

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY SPENCER,

Defendant-Appellant.

UNPUBLISHED
February 19, 2002

No. 220714
Lapeer Circuit Court
LC No. 98-006522-FC

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

A jury convicted defendant Timothy Spencer of first-degree felony murder,¹ second-degree murder,² first-degree criminal sexual conduct,³ and carjacking.⁴ The trial court sentenced Spencer to life in prison without parole for the first-degree murder conviction and vacated the remaining convictions on double jeopardy grounds. Spencer appeals as of right. We affirm.

I. Basic Facts And Procedural History

The victim in this murder case was an eighteen-year-old student at East High School in Lapeer who was killed on March 5, 1997. The prosecution's main witness was Daniel Schreiber, an inmate in the Monroe County jail who knew Spencer during a portion of his incarceration. Schreiber, an Ohio resident, had been transferred to Monroe County in conjunction with an outstanding warrant for larceny for conversion over \$100.00. The prosecutor eventually dismissed the charges against Schreiber, although allegedly not in return for Schreiber's testimony. Schreiber claimed that he provided information against Spencer because it just started eating him up because he had a daughter the victim's age. Schreiber also stated that, at first, he did not believe Spencer's story. He also maintained that the police did not provide him with any details of the killings.

¹ MCL 750.316(1)(b).

² MCL 750.317.

³ MCL 750.520b(1)(f).

⁴ MCL 750.529a.

According to Schreiber, while he and Spencer were in adjacent glass jail cells in January and February 1998, they spoke about Spencer's crime, with Spencer using Schreiber as a "legal sounding board." Spencer told Schreiber that, in addition to the carjacking he was charged with in Monroe County, he was under investigation for a homicide in Lapeer County. Spencer explained that, at the time of the murder, he was living at the Red Oaks Motel, was unemployed, and had "got back into alcohol and drugs real heavy"; a friend had died recently from a drug or alcohol related cause, causing Spencer to go on a "drinking rampage." Spencer was working at the motel to pay his rent.

Spencer reportedly said that he and another friend were drinking together late into the night on March 4, 1997 and, on the morning of the March 5, he took that friend's wallet and walked to a gasoline station with a convenience store to get some cigarettes. There, Spencer ran across a young woman he knew, whom he convinced to give him a ride. Spencer then pulled out a single action revolver that he had obtained from his deceased friend and made some "sexual overtures" toward her. She "rebuffed" him and told him that she was sick and had called home, so her mother was expecting her. Spencer then forced her to drive to a wooded hunting area and park in a place that could not be seen from the road where people routinely practiced target shooting. Spencer said that the woman tried to run, but he grabbed her and struck her in the head with the handgun. The woman fell to the ground, and Spencer began beating her. He then took her into the wooded area, raped her, and then choked her. Spencer put the victim's body in the car and drove a short distance to a river, also inside the hunting area. He put the victim's body in the river. According to Schreiber, Spencer was "excited" about telling the story to him and acted elated.

Schreiber also said that Spencer told him that he then drove to a construction area and burglarized a house there. Afterwards, he drove to a Kmart in Lake Orion. Noticing that he had blood on his jeans, he purchased another pair of jeans, changed clothes in the car, and dumped his old jeans and some of his victim's belongings in a garbage dumpster near the store. After considering what to do, he tried to approach a woman who was eating in her car in the Kmart parking lot and told her that she had left something in the Kmart but when she stated that she had not entered the Kmart, he thought it would be a good idea to leave. At some point, Spencer left the car after wiping it with bleach.

Spencer then said that he went to a nearby restaurant and struck up a conversation with a waitress, telling her that his car had broken down. The waitress stated that she would give him a ride, but a bus boy intervened and gave him a ride. When Spencer got into the car with the bus boy he pulled a gun on him, but eventually let him go. Spencer then drove to Monroe where he ran out of gasoline near a motel and was surrounded by police, who eventually arrested him after a standoff.

Spencer described the victim as very pretty in the face, but a big young woman who "fought like hell." He claimed not to be worried about DNA evidence because he put the victim in the river after he killed her. Spencer commented that the victim's car was small, which made it impossible for him to rape her in the car. Spencer also told Schreiber that he had a very important 9:00 a.m. appointment to work that morning, but did not go because he was drunk; he started the criminal episode to get money. At some point in the day, Spencer also used some of the money he had taken from his friend at the motel and the victim and used it to buy alcohol and crack cocaine.

Much of the additional testimony by the prosecution's witnesses corroborated Schreiber's testimony. In particular, Dean Rothgeb, an assistant principal at Zemmer Junior High School in Lapeer, testified that, on the day of the murder, he saw the victim with another person in a car near the gasoline station. Rothgeb saw the victim, who was driving the car, pull out of the gasoline station and turned in front of him. He followed her car to the next light, moving next to it on the passenger's side at a distance of about six feet. Rothgeb described the passenger of the vehicle as a male with "modeled" or "messed up" hair wearing a jean jacket and a lighter colored shirt. The man was "smaller," and was looking down, and was "fooling" with something in his hands. During the course of the observation, the man looked back at him and stared at him. Rothgeb was able to view the passenger for about a minute and a half, the time between light changes. Rothgeb identified Spencer as the passenger and also stated that he had previously identified him at the preliminary examination and a later hearing. Rothgeb stated that Spencer had put on weight since he first saw him in 1997, and had a cleaner haircut, but he could still identify Spencer by his eyes. Rothgeb identified the victim's car as the one he saw on the date of the murder.

Beverly Carpenter, Spencer's friend, testified that he called her from jail, claiming that he did not remember a three-hour time gap between talking to the police early in the morning and walking to purchase cigarettes and finding himself in Oxford. According to Carpenter, Spencer also told her that he hitchhiked part of the way there and that the person who gave him a ride also sold him a gun. Spencer admitted to her that he got the busboy to give him a ride and then pulled the gun on him. Later, Carpenter and Spencer spoke numerous times on the telephone and discussed the victim's disappearance; Spencer told Carpenter that he had heard that the victim was missing and that the police were trying to pin it on him. During one of the conversations that occurred before police found the victim's body, Spencer admitted to Carpenter that the victim may have given him a ride from Lapeer to Oxford, apparently both admitting and denying being in the victim's car. On her own initiative, Carpenter recorded a number of these conversations. Carpenter also visited Spencer at the jail, apparently wearing a recording device at the behest of an Oakland County Sheriff Detective. During the visit, Carpenter related a "dream" she had had, that she saw Spencer driving with the victim down a dirt road where he "[got] violent" with the victim and took off after she was dead. According to Carpenter, Spencer did not respond verbally and did not admit any involvement in the victim's death, but acted visibly nervous, "fidgeting around," and refusing to make eye contact. Spencer did not want to talk about the victim after that.

Another of Spencer's acquaintances, Lisa Vaughn, also spoke with him while he was in jail. Spencer told Vaughn that he was not involved in the victim's death. However, during one of their phone conversations, Vaughn told Spencer that, if he was in the victim's car "he'd better hope and pray he wiped all the prints off and he says yeah, I guess I better." Like Carpenter, Vaughn also visited Spencer at the jail while wearing a recorder, but he did not admit involvement in the victim's death.

II. Rothgeb's Testimony

A. Standard Of Review

Spencer argues that the trial court erred in allowing Rothgeb's identification testimony because Rothgeb had been exposed to undue suggestion. Whether an in-court identification has

an independent basis, notwithstanding a previously improper identification, is a factual question and, therefore, we review the trial court findings for clear error.⁵

B. Independent Basis

Spencer claimed that Rothgeb's identification testimony should be barred because Rothgeb identified him only after seeing his photograph in the prosecutor's office. The trial court, following a *Wade*⁶ hearing, agreed that this process was impermissibly suggestive, but that Rothgeb had a sufficiently independent basis for identifying Spencer to remove the taint of the improper identification.

An "identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."⁷ However, judicial inquiry into whether a witness's identification testimony is admissible does not cease the moment the court determines that the identification procedure was unduly suggestive.⁸ Rather, the next analytical step is "to determine whether the witness had an independent basis to identify the defendant in court."⁹ Factors relevant to an independent basis, which must be viewed in light of the totality of the circumstance,¹⁰ include: (1) the witness's previous knowledge of the defendant; (2) the witness's opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness's level of certainty at the previous identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any previous proper identification of the defendant or failure to identify the defendant; (7) any previous identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant.¹¹

Here, the record reveals that the trial court considered and weighed the appropriate factors in determining that the totality of the circumstances indicated that there was a sufficient independent basis for Rothgeb's identification of Spencer. We find no clear error in this determination. Accordingly, we conclude that Rothgeb's identification testimony was properly admitted.

⁵ *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

⁶ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

⁷ *Gray*, *supra* at 111 (footnote omitted).

⁸ *Id.* at 114.

⁹ *Id.* at 114-115.

¹⁰ *Id.* at 115.

¹¹ *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

III. Expert Witness

A. Standard Of Review

Spencer argues that the trial court erred in denying his request to appoint an expert witness on eyewitness identification to explain the influence the improper identification procedure had on Rothgeb's in-court identification. We review the court's decision whether to appoint an expert witness for an abuse of discretion.¹²

B. Necessity

MCL 775.15 requires a court to provide funds for an expert witness on behalf of an indigent defendant if the defendant can show that "he cannot safely proceed to a trial" without the witness. As this Court explained in *People v Hill*:¹³

Historically, expert testimony on this issue has been excluded unless the witness suffered from physical or mental disorders or delusions, 20 ALR3d 684. The holdings in Michigan cases, *People v Cowles*, 246 Mich 429, 224 NW 387 (1929); *People v Bastian*, 330 Mich 457; 47 NW2d 692 (1951), are consistent with this analysis. Proper expert testimony on the perception and memory processes and how pretrial identification procedures can affect it may be relevant in some cases. The emphasis the Supreme Court in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), placed on the psychological factors involved in this process, demonstrates the importance of these factors. However, the decision to admit or exclude evidence involves more than a determination of mere relevancy. See MRE 403. The decision to admit or exclude such evidence is entrusted to the trial court's discretion, *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), and this decision will not be reversed absent an abuse of discretion. Furthermore, under GCR 1963, 529.1, "No error in * * * the exclusion of evidence * * * is grounds for * * * setting aside a verdict * * * unless refusal to take such action appears to the court inconsistent with substantial justice."

Here, there was no showing that Rothgeb was suffering from any type of mental disorder or delusions. Moreover, defense counsel questioned Rothgeb at length regarding the circumstances of his identifications, including discrepancies between them and the suggestive nature of the earlier identification procedure. Defense counsel addressed Rothgeb's memory and perception extensively during closing argument, emphasizing the perils of eyewitness identification referred to *Anderson, supra* at 172-180. The trial court also instructed the jury on eyewitness identification in accordance with CJI2d 7.8, which adequately informed the jury of the proper considerations it should have in mind when reviewing eyewitness testimony.¹⁴ Thus,

¹² See *People v Thornton*, 80 Mich App 746, 752; 265 NW2d 35 (1978).

¹³ *People v Hill*, 84 Mich App 90, 95-96; 269 NW2d 492 (1978).

¹⁴ See *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996), adopted 220 Mich App 662 (1996).

we conclude that the trial court did not abuse its discretion in refusing to grant Spencer's request for funds for an expert witness.

IV. Jury Review Of Rothgeb's Testimony

Spencer argues that the trial court erred in denying the jury's request to review Rothgeb's testimony. However, the record reveals that when the trial court discussed its proposed responses to the jury's requests with the attorneys, defense counsel affirmatively agreed that the trial court's proposed responses were appropriate.¹⁵ Thus, Spencer has affirmatively waived this issue for review.¹⁶

V. Cumulative Error

Spencer argues that the cumulative effect of the trial court's failure to appoint an expert witness and to reread Rothgeb's testimony to the jury denied him a fair trial. Because we have concluded that the trial court did not err in responding to the jury's request to review Rothgeb's testimony, nor in denying Spencer's request for an expert witness on eyewitness identification, his claim of cumulative error is without merit.¹⁷

VI. Tape Recorded Conversations

A. Standard Of Review

Spencer argues that the trial court erred in refusing to admit recordings Carpenter and Vaughn made of their conversations with him at the jail, which they made at law enforcement's request. We review a trial court's decision regarding whether to admit evidence for an abuse of discretion.¹⁸

B. Relevance

Spencer asked to admit the recordings because, he claimed, they were relevant to impeaching Carpenter's and Vaughn's testimony. Generally, all relevant evidence is admissible.¹⁹ The hallmark of relevant evidence is its ability to have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

¹⁵ Spencer's appellate counsel attempts to argue that the record is not clear that defense counsel agreed to all of the court's answers to the requests. However, the trial court specifically referred to "notes" and only one further unrelated request was reported on the record on the second day of deliberations. Also, any ambiguity should be construed against Spencer because this Court will not allow a defendant to "harbor error as an appellate parachute." *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996).

¹⁶ See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

¹⁷ See *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999).

¹⁸ See *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

¹⁹ See MRE 402.

less probable than it would be without the evidence.”²⁰ However, even relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”²¹ As the trial court observed in this case, Spencer only sought to impeach Vaughn and Carpenter with the recordings *after* they testified, and Spencer could not identify anything in the audio tapes that had not already been addressed when the attorneys questioned the witnesses in open court. Under these circumstances, the trial court did not abuse its discretion in excluding the audio-tapes because this evidence was unnecessarily cumulative.

C. Completeness

To the extent that Spencer also argues that the trial court should have admitted the tape recordings to explain the full context of his allegedly inculpatory statements made over the telephone, he failed to preserve this issue for appeal.²² In any event, the doctrine of completeness represented in MRE 106 requires only that “[w]hen a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” These recordings were from Carpenter’s and Vaughn’s conversations with Spencer at the jail, not over the telephone. Spencer has not indicated how these jail recordings could have given a more complete picture of any aspect of the telephone conversations. Therefore, fairness did not require their admission and there is no evidence of any plain error affecting Spencer’s substantial rights that would require us to grant him relief for this unpreserved issue.²³

VII. Jury Instructions

A. Standard Of Review

Spencer argues that we must reverse his conviction because the trial court erroneously failed to instruct the jury that, in order to convict him of first-degree felony murder, it had to agree unanimously what the predicate felony was, i.e., carjacking or first-degree criminal sexual conduct. Because Spencer failed to request a specific unanimity instruction at trial, this issue is not preserved, again limiting our review to plain error affecting Spencer’s substantial rights.²⁴

²⁰ MRE 401.

²¹ MRE 403.

²² See *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

²³ See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

²⁴ *Id.* at 763-764.

B. Unanimity

A criminal defendant has the right to a unanimous jury verdict.²⁵ A number of this Court's opinions have expressed concern that if a case contains evidence, multiple elements of which could independently justify a criminal conviction, the trial court must clearly instruct the jury to agree on the same set of facts to return the ultimate decision on guilt or innocence.²⁶ This unanimity problem often occurs in what is sometimes called a "multiple acts" or "separate acts" case, in which the prosecutor introduces evidence of more than one criminal act but only charges that there was a single crime.²⁷ The troubling prospect in such a case is that all the jurors might agree that a crime occurred, but disagree concerning which facts constituted the crime.

This case, however, presents a slightly different scenario. Felony-murder requires evidence of an underlying felony. The prosecutor charged that the killing happened during the carjacking or the criminal sexual conduct. The jury actually and unanimously found Spencer guilty of both of these felonies. These consistent verdicts made it impossible for the typical unanimity problem to occur; there was no possibility that some jurors thought he was guilty of carjacking but innocent of criminal sexual conduct, or vice versa. Every juror thought he was guilty of felony-murder, with more than one underlying felony. Because these felonies were part of the same criminal episode, it is immaterial whether the victim died during one of these felonies rather than the other.²⁸ Additionally, we need not reverse because there is no question that there was sufficient evidence of each of these two theories of guilt underlying the felony-murder charge.²⁹ In sum, Spencer has not demonstrated plain error affecting his substantial rights.

Affirmed.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

²⁵ See *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994).

²⁶ See, e.g., *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992).

²⁷ See *People v Lynn*, 223 Mich App 364, 367, n 1; 566 NW2d 45 (1997).

²⁸ See *People v Thew*, 201 Mich App 78, 85-89; 506 NW2d 547 (1993).

²⁹ See *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).