certain incriminating admissions. After the pre-test interview, defendant was informed that she would not be given the polygraph test because she had admitted her guilt during the pre-test interview. Defendant was never given a polygraph examination. Upon obtaining access to a telephone, defendant contacted her attorney and informed him of what transpired. [*Id*. at 336.]

The trial court granted the defendant's motion to suppress her statements on the ground that defense counsel's addendum "negated any agreement concerning the polygraph test." *Id*. at 337. This Court affirmed that decision, stating:

> In this case, we are not left with a definite and firm conviction that the trial judge erred when he suppressed Lowthian's testimony concerning defendant's statements. At the time the interrogation occurred defendant believed that her attorney approved of the procedure and that she would be allowed to take a polygraph examination. The police, on the other hand, were aware of the conflict between the prosecutor and defense counsel. They knew that defendant's attorney objected to the use of any interrogations connected with the polygraph exam and to the use at defendant's trial of any statements made by her. They failed to inform defendant of this conflict, allowing her to think that her attorney still approved of the procedure. Furthermore, they failed to inform defense counsel that the polygraph examination would be conducted as scheduled. While defense counsel should have informed his client not to talk to the police, under the facts of this case we are unable to say that defendant's waiver of her right to counsel was voluntarily, intelligently and knowingly made. [*Id*. at 338.]

This case is distinguishable from *Strieter* in several aspects. Unlike this case, the defense attorney in *Strieter* had not advised his client against speaking to the officer, except for answering questions during the polygraph examination. The attorney in *Strieter* effectively disapproved of a polygraph examination under conditions to which the prosecutor did not agree. In contrast, defense counsel in this case instructed defendant not to consent to an interview after the examination. Defendant disregarded these instructions against counsel's advice, even after Agent Dwyre specifically informed him that he could call his attorney and Agent Dwyre offered defendant the use his cell phone to do so. *Strieter* does not stand for the proposition that a prosecutor's deviation from a polygraph agreement negates a defendant's subsequent knowing and voluntary waiver of his rights.

In *People v Leonard*, 421 Mich 207, 213; 364 NW2d 625 (1984), the defendant and the prosecutor signed a stipulated agreement excluding from evidence the defendant's submission to a polygraph examination, the results of the examination, and anyone's interpretation of the examination. After the defendant was detached from the polygraph machine, he made inculpatory statements in response to the officer's questions. *Id*. at 214-215. Our Supreme Court agreed with this Court's conclusion that the defendant's statements after the polygraph examination should not have been admitted, but premised its agreement "on the ground that the defendant did not knowingly waive his right to remain silent in view of the stipulation" between the parties that "the

results of the polygraph examination and opinions drawn therefrom would not be admissible in evidence." *Id*. at 209-210. Of the seven concurring justices, Chief Justice WILLIAMS wrote a separate concurrence in which he stated that he held that the prosecution failed to meet its constitutional burden "of proving that the defendant knowingly, intelligently and intentionally relinquished his right to counsel for his defense." *Id*. at 212. Chief Justice WILLIAMS explained that the state must prove that the defendant intentionally and intelligently waived his right to assistance of counsel by showing that "he knows what he is doing and his choice is made with eyes open" after being "apprised of the nature of the protection which an attorney can provide at this stage of the proceeding." *Id*. at 224 Chief Justice WILLIAMS considered the particular facts of the case and concluded:

> Plaintiff, however, introduced no evidence that defendant made an intentional and intelligent relinquishment of his right to counsel for his defense beyond the "yeah" to the question of whether he understood his *Miranda* rights and the "yeap" to the question of whether he relinquished those rights. Plaintiff made no showing whatsoever as to whether defendant believed his rights under the stipulation and court order meant that whatever he said would be suppressed from introduction into evidence, as defendant claimed, or that defendant believed that only what he said while attached to the polygraph machine would be excluded from evidence, as plaintiff claimed. [*Id*. at 225.]

Chief Justice WILLIAMS remarked that the prosecutor failed to demonstrate that the defendant understood that the stipulation no longer applied after the polygraph examination ended. It was therefore not possible "to know whether defendant *intelligently* relinquished his right to counsel for his defense." *Id*. The facts and circumstances of *Leonard* are plainly distinguishable from the instant case because Agent Dwyre explicitly reviewed defendant's rights in detail with him multiple times, first through discussion about each of defendant's rights, next by having him read his rights and answers to questions about understanding his rights, then Agent Dwyre read defendant the *Miranda* warning, whereupon defendant knowingly and voluntarily waived his rights and signed his waiver. Agent Dwyre also had defendant review and sign a permission form which again advised defendant of his rights. Agent Dwyre also advised defendant that he could stop at any time.

In sum, regardless of the terms of the polygraph agreement, the record reflects that defendant was fully aware that counsel would not be present during questioning, defendant was advised of his rights and understood that he could request counsel or contact his attorney at any time during questioning but never did so, and that counsel had instructed defendant not to answer any questions after the polygraph examination but defendant disregarded counsel's instructions and knowingly and voluntarily waived his rights and proceeded to respond to further questioning. Under these circumstances, defendant has not established that defense counsel's failure to obtain a written agreement or provide sworn testimony of the agreement's alleged terms affected the

outcome of the proceedings. Accordingly, defendant has failed to establish that his trial counsel provided him ineffective assistance.[3]

## III. ALIBI TESTIMONY

Defendant argues that the trial court erred by excluding Terrance Boone's proposed alibi testimony for failure to timely provide notice of the proposed testimony. Alternatively, he argues that defense counsel provided ineffective assistance by failing to provide timely notice of the testimony. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013) (quotation marks and citation omitted). "We review de novo the trial court's rulings on preliminary questions of law regarding the admissibility of evidence, such as the application of a statute or rule of evidence." *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012) (citation omitted).

MCL 768.20 requires a defendant to provide prior notice of intent to offer alibi testimony. The statute provides in pertinent part:

> (1) If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, *or at such other time as the court directs*, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.
>
> * * *

[3] In the dissent, matters about defendant not having his defense counsel's cell phone number and sleep deprivation are discussed. We note we have both read the transcript of and listened to the recorded interview between defendant and the polygraph examiner as well as reviewed the rest of the record from the trial court. We are unable to locate any evidence of record which indicates defendant did not have his attorney's phone number. Likewise, except for a comment by defendant, memorialized at page 27 of the transcript of the interview where defendant stated his sleep was "Not so good" we are unable to identify any other evidence of record related to sleep deprivation and we observe that after listening to and reading the transcript of the interview, it appears defendant is responsive and engaged during the entire process.

> (3) Both the defendant and the prosecuting attorney shall be under a continuing duty to disclose promptly the names of additional witnesses which come to the attention of either party subsequent to filing their respective notices as provided in this section. *Upon motion with notice to the other party and upon a showing by the moving party that the name of an additional witness was not available when the notice required by subsections (1) or (2) was filed and could not have been available by the exercise of due diligence, the additional witness may be called by the moving party to testify as a witness for the purpose of establishing or rebutting an alibi defense.* [Emphasis added.]

MCL 768.21(1) provides:

> If the defendant fails to file and serve the written notice prescribed in section 20 or 20a, *the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi* or the insanity of the defendant. If the notice given by the defendant does not state, as particularly as is known to the defendant or the defendant's attorney, the name of a witness to be called in behalf of the defendant to establish a defense specified in section 20 or 20a, the court shall exclude the testimony of a witness which is offered by the defendant for the purpose of establishing that defense. [Emphasis added.]

In *People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993), our Supreme Court held that the language "or at such other time as the court may direct" in MCL 768.20 "preserves the trial court's discretion to fix the timeliness of notice in view of the circumstances." The Court observed that MCL 768.21(1) states that "the court *shall* exclude evidence . . . ," which suggested that "the sanction of exclusion" was mandatory, and acknowledged that caselaw had both treated the exclusion as mandatory and held that a trial court has discretion to admit such evidence when timely notice has not been provided. *Travis*, 443 Mich at 678-679. The Court "agree[d] with those panels that have concluded that the language 'or at such other time as the court may direct' preserves the trial court's discretion to fix the timeliness of notice in view of the circumstances." *Id*. at 679.

Plaintiff argues that the statutory scheme allows the trial court discretion only in the circumstances described in MCL 768.20(3), namely, when the alibi witness was not known to the party. However, *Travis* does not support such interpretation. In *Travis*, our Supreme Court indicated that the trial court's discretion is derived from MCL 768.20(1), not the limited circumstances prescribed in MCL 768.20(3).

In this case, after observing that it was undisputed that timely notice of Boone's proposed alibi testimony had not been provided, the trial court concluded that the testimony was "prohibited" and "[f]orbidden." We agree with defendant that the trial court's statement suggests that it erroneously believed that it had no discretion to allow the testimony because the term "shall" foreclosed any discretion. The trial court did not indicate whether it would have been inclined to allow the testimony despite the lack of timely notice. Nonetheless, "a preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) (quotation marks omitted). In view

of defendant's own inculpatory admissions to Agent Dwyre, we cannot conclude that it is more probable than not that the claimed error was outcome-determinative. Significantly, although defendant gave different versions of the events in his statements to Agent Dwyre regarding his participation in the robbery and homicide, his statements were consistent in admitting that he was present with Lay at the time of the robbery. Accordingly, defendant has failed to establish that more probable than not the exclusion of Boone's proposed testimony affected the outcome. Therefore, any error was harmless.

Defendant also argues that defense counsel's failure to provide timely notice of the alibi testimony constituted ineffective assistance of counsel. Defendant did not raise this issue in his motion for a new trial, and thus the issue was not addressed at the *Ginther* hearing. This Court also denied defendant's motion to remand respecting this issue.[4] In the absence of a *Ginther* hearing, this Court's review "is limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). It is not apparent from the record when defendant advised defense counsel that Boone was a potential alibi witness, and defendant has not submitted an affidavit or other offer of proof in support of this claim. Further, there is no record evidence of how Boone would have testified if defendant had been permitted to call him as a witness. Accordingly, defendant has not established factual support for his claim that defense counsel performed deficiently by failing to timely file a notice of alibi respecting Boone, nor has he demonstrated that he was prejudiced by Boone's failure to testify.

## IV. STATEMENT AGAINST PENAL INTEREST HEARSAY EXCEPTION

Defendant argues that the trial court erred by permitting Preston Walker to testify regarding Lay's statements regarding Lay's and defendant's involvement in the robbery and homicide. Defendant argues that Lay's statements were inadmissible hearsay and violated his constitutional right of confrontation. We disagree.

The trial court found that Lay's statements were admissible under MRE 804(b)(3) and did not violate the Confrontation Clause. We review the trial court's decision to allow the testimony for an abuse of discretion, but review any preliminary questions of law de novo. *Jackson*, 498 Mich at 257; *King*, 297 Mich App at 472.

Initially, the admission of Lay's statements to Walker did not violate defendant's constitutional right of confrontation because Lay's statements were not testimonial. "The Confrontation Clause of the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' " *People v Fontenot*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 350391); slip op at 2, lv pending, quoting US Const, Am VI. In *Crawford v Washington*, 541 US 36, 50-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), "the United States Supreme Court held that, under the Confrontation Clause, out-of-court testimonial statements are inadmissible against a criminal defendant unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant." *Fontenot*, ___ Mich App at ___; slip op at 2. An

[4] *People v Thompson*, unpublished order of the Michigan Court of Appeals, entered April 1, 2020 (Docket No. 344834).

accomplice's statement admitted under MRE 804(b)(3) does not violate the Confrontation Clause if it is a nontestimonial statement. *People v Taylor*, 482 Mich 368, 374-375; 759 NW2d 361 (2008). In *Taylor*, our Supreme Court held that a codefendant's out-of-court inculpatory statements to an acquaintance that implicated his codefendant were nontestimonial and, therefore, did not implicate the Confrontation Clause and were solely governed by and admissible under MRE 804(b)(3). *Id*. at 378. The Court reiterated the applicable standard for admissibility under MRE 804(b)(3) as follows:

> [W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Id*. at 379 (citation omitted).]

"Pretrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if they were made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " *Fontenot*, ___ Mich App at ___; slip op at 3, quoting *Crawford*, 541 US at 51-52. In *People v Nunley*, 491 Mich 686, 706; 821 NW2d 642 (2012), our Supreme Court noted that "the core class of testimonial statements" are "extrajudicial statements" such as "affidavits, depositions, prior testimony and confessions . . . ."

In this case, Lay described to an acquaintance in an informal and casual conversation his and defendant's involvement in the incident. His statements to Walker were not the product of police questioning or even made in an investigative context. Therefore, they did not qualify as "testimonial" in nature. Accordingly, the admission of Lay's statements did not violate the Confrontation Clause and were governed by MRE 804(b)(3). *Taylor*, 482 Mich at 378-379.

"Under MRE 801(c), 'hearsay' is defined as 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' " *People v Solloway*, 316 Mich App 174, 198-199; 891 NW2d 255 (2016). "Hearsay evidence is inadmissible unless it falls within one of the exceptions listed in the Michigan Rules of Evidence." *Id*. at 199, citing MRE 802. MRE 804(b)(3) provides an exception to the general rule against hearsay when the declarant is unavailable as a witness and allows for the admission of the following:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In this case, Lay was unavailable because he was a jointly-tried codefendant who exercised his Fifth Amendment right not to testify.

Defendant argues that Lay's statement to Walker did not meet the requirements of MRE 804(b)(3) because the statements were not contrary to his penal interests, but instead made to deflect blame from Lay to defendant. We disagree.

Walker testified that Lay told him that he planned the robbery in advance, recruited different people to participate in the planned robbery, called in the delivery to the abandoned house, and then waited on West Genesee for the victim to arrive. Lay also admitted giving defendant the gun that was used to shoot the victim. These admissions clearly had a tendency to subject Lay to criminal liability under an aiding or abetting theory. See *People v Bulls*, 262 Mich App 618, 624-625; 687 NW2d 159 (2004). Even though Lay identified defendant as the shooter, he directly inculpated himself in the planning and execution of the armed robbery. Further, Lay's admissions that he advised defendant to destroy evidence and his implicit warning that Walker should not snitch reflected his conscious belief that he understood that his admissions exposed him to criminal liability. Lay's statements were against his penal interests and admissible under MRE 804(b)(3). Moreover, because Lay inculpated defendant, his accomplice, and himself in the context of a narrative of events to Walker at Lay's initiative without any prompting or inquiry, Lay's whole statement, including the portions that inculpated defendant were admissible as substantive evidence at trial under MRE 804(b)(3). *Taylor*, 482 Mich at 378-379. The trial court, therefore, did not err by admitting Walker's testimony regarding Lay's statements.

Affirmed.

/s/ Michael J. Kelly
/s/ James Robert Redford

*If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.*

# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LIONEL THOMPSON, JR,

Defendant-Appellant.

UNPUBLISHED
May 6, 2021

No. 344834
Genesee Circuit Court
LC No. 16-039869-FC

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent, because although I do not disagree with the majority's thorough recitation of the facts, I conclude that defendant's waiver of his right to counsel prior to his polygraph examination was not voluntary, knowing, and intelligent under the circumstances. I would remand for a new trial; or, at a minimum, for the trial court to make an express factual finding as to the parameters of the agreement between the defense and the prosecution regarding defendant volunteering to take the polygraph examination.

## I. BASIS FOR REVIEW

Despite the considerable attention given to the issue at oral argument and in the briefs, the majority accurately observes that defendant technically does not directly seek reversal of the trial court's order denying his request to suppress his post-polygraph statements. However, such a request is implicit in his argument and analysis, which is premised upon the effect it would have had on the proceedings if the trial court granted his suppression request. Strictly speaking, this Court need not address an issue not set forth in an appellant's statement of issues presented. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). However, "addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle," and "the parties' failure or refusal to offer correct solutions to" an issue does not limit an appellate court's "ability to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002). "The court is obligated only to review issues that are properly raised and preserved; the court is *empowered*, however, to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and

resolved." *Paschke v Retool Industries (On Reh)*, 198 Mich App 702, 705; 499 NW2d 453 (1993) (emphasis in original), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994). Under the circumstances, it is impossible to resolve defendant's challenge to the effective assistance of counsel without resolving whether there *was* an agreement, whether that agreement was violated, and whether suppression would have been proper on the basis of that violation.

## II. WAIVER IF THERE WAS AN AGREEMENT

It has long been established that prosecutors are bound by agreements they make with the defense, even if those agreements are unwise or disproportionately beneficial to the defense. *People v Reagan*, 395 Mich 306, 313-319; 235 NW2d 581 (1975). I find it inappropriate to treat any violation of such an agreement as irrelevant or trivial, irrespective of defendant's reaction to the violation. Nevertheless, contrary to the position taken by defendant at oral argument, "the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent . . . whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Montejo v Louisiana*, 556 US 778, 786; 129 S Ct 2079; 173 L Ed 2d 955 (2009). There is no absolute bar to defendant choosing to waive his right to counsel after having invoked that right, so long as the police do not engage in any custodial "badgering." *Id*. at 794-797. For such a waiver to be voluntary, knowing, and intelligent:

> First, 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. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*People v Tanner*, 496 Mich 199, 209; 853 NW2d 653 (2014), quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).]

As the majority notes, Dwyre reviewed defendant's rights with him before commencing the polygraph examination, and defendant executed a waiver. Dwyre did not re-warn defendant of his rights between the end of the examination and the commencement of post-polygraph questioning.

I disagree with the majority that defendant's purported waiver prior to the examination ends the analysis. This Court has held that a waiver executed before a polygraph examination is not effective as to post-polygraph questioning unless the defendant was advised that there would be post-polygraph questioning and the defendant in some way extended the waiver to that post-polygraph questioning. *People v Leonard* (*Leonard I*), 125 Mich App 756, 759-760; 337 NW2d 291 (1983). Our Supreme Court affirmed on alternative grounds, albeit without any apparent criticism of this Court's analysis,[1] because the prosecution and the defense had stipulated to

[1] The majority finds CHIEF JUSTICE WILLIAMS's separate concurrence instructive, which is entirely proper, *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 411 n 5; 952 NW2d 586 (2020), but I respectfully do not share the majority's assessment of its relevance to this particular matter.

exclude from evidence the polygraph results and the polygraph operator's opinion, and defendant's waiver was unknowing in light of that stipulation. *People v Leonard* (*Leonard II*), 421 Mich 207, 210; 364 NW2d 625 (1984). Our Supreme Court subsequently clarified that no rule mandates that defendants be re-warned of their constitutional rights between the end of a polygraph examination and the commencement of post-polygraph questioning; but, critically, whether a pre-polygraph waiver is valid as to post-polygraph questioning must be evaluated under the totality of the circumstances. *People v Ray*, 431 Mich 260, 276-277; 430 NW2d 626 (1988). Therefore, the context of any purported waiver, including a defendant's understanding of the nature of the examination, is important.

There can be no dispute that some kind of agreement existed for defendant to take a polygraph examination. However, the trial court made only one narrow factual finding as to the terms of that agreement: that there was no agreement for defendant's trial counsel to be present in the room while the polygraph examination took place. Because that finding comports with defendant's trial counsel's later testimony, this finding is obviously not clearly erroneous, so it is binding upon us. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Otherwise, the trial court essentially held that the existence of any such agreement was irrelevant because defendant validly waived his right to counsel. I disagree. If there was, in fact, an agreement for counsel to be present during the examination (albeit not in the same room) and for there to be no post-polygraph questioning, I cannot agree that defendant's purported waiver was valid.

I conclude that the trial court clearly erred in failing to find that there was an agreement for defendant's trial counsel to be present during the polygraph examination, albeit not in the same room as the examination. The prosecutor stipulated that the polygraph examination had originally been scheduled for 7:00 p.m., and another assistant prosecuting attorney testified at the suppression hearing that he had been instructed to allow defendant's attorney into the building at that time. The trial court recognized that 7:00 p.m. was after the building would have closed, so counsel could not have obtained entry without someone letting him in, and there would have been no other reason to let counsel in at that time. I find nothing in the record that clearly conflicts with the necessary conclusion that there must have been an agreement in place for trial counsel to be present outside the examination room but during the examination.

Furthermore, defendant testified that he knew he had been scheduled for a polygraph at 7:00 p.m., "but they changed the time and so I really didn't know [what] I was going to court for until [Dwyre] came to see me." Defendant also explained to Dwyre that his sleep was "not so good," and he was averaging only about five hours of sleep a night. In addition to being sleep deprived, defendant started the examination confused and alone, contrary to his reasonable expectations. Our Supreme Court also indicated that a defendant in a weakened mental state, which sleep deprivation would certainly cause, might reflect negatively upon the true voluntariness of a defendant's waiver. *Ray*, 431 Mich at 270-271. The trial court opined that defendant believed his attorney was present outside the room and made no effort to contact his attorney, so for all practical purposes, his attorney may as well have been there. However, after reviewing the polygraph examination and interview, I cannot find any hint that defendant did, in fact, believe his attorney was present outside the room.

Agent Dwyre told defendant before the polygraph examination that he could have his attorney any time he wanted, even offering to allow defendant to use Dwyre's own phone.

Notably, however, defendant explained at the suppression hearing that he did not know his attorney's phone number. Dwyre also commented before the polygraph examination that defendant's attorney had "sent" defendant there, that defendant's attorney completely trusted Dwyre, that he never permitted attorneys into the room, and that "sometimes the attorneys forget about the scheduling and all that." Nothing in this commentary suggests that defendant's attorney was outside; rather, it suggests that defendant was on his own. The fact that defendant would need a phone to contact his attorney necessarily implies that his attorney was *not* just outside the door; and the fact that defendant did not know his attorney's phone number renders the offer of contacting his attorney at any time practically illusory. Although, as the majority notes, it does not appear that defendant told Dwyre he did not know his attorney's phone number, even if defendant had the practical, rather than purely theoretical, ability to call his attorney, doing so would have been significantly more effort than simply walking outside, and thus implicitly discouraged. Furthermore, using Dwyre's phone would have lacked even the slightest pretense of confidentiality.

Importantly, had defendant's attorney arrived with defendant—which would have occurred if Dwyre had not unilaterally changed the time of the exam without notice to anyone—defendant would have actually known his attorney was present. Not only would this be of immense psychological benefit, but his attorney could have reminded defendant not to answer post-polygraph questions and confirmed with Dwyre the terms of the agreement. The presence of counsel is an important consideration when evaluating voluntariness, and, in direct contrast to the situation here, our Supreme Court has indicated a defendant will not be considered "isolated from counsel" where the defendant and counsel arrived together, counsel was present in the building throughout the examination, and the defendant made no allegation that he was questioned "beyond what was expected or agreed upon." *Ray*, 431 Mich at 277. Irrespective of whether there was an agreement regarding post-polygraph questioning, Dwyre's unilateral and unannounced rescheduling was a breach of the agreement with practical consequences to defendant's psychological state and ability to realistically invoke or waive his right to counsel.

To make matters worse, the context in which Dwyre explained defendant's rights and obtained a waiver was unambiguously indicated that the waiver was for the purpose of receiving a polygraph examination, not a custodial police interview. Even if there had been no agreement regarding post-polygraph questioning, Dwyre never conveyed to defendant that he might be waiving his rights for any purpose other than the polygraph examination. In *Ray*, our Supreme Court regarded as important whether a defendant clearly understood the distinction between the polygraph examination itself and questioning after the polygraph examination. *Ray*, 431 Mich at 267-268. Notably, the manner in which Dwyre continued questioning defendant after seemingly concluding the polygraph examination undermined and blurred any clear indication where the exam ended and the interview began. Even if defendant was technically an adult, by all of four months, he was young and inexperienced in addition to being alone and sleep-deprived. It is, as a consequence, difficult to imagine how defendant's purported waiver could possibly have been voluntary, knowing, and intelligent as to the post-polygraph interview, even if there had not been an agreement that no such interview would occur. If there had been an agreement regarding post-polygraph questioning, then defendant's initial waiver would have been even more unknowing.

I further note that Dwyre made various promises that were simply not his to make. He promised defendant that the prosecutor would drop the charges if Dwyre told the prosecutor that

defendant did not commit the charged crimes; Dwyre had absolutely no such authority. The prosecutor testified that it was fairly probable that if defendant passed the polygraph, he would be offered some kind of favorable plea or possibly dismissal, but that even she did not have the authority to make that decision; implicitly, there were no guarantees. The police are permitted to lie to defendants during interviews about factual matters, but not about matters that "deprive[] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v Burbine*, 475 US 412, 423-424; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Standing alone, such a promise might not be sufficiently egregious to undermine defendant's ability to validly exercise or waive his rights, but I believe it must be considered in context. Likewise, Dwyre promised defendant that the examination, and the post-examination questioning by necessary implication, was not being recorded in any way. This was also a lie that would have undermined defendant's perception of the nature of his interaction with Dwyre and, consequently, "his ability to understand the nature of his rights and the consequences of abandoning them." *Id*. Again, even if this deceit would not have undermined defendant's waiver by itself, it was a contributing factor.

It was clearly erroneous for the trial court not to find that there was an agreement for trial counsel to be present for the polygraph examination, albeit not in the same room. I am unable to find the same degree of fault in the trial court's failure to make a factual finding at the suppression hearing whether there was an agreement for there to be no post-polygraph questioning, given trial counsel's tactical decision that defendant would suffer less harm by counsel continuing to represent defendant instead of calling himself as a witness to testify. Nevertheless, after the *Ginther* hearing, the trial court should have made such a factual finding, because the testimonies of the trial attorneys constituted evidence, and the trial court is situated to resolve their factual disagreement. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). I would find that at a minimum, this Court should remand for the trial court to make that determination. However, I would find that defendant's waiver of his right to counsel was not voluntary, knowing, and intelligent under the circumstances, irrespective of whether there was an agreement as to post-examination questioning. If there was such an agreement, then Dwyer's violation of the agreement would be all the more egregious.

## III. OTHER ISSUES

I agree with the majority that the trial court abused its discretion by excluding Boone's proposed alibi testimony on the apparent ground that it believed it lacked discretion to admit the testimony. See *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). I do not disagree that *if* evidence of defendant's post-polygraph statements had been properly admitted, defendant could not establish that exclusion of the alibi testimony affected the outcome of the proceedings. However, I do not agree that the post-polygraph statements were properly admitted. I am therefore unpersuaded that the exclusion of the alibi testimony was harmless. Although, as the majority notes, this Court previously denied defendant's motion to remand for a *Ginther* hearing regarding trial counsel's failure to provide timely notice of the alibi testimony, this Court may always reconsider that denial after plenary review. See *People v Smith*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 346044), slip op at p 10. Furthermore, this Court should consider materials outside the record for the purpose of whether to remand the matter for an evidentiary hearing, especially where a defendant preserved a request for such a hearing. *People v Moore*, 493 Mich 933, 933; 82 NW2d 580 (2013). I would grant defendant's request to remand for a

second *Ginther* hearing regarding counsel's failure to provide timely notice of the alibi testimony. Conversely, I concur with the majority's analysis of Walker's testimony regarding statements made by Lay.

## IV. CONCLUSION

I respectfully disagree with the majority that defendant validly waived his right to counsel as to the post-polygraph questioning. Consequently, I would grant defendant a new trial on that basis, even if defendant does not expressly ask for relief on that specific basis. At a minimum, I would remand to the trial court to make a factual determination of the parameters of the agreement between the defense and the prosecution for defendant to take the polygraph; with the caveats that there clearly was an agreement for trial counsel to be present in the building during the examination, and I am unpersuaded that a specific agreement as to post-polygraph questioning would affect anything other than the egregiousness of Dwyer's conduct. I would also remand for a *Ginther* hearing regarding trial counsel's failure to provide timely notice of the proposed alibi testimony.

/s/ Amy Ronayne Krause