

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG ALEXANDER JULIAN,

Defendant-Appellant.

UNPUBLISHED
November 27, 2012

No. 306044
Bay Circuit Court
LC No. 10-010989-FC

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of aiding and abetting first-degree murder, MCL 750.316 and MCL 767.39, and removing or carrying away a human body, MCL 750.160. Because defendant waived appellate review of his Confrontation Clause argument, which is moot in any event, and the trial court did not abuse its discretion by admitting photographs of the decedent's body or evidence of a recorded conversation involving defendant's brother, we affirm.

Defendant's convictions stem from the strangulation death of Lynn Spicer, the girlfriend of defendant's brother, Jeffrey Julian. It is undisputed that Julian killed Spicer by strangling her. Before he did so, he told defendant that he wanted to "get rid of her." Julian twice discussed with defendant killing Spicer in the weeks before her death. Julian and defendant discussed different ways that Julian could "get rid" of Spicer, including sending her to Texas to live with an ex-boyfriend and killing her. Julian decided that killing Spicer was the best way to "get rid" of her, and he and defendant discussed different ways that he could kill her. They decided that strangling her "would work." At one point, Julian told defendant that he did not know if he would be able to kill Spicer and stated that defendant might have to do it. Defendant responded, "I gotcha man, I gotcha." Julian ultimately decided that killing Spicer was his responsibility and that having defendant do it "just wouldn't be right." Shortly before the murder, Julian told defendant, "it's comin [sic]" and "be ready." Defendant responded, "I gotcha man, just let me know."

In the early morning hours of August 21, 2010, Julian and Spicer went to Walmart and returned home to Julian's grandmother's house, where they were living at the time. Julian lured Spicer outside into the backyard under the pretense of having sex with her. He then strangled her, and she eventually lost consciousness and fell to the ground. Julian got on top of Spicer and

continued to strangle her to ensure that she was dead. While still on top of her, Julian sent a text message to defendant stating, “I need you here now.” When defendant received the message, he suspected that Julian might have killed Spicer and that he would have to help dispose of her body. Defendant arrived shortly thereafter, and Julian asked defendant to check Spicer’s pulse. Defendant did so and told Julian that he still felt a pulse. After Julian unsuccessfully attempted to break Spicer’s neck, Julian and defendant were satisfied that she was dead. They lifted her body over a fence and into a field behind the house. Julian buried Spicer’s body in a hole that Julian and defendant had dug in the field before the murder. Dustin Pirl, a friend and coworker of Julian, was present when Julian and defendant had dug the hole. They told Pirl that they intended to bury motor oil in the hole. Julian filed a missing persons report and told the police that he and Spicer had gotten into a fight after leaving Walmart and that Spicer was missing.

Months later, Julian admitted to Pirl that he had killed Spicer. Pirl informed the police, who outfitted him with a recording device. In a recorded conversation with Pirl, Julian revealed details involving the planning and commission of the murder, including some discussion of defendant’s role. Julian was then arrested, and defendant was questioned regarding his involvement in the murder. Defendant eventually admitted his knowledge of the murder and confessed to helping Julian move Spicer’s body.

Before trial, defendant unsuccessfully moved to suppress the recorded conversation between Julian and Pirl on the basis that its admission would violate defendant’s right to confrontation. At that time, it was believed that Julian would exercise his Fifth Amendment right not to testify and would therefore be unavailable during defendant’s trial. Julian ultimately waived his Fifth Amendment right, however, and testified. The prosecution played the recorded conversation before the jury during trial.

Defendant first argues that the trial court’s admission of Julian’s recorded statements to Pirl as substantive evidence denied him his Sixth Amendment right to confrontation. Defendant waived appellate review of this issue by acknowledging in the trial court that if defense counsel called Julian to testify and Julian was available for cross-examination, the Confrontation Clause issue would become moot.¹ Further, because Julian testified and was available for cross-examination, this issue is moot as discussed below.

¹ “[W]aiver is the intentional relinquishment or abandonment of a known right.” *People v Buie*, 491 Mich 294, 305; 817 NW2d 33 (2012) (quotation marks and citations omitted). During trial, the following colloquy occurred:

MR. DUNN [defense counsel]: First, with respect to the pre-trial motion to exclude the recorded conversations given to Dustin Pirl while Dustin Pirl was acting as a police agent, there’s a – the Court, of course, denied that motion – and there’s a potential for that on appeal since this is a fairly new area of the law since the Crawford versus Washington case of the U.S. Supreme Court in 2004 that changed the whole previous understanding of this issue.

The Confrontation Clause precludes the admission of testimonial statements of a witness who is not present at trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “[W]hen the declarant appears for cross-examination at trial,” however, “the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford*, 541 US at 59 n 9. Notably, only “testimonial statements” “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nontestimonial statements, “while subject to traditional limitations upon hearsay evidence, [are] not subject to the Confrontation Clause. *Id.*”

Defendant argues that Julian’s recorded statements to Pirl were testimonial and that, accordingly, their admission violated his right to confrontation. Because Julian was present during trial and testified, however, the Confrontation Clause was not implicated and his argument is moot. *Crawford*, 541 US at 53-54, 59 n 9. Defendant asserts that his argument is not moot because the prosecution did not call Julian as a witness, but rather, merely played the recording of Julian’s conversation with Pirl. Defendant contends that he had no choice but to call Julian as a witness in order for Julian to explain his recorded statements. Defendant cites *Melendez-Diaz v Massachusetts*, 557 US 305, 324-325; 129 S Ct 2527; 174 L Ed 2d 314 (2009), for the proposition that “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.” In *Melendez-Diaz*, the prosecution presented “certificates of analysis,” or affidavits, showing that forensic testing of seized substances revealed the presence of cocaine. The petitioner objected to the admission of the certificates, arguing that the Confrontation Clause required that the analysts testify in person.

I’ve informed [defendant] that in the event that I call Jeff Julian, he’s now available for cross-examination and that would make that issue moot. We’ve weighed this back and forth and discussed the pros and cons, and I believe we’ve come to an agreement that if Mr. Jeff Julian becomes available after consulting with his counsel to testify in this trial, that we are going to call him to the stand and that means that he loses that issue. [Defendant], is that your understanding?

THE DEFENDANT: Yes, it is.

MR. DUNN: Do you agree with that?

THE DEFENDANT: Yes, I do.

* * *

MR. DUNN: And you’ve agreed with me to proceed if Jeff Julian becomes available and have him testify?

THE DEFENDANT: Yes, I have.

Id. at 308-310. The Court held that the admission of the evidence was erroneous and opined that “[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits.” *Id.* at 329.

Melendez-Diaz is distinguishable from the instant case and is therefore inapplicable. Here, defendant indicated his intent to call Julian as a witness before the prosecution played the recorded conversation before the jury. Thus, the prosecutor was aware that Julian was going to testify before the trial court admitted the challenged evidence. Moreover, Julian was not a witness who was adverse to defendant. To the contrary, Julian told his father to tell his lawyer to “throw [him] under the bus” to help defendant because he could “handle this” better than defendant. Julian also testified that he would be willing to plead guilty in order to help defendant. Accordingly, considering the circumstances of this case, Julian’s testimony at trial rendered moot defendant’s Confrontation Clause argument, and we need not determine whether Julian’s statements to Pirl were testimonial or nontestimonial.

Defendant next argues that the trial court abused its discretion by admitting Julian’s recorded conversation with Pirl under MRE 803(24). We review for an abuse of discretion a trial court’s decision whether to admit evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when the trial court selects an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If a decision involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of evidence, we review the issue *de novo*. *Id.*

Under MRE 803(24), the residual hearsay exception, a hearsay statement may be admitted regardless of the declarant’s availability. MRE 803(24) pertains to:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. [MRE 803(24).]

“Thus, evidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice.” *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003). “The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions.” *Id.* at 290. “Thus, courts should consider the ‘totality of the circumstances’ surrounding each statement to determine whether equivalent guarantees of trustworthiness exist.” *Id.* at 291. Factors to consider in making this determination include:

- (1) the spontaneity of the statements,
- (2) the consistency of the statements,
- (3) lack of motive to fabricate or lack of bias, . . .
- (5) the voluntariness of the

statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements were made. [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (citation omitted).]

Defendant concedes that the evidence tended to establish a material fact. He argues that the recording failed to satisfy the remaining three factors set forth in *Katt*. His argument lacks merit. The recorded statements had circumstantial guarantees of trustworthiness and indicia of reliability. Julian was unaware that Pirl was recording their conversation and testified that he shared his secrets with Pirl because he wanted to bring Pirl into his inner circle of trust. Julian had no motive to fabricate, and his statements were consistent. He committed the murder only a few months before the conversation, and the events were fresh in his mind when he recounted them to Pirl. Julian had first-hand knowledge of the events because he was responsible for the acts that he described. Moreover, Pirl's questioning of Julian did not resemble a police interrogation and appeared to be a casual conversation between friends. Pirl asked Julian open-ended questions, and Julian answered in long, largely uninterrupted monologues. Thus, the trial court did not abuse its discretion by concluding that Julian's statements had circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions.

The trial court also did not abuse its discretion by concluding that the recorded conversation was the most probative evidence that could be presented regarding defendant's involvement in planning and carrying out Spicer's murder. As the trial court recognized, it appeared that Julian made himself available to testify in order to help defendant defend against the charges. Julian also told his father to let his lawyer know that it was acceptable to "throw [him] under the bus" in order to help his brother. Thus, Julian had a strong incentive to testify favorably to defendant and in fact admitted at trial that he essentially pleaded guilty by virtue of his testimony. Therefore, considering the questionable reliability of Julian's testimony, the recorded conversation between he and Pirl was the most probative evidence that could be presented regarding defendant's involvement in the murder.

Further, admission of the recording served the interests of justice. As the trial court aptly stated:

I find that the admission of these statements serves the interests of justice. If the—if Mr. Jeffrey Julian testifies consistent with the prior statements, then it's inconsequential as to whether or not they were admitted or not. If he testifies differently, the prior statements would be admissible in any event to impeach Jeffrey Julian. And given his statements and his motivation to help his brother in this matter, it may be—it is—may well be that the statements made to Mr. Pirl are more reliable than anything he might say here in court, and therefore it would serve the interests of justice to have the statements admitted, not only to impeach Mr. Jeffrey Julian, but also as substantive evidence of the crimes charged.

Considering that Julian had significant incentive to testify favorably to defendant and that the circumstances surrounding the statements made to Pirl indicated their reliability, admitting the recording served the interests of justice. Accordingly, the trial court's admission of the recorded

conversation under MRE 803(24) was within the range of reasonable and principled outcomes and did not constitute an abuse of discretion.

Finally, defendant argues that the trial court violated his rights to due process when it admitted photographs of Spicer's body taken at the burial site during the excavation process. We review constitutional questions de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). Further, "[a] decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Id.* Evidence is relevant if it has "any tendency 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. Even when relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." MRE 403. "MRE 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

"Photographs may . . . be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion." *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008) (quotation marks, citation, and brackets omitted). In *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001), this Court concluded that the trial court did not abuse its discretion by admitting gory photographs of the murder victim and the murder scene, explaining that although the photographs were undoubtedly prejudicial, they were not unfairly prejudicial and were probative of the defendant's intent to kill the victim and the forensic pathologist's conclusion regarding the cause of death.

In this case, the challenged photographs depicted Spicer's body at different stages of the excavation process. The photographs showed portions of Spicer's body at various angles and vividly depicted the extent of decomposition and the burial site. Although photographs of a decomposed body are necessarily prejudicial, gruesomeness alone does not render photographs inadmissible. *Unger*, 278 Mich App at 257. The photographs were probative in that they bolstered the testimony of forensic pathologist Dr. Kanu Virani and allowed the jury to confirm aspects of Dr. Virani's testimony. Dr. Virani opined that DNA evidence could not be recovered from Spicer's body because of the extent of decomposition and mold. The photographs assisted the jury in evaluating Dr. Virani's testimony and understanding why Dr. Virani was unable to recover DNA evidence from Spicer's body that may have linked her body to defendant. Defense counsel had previously questioned a witness regarding whether any DNA evidence had been recovered from Spicer's body that could have been compared to defendant's DNA. Dr. Virani also testified that his examination of Spicer's body revealed no obvious external injuries, and that he ultimately concluded that asphyxia due to neck compression was her cause of death. The photographs allowed the jury to verify Dr. Virani's claims. "The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Gayheart*, 285 Mich App at 227.

The photographs also supported Detective Brian Berthiaume's testimony that because of the extensive decomposition of the body, Spicer had to be identified through her dental records. In addition, the photographs depicted the excavation process and processing of the crime scene. The photographs supported Kenneth Binder's testimony that the excavation was conducted much like an archeological dig and that officers dug down approximately three to four inches at a time, processing the scene at different levels. Further, the photographs were consistent with defendant's and Julian's accounts of the murder, i.e., that Julian strangled Spicer and buried her in a shallow grave in a field behind his grandmother's house. Even when a defendant does not dispute the manner of death or another element of a charged offense, photographs may nevertheless be introduced if they are probative of the issue because "the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *People v Mesik (On Recon)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). Accordingly, the trial court did not abuse its discretion by admitting the photographs.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio