

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 27, 2013

v

TONY WALLACE,

Defendant-Appellant.

No. 310442
Wayne Circuit Court
LC No. 11-011444-01-FC

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 375 months to 600 months for second-degree murder, 80 to 120 months for assault with intent to do great bodily harm less than murder, and 24 to 48 months for assault with a dangerous weapon, and to a consecutive term of two years for felony firearm. We affirm.

I. BACKGROUND

The case arose out of a shooting on June 17, 2011. While walking down the street, Lindsay Pitman was approached by a vehicle driven by Angela Carson. Pitman got into the car, and Carson drove to an apartment building owned by Roosevelt Ward and parked across the street from the apartment. Ward approached the car on the driver's side and engaged the women in conversation. Soon after, a man, identified as defendant Tony Wallace, ran toward the car and began shooting a handgun. Ward was severely/seriously injured, and Carson was killed. Ward was unable to identify the gunman, and immediately after the event, Pitman told police that she also was unable to identify him. However, Pitman subsequently testified that she did recognize the gunman as defendant, from whom she regularly purchased drugs. She spoke with defendant after the shooting on a couple of occasions. One of the times he said, "Snitches end up in ditches." The next time he asked her, "how does a lamb lye [sic]" and then stated, "They're only lying when they're dead."

On July 28, 2011, Pitman went to the police and informed Officer Karen Miller that defendant was the shooter. Police then prepared three photo arrays for Pitman. The first two arrays did not have defendant's picture, but the third one did. Pitman picked defendant out of the

third array. Defendant filed a pretrial motion challenging the admissibility of the photo lineup identification, and the trial court held an evidentiary hearing. Officer Miller, who conducted the third photo array,¹ testified at the hearing, and acknowledged that she had to shake Pitman in an effort to wake her up during the interview. Pitman, who was in custody on unrelated charges, did not appear at the hearing despite defense counsel's request that Pitman be produced, so that counsel could cross-examine her and establish that at the time she made her identification of defendant, she was high on drugs. However, after hearing Officer Miller's testimony and viewing the photo array the trial court eventually denied the request to produce Pitman, stating that the photo array [was] extremely fair. The trial court found that the lineup was not impermissibly suggestive, that plaintiff did not have to establish an independent basis for the identification at trial, and that the question regarding the credibility of Pitman's identification of defendant was for the trier of fact.

At trial, Pitman identified defendant in court as the shooter. Pitman testified that, while she was high at the time of the shooting, she had seen defendant over 100 times before at a particular dope house and had known him for approximately six months. She admitted using crack cocaine and heroin and that she had bought drugs from defendant. Pitman also testified that she did not identify defendant as the shooter on the night of the incident because he was her drug source and she did not want him to go to jail.

At trial, defense counsel called, as a witness, the evidence technician who collected evidence from the vehicle driven by Carson. The technician's report indicated that she had found approximately 15 driver's licenses and Michigan identification cards in the vehicle. However, before she could testify regarding this information, the prosecutor objected to the introduction of the evidence on the ground of relevance. Defense counsel argued that the testimony went to third-party culpability. The trial court sustained the prosecutor's objection, and neither party asked this witness further questions. Defendant was convicted as charged, and this appeal ensued.

II. ANALYSIS

Defendant first argues that the trial court erred in permitting Pitman's in-court identification of defendant as the shooter. Specifically, defendant contends that he should have been able to examine Pitman at the evidentiary hearing to test the validity of the photo lineup. A "trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). A decision is clearly erroneous when it leaves this Court with a definite and firm conviction that a mistake was made. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

A court must evaluate the fairness of an identification procedure in light of the total circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it

¹ The other two photo arrays were shown to Pitman by another officer.

gave rise to a very substantial likelihood of irreparable misidentification. *Kurylczyk*, 443 Mich at 311-312, 318; *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Generally, a photo array is not suggestive if it contains some photographs that are fairly representative of the defendant's physical features, and thus, are sufficient to reasonably test the identification. *Kurylczyk*, 443 Mich at 304. If a witness has exposure to an impermissibly suggestive pretrial lineup or showup, that witness may not make an in-court identification of the defendant unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). “The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive.” *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

In this case, the trial court heard the testimony of Officer Miller that she prepared the third photo array, with defendant’s picture in it, based on the facial characteristics of the suspect, which were described by Pitman, as well as the approximate age of the suspect. Officer Miller testified that the computer generated the photos based on this information, which included that the suspect was a black male with short braids and facial hair. The trial court observed the photo array, found it to be extremely fair, and concluded that Pitman’s testimony was not necessary at the hearing and would be evaluated instead by the trier of fact.

The trial court did not abuse its discretion in making this determination. The men chosen for the lineup look strikingly similar to defendant, and there is nothing about defendant’s photo that makes it stand out more than the others. Furthermore, both the trial court and defense counsel had access to a video and written transcript of the photo lineup identification during the evidentiary hearing. As such, defendant can demonstrate no particular necessity for acquiring Pitman’s testimony at the hearing which focused principally on whether the photo lineup was suggestive. See *Kurylczyk*, 443 Mich at 304. Defendant’s assertion that Pitman’s testimony would have established that she was high during the photo lineup identification may be true, but the fact that she may have been high is a consideration for the trier of fact in *weighing* her identification testimony – it does not go to its *admissibility*, which was the purpose of the hearing. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (“It is the province of the jury to determine questions of fact and assess the credibility of witnesses.”); *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000).

In summary, viewing the totality of the circumstances surrounding the photographic lineup, we conclude that the trial court did not clearly err in finding that the procedure followed by the officer in charge was not so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Kurylczyk*, 443 Mich at 311-312, 318.

Because the pretrial identification procedure was not unduly suggestive, it is not necessary for this Court to determine whether there was an independent basis for Pitman’s in-court identification. Nevertheless, the record does establish that there was an independent basis for the in-court identification. The following factors are considered in determining whether an independent basis exists for the admission of an in-court identification:

(1) prior relationship or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup [sic] of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*Davis*, 241 Mich App at 702-703.]

It is not necessary that all factors be given equal weight. *Kachar*, 400 Mich at 97.

In this case, Pitman testified that (1) she had known defendant for six months and had seen him approximately 100 times, (2) she was roughly five feet from the individual who shot the other two victims and pointed a gun at her, (3) she provided the police with a description of defendant about a month after the alleged offense, after stating that she could not identify the alleged shooter, and explained that he was her drug supplier and she did not want to lose her access to her drugs, (4) her description matched the description of defendant's actual appearance, and (5) there was no evidence that she had ever identified anyone else. The record clearly establishes that there was an independent basis for Pitman's in-court identification. Accordingly, we find that the trial court did not err in allowing her in-court identification at trial.

Defendant also makes a general claim that his constitutional rights were violated when the trial court denied him the opportunity to examine Pitman during the evidentiary hearing. However, defendant offers no authority to show that he had a right to confront the witness during the hearing or that "cross-examination of Ms. Pitman at trial [did] not substitute for testing the validity of the identification procedure at a pre-trial evidentiary hearing." As this Court has repeatedly recognized, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). As such, defendant has abandoned the issue by failing to support his claim with legal authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Moreover, we reiterate that because the primary purpose of the hearing was to ascertain whether the photo lineup was unduly suggestive, the fairness of the identification procedure is evaluated in the light of the totality of the circumstances. The test is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness for identification. *People v Lee*, 391 Mich 618, 626, 218 NW2d 655(1974). As already discussed, the photographic lineup, along with a video and transcript of the photo identification were available at the evidentiary hearing. Because this evidence speaks for itself, both as to the suggestiveness of the photo array and how it was presented, Pitman's testimony as to her state of mind would not have been meaningful or significant. As such, the trial court did not abuse its discretion in precluding her testimony. See *Kurylczyk*, 443 Mich at 304. As we noted earlier, Pitman testifying that she was high or impaired at the time of the photo identification goes to the weight of the evidence, not its admissibility. See *Lemmon*, 456 Mich at 637; *Davis*, 241 Mich App at 705.

Defendant next argues that he was denied due process of law when the trial court precluded evidence that Carson was involved in an illegal prescription drug business and that another individual had a motive to shoot her. However, the record shows that this theory was too speculative to be admissible. We review issues regarding a defendant's constitutional due-process rights de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

“[T]he right to present a defense is a fundamental element of due process, [but] it is not an absolute right.” *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). States generally have the power “to establish and implement their own criminal trial rules and procedures.” *People v Unger (On Remand)*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Evidence of third-party guilt may be introduced by the defendant when it is inconsistent with, and raises a reasonable doubt about, the defendant's guilt. *Holmes v South Carolina*, 547 US 319, 327; 126 S Ct 1727; 164 L Ed 2d 503 (2006). However, such evidence should be excluded where it does not sufficiently connect the other person to the crime, such as where the evidence is speculative or remote, where it does not tend to prove or disprove a material fact in issue, where it has no effect other than to cast a bare suspicion upon another person, or where it raises a conjectural inference regarding the commission of the crime by another person. *Id.* at 327-328. “Before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.” *Id.* In *People v McCracken*, 172 Mich App 94, 98-99; 431 NW2d 840 (1988), this Court upheld a trial court ruling excluding evidence of third-party culpability on the basis that it was merely speculative. Further, this Court has previously held that evidence tending to incriminate another person is admissible if it creates more than a mere suspicion that someone else was the perpetrator. *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). In this case, any evidence of the possible culpability of another individual was merely speculative and based on sheer suspicion.

Defendant's proposed evidence primarily consists of the testimony of the evidence technician who cataloged all of the personal property in Carson's vehicle after the shooting and the testimony of Jason Poyle.

As noted earlier, the evidence technician would have testified to recovering various items from Carson's vehicle after the shooting, including 15 driver's licenses and identification cards. Although this evidence may have cast light on Carson's other illegal activities, it did not sufficiently connect any other person to being her shooter, and it was properly excluded. See *Holmes*, 547 US at 327-328; *McCracken*, 172 Mich App at 98-99.

According to Poyle's affidavit, he was approached by an individual known as “D” shortly after the murder. “D” asked him to erase the hard drive on a laptop computer. When Poyle accessed the computer, he noticed that one of the user names was “Angela.” Poyle also noted that “D” was between 5'7” and 5'9” tall and he had seen “D” at sometime in the past wear a “light blue hoody with a design.” He further stated that Carson was known to illegally sell prescription medications. Defendant avers that this information is evidence that “D” was the person who shot Carson, and the fact that it was not admitted at trial violated his right to due process. However, the above information does nothing to make it more probable than not that “D” was the actual perpetrator. See MRE 402. First, Poyle's affidavit makes it clear that the name “Angela” was only one of many names on the computer; it is unclear whether the computer was used exclusively by “Angela.” Second, it is pure speculation whether “Angela” is Angela

Carson, someone else named Angela, or someone with a different name using the “code” name of Angela as a user name. Further, it was clear that nothing was stolen, including any laptop computers, from the car after the shooting. Therefore, any connection between Carson’s murder, the computer, and “D” is purely speculative, and it was properly not admitted at trial. See *Holmes*, 547 US at 327-328; *McCracken*, 172 Mich App at 98-99.

Defendant’s reliance on *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1972), is misplaced. Contrary to defendant’s assertion on appeal, *Chambers* does not stand for the proposition that a defendant is free to bypass the rules of evidence as long as the “evidence” is designed to show third-party culpability. Notably, while the *Chambers* Court cautioned that evidentiary rules, including the hearsay rule, “may not be applied mechanistically to defeat the ends of justice,” *Chambers*, 410 US at 302, *Chambers* reaffirmed that criminal defendants, even when asserting the constitutional right of presenting a defense, “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* at 302; see also *Unger*, 278 Mich App at 250.

In *Chambers*, the defendant was accused of killing a police officer. Another person, McDonald, had signed a sworn confession to having committed the murder. He also made several statements to three different friends, admitting that he was the one who shot the officer. The defendant was allowed to call McDonald as a witness and admit the sworn confession into evidence. But on the stand, McDonald denied committing the murder and recanted his confession. Under Mississippi’s “voucher” rule, the defendant was prohibited from impeaching McDonald’s credibility because the court did not consider McDonald to be an “adverse” witness. The defendant also was precluded from (1) admitting McDonald’s confessions that he made to his friends and (2) asking McDonald about these other confessions. The *Chambers* Court concluded that the exclusion of these confessions, coupled with the trial court’s refusal to permit the defendant to cross-examine McDonald, denied him a fair trial. *Id.* The Court determined that the hearsay testimony “that was rejected by the trial court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest.” *Id.*

Unlike the facts in *Chambers*, in the present case, the evidence “rejected” by the trial court did not support defendant’s theory that someone else committed the murder. As noted, rather than evidence, defendant presents only speculation and conjecture that someone else committed the crime. Accordingly, *Chambers* is not applicable, and his due-process claim fails.

Defendant also argues that his attorney was ineffective for not properly establishing a foundation to admit evidence for a defense theory of third-party culpability. In particular, defendant argues that defense counsel “failed to make an offer of proof outlining the evidence she had at her disposal which would have allowed the court to make a more informed decision on the issue” of third-party culpability. We disagree.

“To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance resulted in prejudice.” *People v Russell*, 297 Mich App 707, 724; 825 NW2d 623 (2012). Here, defendant cannot establish the requisite prejudice. Assuming *arguendo* that defense counsel’s performance was deficient for failing to make the

offer of proof of all the third-party culpability evidence discussed above, we have already concluded that the evidence was not admissible. Thus, the offer of proof would not have changed the outcome of the case, making defendant unable to establish any prejudice.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kurtis T. Wilder

/s/ Elizabeth L. Gleicher