

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE EDWARD CLARK,

Defendant-Appellant.

UNPUBLISHED

April 28, 2005

No. 247847

Wayne Circuit Court

LC No. 02-013361

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, and the trial court sentenced defendant to life imprisonment. Defendant appeals his conviction and sentence, and we affirm.

Defendant argues that the trial court erred when it denied his motion for a new trial because his codefendant was also granted a new trial, and defendant and the codefendant were similarly situated. However, the basis for the codefendant's new trial rested primarily on the fact that his trial counsel engaged in misconduct and thus was ineffective.¹ On the other hand, the review of the record shows that defendant had separate counsel who conducted himself properly and that defendant's trial counsel was not ineffective.

Defendant also maintains that the trial court erred when it denied him a new trial because defendant was denied his Sixth Amendment² right to confront a witness. Beria Stewart witnessed defendant and a codefendant start a fight with the victim, then drag the victim into a field. Stewart heard several gunshots and defendant and the codefendant returned to Stewart's home and threatened to kill her if she told anyone what had happened. At trial, Stewart gave testimony that was inconsistent with her preliminary examination testimony. At trial, Stewart claimed that her life had been threatened after Martin's death, and that she was frightened.³ The trial court ruled that Stewart was unavailable as a witness pursuant to MRE 804(a)(2) (witness

¹ The record shows that the codefendant's trial counsel engaged in egregious misconduct.

² US Const, Am VI.

³ The record also reflects that Stewart was threatened while testifying at defendant's preliminary examination by a woman who drew her finger across her throat.

refuses to testify) and (a)(3) (witness has a lack of memory),⁴ and allowed the prosecution to read Stewart's preliminary examination testimony into evidence.

The trial court has the discretion to limit the scope of cross-examination. *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). And, though it is permissible for a trial court to control the proceedings, it cannot do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). The trial court may admit testimonial evidence when the declarant is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, we conclude that the trial court properly declared Stewart unavailable because she was unable to remember facts, and because she had been threatened and was afraid to testify. Furthermore, defendant had the opportunity to cross-examine her at his preliminary examination. Accordingly, we hold that defendant was not denied his Confrontation Clause rights when the trial court allowed Stewart's preliminary examination testimony to be read into evidence.⁵

For the foregoing reasons, we hold that the trial court did not err when it denied defendant's motion for a new trial.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

⁴ MRE 804(a) provides that unavailability as a witness:

includes situations in which the declarant

* * *

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement [MRE 804(a)].

⁵ Defendant also maintains that the trial court failed to intervene to stop Evans' improper conduct during trial. However, the record reflects that the trial court repeatedly intervened to control Evans. Accordingly, we reject defendant's contention to the contrary.