

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ERIC DUYST,

Defendant-Appellant.

UNPUBLISHED

August 12, 2003

No. 234482

Kent Circuit Court

LC No. 00-009779-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison without the possibility of parole for the murder conviction, to be served consecutively to two years' imprisonment for defendant's felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of the fatal shooting of defendant's wife, Sandra Duyst. On March 29, 2000, defendant telephoned 911 and reported that his wife tried to commit suicide. When the emergency workers arrived they discovered Mrs. Duyst lying on her left side in a sleeping position on the bed in the master bedroom. They testified that it was evident that she had suffered a severe wound to the back of her head. A gun was on the bed in front of her hands, which were in front of her body. Mrs. Duyst was transported to the hospital where she was pronounced dead.

During the autopsy, the medical examiner could not confirm that Mrs. Duyst ever held or fired the gun. The medical examiner specifically noted the lack of gunpowder or blood spatter on Mrs. Duyst's hands, despite the fact that there was blood spatter on the handgun. The medical examiner also found two separate entry wounds. He concluded that the wounds were caused by two bullets being fired into Mrs. Duyst's skull. The medical examiner further testified that the first bullet took a path through a portion of Mrs. Duyst's brain that would have rendered her immediately incapacitated and unable to reposition the gun and pull the trigger a second time. Consequently, the death was ruled a homicide.

Defendant maintained that his wife's death was a suicide. He offered testimony from several witnesses suggesting that she was suicidal. Defendant also asserted that he was actually outside the bedroom at the time of the shooting. In support of this claim, defendant's sons

testified that they heard footsteps suggesting that defendant moved from the family room to the bedroom after the shooting. The forensic evidence, however, showed that there was high velocity blood spatter on the T-shirt that defendant was wearing the morning of the shooting. According to the prosecution's blood spatter expert, this indicated that defendant was less than four feet away from Mrs. Duyst at the time of the shooting. A firearms expert also testified that the gun operated normally and that each shot required a distinct trigger pull of 8-1/4 to 8-1/2 pounds of force to pull the trigger each time. There was also testimony from a gunsmith indicating that he could articulate no circumstance in which the gun would double discharge. Rather, he opined that the gun required a fully pulled back trigger to discharge a bullet. Evidence was also presented suggesting that defendant had a motive and the opportunity to kill Mrs. Duyst.

I. Suppression of Evidence

Defendant initially argues that error requiring reversal occurred when the trial court refused to suppress expert testimony concerning the blood spatter evidence. Defendant claims that suppression was the appropriate remedy for a due process violation that resulted from the authorities' failure to retain other evidence in this case. We disagree. A trial court's ruling on a motion to suppress is reviewed de novo on appeal. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

The police retained the fitted sheet and pillows from the bed where Mrs. Duyst was shot. However, the police failed to preserve the top flat sheet, comforter, or blanket from the bed. Detective Daniel Scalici and evidence technician David Dehaan testified that they retained the fitted sheet and pillows because those items had obvious evidentiary value; whereas, the evidentiary value of the other items was not readily apparent. They specifically noted that there was no visible blood on the discarded bedding material. The clothing Ms. Duyst was wearing at the time of the shooting was also unavailable for trial as it was discarded during the autopsy.

Rod Englert, the prosecution's blood spatter expert, testified that the spatter cloud is comprised of very small blood droplets and that the pattern is found only in close proximity to the impact. Thus, if the top sheet was pulled up, as defendant claims, the high velocity spatter would not have been found on the fitted sheet. Moreover, while Mr. Dehaan and Detective Scalici observed that the fitted sheet had obvious evidentiary value, neither saw any blood spatter on the top sheet. Mr. Englert testified that no magnification was necessary to see spatter on the sheet. Defendant's theory that the discarded bedding may have shown evidence of gunpowder residue is also purely speculative and would not exonerate the defendant. Testimony revealed that gunpowder residue could be found throughout the general area where a gun is fired. Thus, even if gunpowder residue was found on the top sheet, it would not prove defendant's innocence.

The clothing Mrs. Duyst was wearing should have been retained. There is no question that blood spatter would have been apparent on the clothing, given its close proximity to the gun at the time of the shooting. However, while retention of Mrs. Duyst's nightshirt may have confirmed that it was in the spatter cloud, this fact was also not exculpatory. Indeed, it is undisputed that Mrs. Duyst was wearing the nightshirt when she was shot. Likewise, because gunpowder residue is also found throughout the general area when a gun is fired, residue on the nightshirt would not confirm that she committed suicide. Thus, defendant has failed to show that this evidence would have established his innocence.

“[W]hen the exculpatory nature of [missing] evidence is speculative, due process is not violated in the absence of bad faith where the state fails to preserve such evidence.” *People v Huttenga*, 196 Mich App 633, 642; 493 NW2d 486 (1992), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *Youngblood*, *supra* at 57-58, the Court stated:

The Due Process Clause . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Thus, without proof of an intentional suppression of evidence or a showing of bad faith, the loss of potentially exculpatory evidence before a defense request for its production does not mandate reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989).

Defendant conceded during the pretrial motion hearing that there was no evidence of bad faith in this case. Contrary to defendant’s position on appeal, there was also no evidence presented at trial to support a finding of bad faith. There is no dispute that the medical examiner’s failure to preserve the nightshirt was unintentional. Further, the record shows that the police discarded the bedding because they believed it lacked evidentiary value. Defendant has cited no authority that requires the police to seize every item from a crime scene on the potential chance that a defendant may someday want the item for testing. Thus, the trial court properly refused to suppress Mr. Englert’s testimony.

To the extent defendant challenges the admission of the fitted sheet and pillows into evidence, he failed to preserve this issue with an appropriate objection at trial. We review unpreserved issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error in this regard. There was no basis to deny admission of this properly retained evidence.

Absent any evidence of a due process violation with respect to the missing items, we need not address defendant’s argument that the trial court should have given an adverse inference instruction to remedy the error. *People v Jagotka*, 461 Mich 274, 281; 622 NW2d 57 (1999); see also *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

II. DNA Evidence

Defendant next asserts that the trial court erroneously admitted DNA evidence without informing the jury of the inherent limitations with the testing methodology employed.¹ Because defendant failed to preserve this issue with an appropriate objection at trial, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.

Defendant contends that the DNA evidence was improperly admitted into evidence because the jury was never informed of the limitations inherent with the polymerase chain reaction (PCR) method. In *People v Lee*, 212 Mich App 228, 283; 537 NW2d 233 (1995), this Court indicated that the jury should be informed of the limitations with respect to this method. In this case, however, defendant never requested a limiting instruction, and he failed to object to the absence of such an instruction. Failure to request a jury instruction or object to the instructions as given waives error absent manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). Manifest injustice occurs when an instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

After reviewing the record, it is clear that not only is this issue non-controlling, but it is totally irrelevant. Relevancy centers on the tendency of evidence “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

There was never any question presented at trial as to the source of the blood on defendant’s T-shirt. Rather, defendant’s line of questioning during the cross-examination of plaintiff’s expert DNA witness centered on whether the DNA could have been a combination of Mrs. Duyst’s blood and saliva. Defendant attempted to use the DNA evidence to support his theory of the case that the blood splatter pattern on the T-shirt was more consistent with Mrs. Duyst expectorating blood or saliva on defendant. During closing argument, defendant’s attorney posited the following to the jury:

I would submit to you that the more likely . . . common-sense explanation for the three spots of Mrs. Duyst’s blood on the stomach area of [the T-shirt], and the one spot on the back of the right sleeve, . . . is that the wearer of the shirt would have been up close to Mrs. Duyst while Mrs. Duyst was expiring [sic] blood.

However, the spatter pattern on defendant’s T-shirt filled the void in the high velocity spatter pattern found on the fitted sheet. There was also further testimony that high velocity spatter could only be caused by gunshots or high energy forces and that to be in a spatter cloud a person needed to be very close to the actual shooting. The spatter pattern was critical because it independently placed defendant in the room at the time of the shooting. Therefore, the real issue

¹ In his argument, defendant also challenges the testimony concerning the use of mixed DNA and claims that it was improper because it was not accompanied by any statistical information. He further argues that the prosecution failed to meet its burden of proof with respect to demonstrating that it used generally accepted testing procedures. Ultimately, defendant claims that the statistical evidence is flawed because it related only to the Caucasian population.

at trial was *how* Mrs. Duyst's blood got on defendant's shirt, not whether it belonged to her. Defendant may not assign error to the use of this DNA evidence when he deemed it proper at trial. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

III. Jury View

Defendant next argues that the trial court abused its discretion when it denied his request to have the jury view both the alleged homicide scene and the barn owned by Mrs. Duyst and defendant. We review a trial court's decision to grant a motion for a jury view for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001).

Pursuant to MCR 6.414(D), "[t]he court may order a jury view of property or of a place where a material event occurred. . . . During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial." In this case, defendant wanted the jury to view the home primarily to support his theory that his sons could have heard him moving from the couch to the master bedroom. We agree with the trial court that a view of the home, without any demonstration with respect to the sounds, would not have assisted the jury anymore than the available photographs, diagrams and video evidence of the flooring and layout of the house. Similarly, the videotape of the barn provided the jury with a satisfactory layout of the premises. For these reasons, the trial court did not abuse its discretion in denying the jury views. See *People v Rice*, 192 Mich App 240, 246; 481 NW2d 10 (1991) (finding no abuse of discretion when the trial court denied the defendant's request for a jury view because sufficient evidence was presented to give the jury a satisfactory layout of the premises).

IV. Prior Consistent Statement

Defendant further claims that the trial court improperly prohibited James Straub from testifying that, on April 11, 2000, defendant informed him that Mrs. Duyst had a sheet in her hand when defendant found her after the shooting. Defendant avers that Straub's testimony was admissible under MRE 801(d)(1)(B), because it rebutted the prosecutor's claim that defendant fabricated his testimony. A trial court's decision to admit or deny evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

MRE 801(d)(1)(B) provides, in relevant part, that a witness' prior statement is not hearsay if the declarant testifies at trial and is subject to cross-examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication, or improper influence or motive." However, a prior consistent statement, made after a motive to fabricate arises, does not fall within the parameters of MRE 801(d)(1)(B). *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001).

In this case, defendant reported that Mrs. Duyst shot herself on March 29, 2000. The police returned to seize defendant's clothing later that same afternoon. Defendant was aware that the death was being further investigated as a possible homicide. Because the statement was made after a motive to fabricate arose, the trial court did not abuse its discretion in excluding this testimony. *Id.* Although the trial court denied admission of this testimony on a different ground, we need not address this independent basis for excluding the testimony as the correct result was reached. See *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

V. Expert Testimony

Defendant next argues that the trial court impermissibly limited the scope of his experts' testimony when it precluded them from testifying that in their opinion Mrs. Duyst had committed suicide. We disagree. The admissibility of expert testimony is reviewed on appeal for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Expert witness testimony addressing the ultimate issue in a case is not generally barred. MRE 704; *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986); *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). However, such testimony is subject to exclusion under MRE 403, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Smith, supra* at 107, n 5. Speculative expert testimony may be excluded under MRE 403. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995).

In *Dye v Wayne Co*, 154 Mich App 237; 397 NW2d 188 (1986), the plaintiffs attempted to present expert testimony that the manner of death was unusual and that the death was not a suicide. This Court affirmed the trial court's limitation on the proposed testimony:

While [the expert] had considerable experience in counseling and suicide prevention, and considerable contact with suicidal persons, nothing in the record suggests that she was an expert in forensic pathology or other forensic sciences such that she could determine when a death was a suicide. She was permitted to testify that she did not believe Dye was suicidal and that she was surprised by his death. We believe that was the extent of her expertise, based on the record before us. Therefore, the trial court did not abuse its discretion in excluding [the expert's] testimony as to the cause of . . . death. [*Id.* at 242.]

In the instant case, both experts effectively conceded during the prosecution's voir dire and on cross-examination that they did not have an adequate foundation to conclude that Mrs. Duyst committed suicide. Steven Berger, M.D., a forensic psychiatrist, admitted that he could not testify that a person committed suicide unless he was a witness to the action. Dr. Berger also acknowledged that he was unaware of what the forensic testimony revealed in the case, and that he had never reviewed or examined Mrs. Duyst's injuries. Dr. Berger further agreed that it would be improper to assume that an individual committed suicide simply because she had symptoms consistent with a suicidal person. William Kooistra, a clinical psychologist, similarly agreed that a person could possess all of the symptoms of a suicidal person and still be murdered. Dr. Kooistra further testified that while he had extensively interviewed defendant before reaching a conclusion, he never interviewed Mrs. Duyst. There was also no indication that Dr. Kooistra reviewed the autopsy reports or that he was familiar with the physical evidence in this case. While both experts were allowed to testify that Mrs. Duyst had traits similar to those exhibited by suicidal people, they were properly limited from offering their opinions that her death was a suicide.

VI. Witnesses Not Allowed To Testify

Defendant also argues that the trial court abused its discretion when it denied his requests to admit testimony from three witnesses regarding statements allegedly made by Mrs. Duyst

several months before her death. Defendant maintains that the testimony was admissible under MRE 803(3), as evidence of Mrs. Duyst's then existing mental, emotional, or physical condition. However, these alleged statements either did not concern Mrs. Duyst's then existing mental, emotional, or physical condition, were hearsay within hearsay, or were made after the fact. Defendant provides no further analysis for his position and we therefore find this issue to be without merit. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

VII. Cumulative Errors

Because there were no errors of consequence, which combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood