

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRAE LAMAR SPARKMAN,

Defendant-Appellant.

UNPUBLISHED

June 23, 2011

No. 295383

Kent Circuit Court

LC No. 09-005531-FC

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Deondrae Lamar Sparkman challenges his jury trial convictions of felony murder¹, assault with intent to rob while armed² and possession of a firearm during the commission of a felony (felony-firearm).³ Sparkman was sentenced as a third habitual offender⁴ to life in prison without parole for the felony murder conviction, 50 to 95 years' imprisonment for the assault with intent to rob while armed conviction and 2 years in prison for the felony-firearm. We affirm.

Sparkman first contends that the prosecution engaged in misconduct by failing to disclose exculpatory evidence comprised of telephone records illustrating that Jermario Phillips engaged in two-way direct connect telephone calls with Sparkman shortly before the victim's murder.⁵

¹ MCL 750.316(1)(b).

² MCL 750.89.

³ MCL 750.227b.

⁴ MCL 769.11.

⁵ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

We review claims of prosecutorial misconduct and issues of constitutional law de novo.⁶ We review a trial court's findings of fact at an evidentiary hearing for clear error.⁷

Prosecutors have a duty to disclose evidence that is “material either to guilt or to punishment.”⁸ To establish that a prosecutor has engaged in misconduct by failing to disclose exculpatory evidence, a defendant is required to show (1) the state possessed evidence favorable to him; (2) he neither possessed the evidence nor could have obtained the evidence through reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) a reasonable probability that the result of his trial would have been different had the prosecution disclosed the evidence.⁹ Sparkman is unable to meet these requirements.

At the outset, we note that the prosecutor did not suppress Phillips's telephone records, as the records were made available to defense counsel before trial initiated. The prosecutor's lack of awareness that the voluminous telephone records contained potentially exculpatory evidence did not constitute misconduct as a prosecutor is not required to “seek and find” exculpatory evidence.¹⁰ In addition, defense counsel could have obtained Phillips's telephone records through reasonable diligence.¹¹ Even if we were to characterize the prosecutor's indication to defense counsel that she did not believe that the Phillips' telephone records had any inherent evidentiary value as a form of suppression, Sparkman has failed to demonstrate a reasonable probability that the result of the proceedings would have been different had he introduced the records at trial.¹² The record of Phillips' telephone call to Sparkman 17 minutes before the shooting would have been of minimal value to establish that Sparkman was not present with Phillips at the scene of the shooting as it is not uncommon for people to communicate over a two-way direct connect telephone feature while in close physical proximity. Similarly, given the strong evidence provided by two witnesses placing Sparkman at the scene of the shooting and three additional witnesses testifying to statements he made indicating his involvement in the murder, Sparkman is unable to demonstrate that the evidence would have altered the result of the proceeding.

We also reject Sparkman's related argument of ineffective assistance of counsel because his attorney failed to investigate Phillips's telephone records. Whether a defendant was denied

⁶ *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005); *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

⁷ *People v Van Tubbergen*, 249 Mich App 354, 359; 642 NW2d 368 (2002).

⁸ *People v Aldrich*, 246 Mich App 101, 133; 631 NW2d 67 (2001) (citation omitted).

⁹ *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

¹⁰ *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003).

¹¹ *Schumacher*, 276 Mich App at 177.

¹² *Id.*

the effective assistance of counsel presents a mixed question of constitutional law and fact.¹³ To prevail on his claim of ineffective assistance of counsel, Sparkman must meet the two-part test as elucidated by the United States Supreme Court.¹⁴ First, Sparkman must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁵ Sparkman is unable to establish the second requirement of this test. The record of Phillips' telephone call to Sparkman shortly before the shooting was of minimal exculpatory value. While defense counsel could have argued that the telephone record indicated that Sparkman was not with Phillips, Marvin Walton, and James Cross at the time of the murder, the record equally supports the alternative argument that Phillips placed the two-way direct connect call to Sparkman just before the murder while both were at a local club trying to effectuate a drug transaction. When viewed in conjunction with the strong evidence of Sparkman's guilt, it is unlikely that pursuit of this theory by defense counsel would have resulted in a different verdict.

Next, Sparkman asserts that the trial court erred and deprived him of a fair trial when it admitted into evidence records of his telephone calls to Davonna Dobbs after the prosecution failed to disclose the records.¹⁶ We review a trial court's decision to admit evidence for an abuse of discretion¹⁷ and its findings of fact for clear error.¹⁸ We review constitutional issues de novo.¹⁹

"[D]iscovery in criminal cases is constrained by the limitations expressly set forth in . . . MCR 6.201."²⁰ In accordance with the court rules, "a party upon request must provide all other parties . . . a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document . . . or other paper, with copies to be provided upon request."²¹ We find that the prosecutor did not violate the relevant court rule.²²

¹³ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁴ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹⁵ *Strickland*, 466 US at 687-688, 694.

¹⁶ MCR 6.201(A)(6).

¹⁷ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

¹⁸ *Van Tubbergen*, 249 Mich App at 359.

¹⁹ *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

²⁰ *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006).

²¹ MCR 6.201(A)(6).

²² *Id.*

First and foremost, “[t]here is no general constitutional right to discovery in a criminal case.”²³ Second, the prosecutor provided defense counsel with the opportunity to inspect and copy the telephone records, which included a listing of the telephone calls between Sparkman and Dobbs. Based on the availability of the records to counsel, the trial court did not abuse its discretion when it admitted into evidence the records consisting of the telephone calls from Sparkman to Dobbs.

Even if this Court were to construe the admission of these records by the trial court as an abuse of discretion, which we do not, any such error would be deemed harmless. “In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative,” i.e., “undermined the reliability of the verdict.”²⁴ Given the strength of the other evidence in this case, the reliability of the verdict was not undermined. The record of telephone calls between Sparkman and Dobbs tended to show that they were not together at the time of the murder. Even if this evidence had been excluded, Dobbs testified that she could not verify Sparkman’s whereabouts when the crime occurred and eyewitness testimony placed Sparkman at the scene of the murder. Three other witnesses indicated that Sparkman made statements acknowledging his involvement in the murder. Based on all of the evidence, it is highly unlikely that admission of the challenged telephone records could be deemed to have been outcome determinative.²⁵

Sparkman also raises an issue contending that the admission of his investigative subpoena testimony violated his constitutional rights against compulsory self-incrimination and due process. We review the trial court’s decision to admit the investigative subpoena testimony for an abuse of discretion²⁶ and constitutional issues de novo.²⁷ The United States and Michigan Constitutions protect a person from compulsory self-incrimination and deprivations of life, liberty, or property without due process of law.²⁸ The relevant statute provides, “[a] person properly served with an investigative subpoena . . . shall appear before [a] prosecuting attorney and answer questions concerning the felony being investigated”²⁹ In addition, “[a]ny person may have legal counsel present in the room in which the inquiry is held”³⁰ and mandates

²³ *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000).

²⁴ *Id.* at 766.

²⁵ *Id.*

²⁶ *Lukity*, 460 Mich at 488.

²⁷ *Beasley*, 239 Mich App at 557.

²⁸ US Const, Am V; Const 1963, art 1, § 17.

²⁹ MCL 767A.5(1); see also *People v Farquharson*, 274 Mich App 268, 273; 731 NW2d 797 (2007).

³⁰ MCL 767A.5(3).

that a prosecutor “shall inform the person of his or her constitutional rights regarding compulsory self-incrimination before asking any questions under an investigative subpoena,”³¹ unless the person subject to the investigation is granted immunity.³² Although raised as an issue in his appellate brief, Sparkman indicates he is only seeking to preserve the issue for a future appeal as he recognizes that this Court has rejected his argument and recently determined that the admission of a defendant’s investigative subpoena testimony is not violative of a defendant’s right against compelled self-incrimination.³³ In accordance with the “first out” rule, we are required to follow the rule of law established by a prior published opinion of this Court issued on or after November 1, 1990.³⁴

Regardless, we find that the trial court neither abused its discretion nor violated Sparkman’s constitutional rights by admitting his investigative subpoena testimony into evidence. Sparkman’s investigative subpoena testimony was not incriminating as he simply denied any involvement in the murder nor did his testimony lead to the disclosure of incriminating evidence or “furnish a link in the chain of evidence needed to prosecute.”³⁵ Even if we were to find the investigative subpoena testimony to be incriminating, Sparkman is unable to demonstrate that it was “forced” or compulsory.³⁶ Sparkman was informed of his right to have an attorney present and of his right to refuse to provide incriminating responses.³⁷ Sparkman was free to object to any question or refuse to answer.³⁸

Finally, Sparkman contends the trial court erred in permitting highly prejudicial autopsy photographs to be introduced into evidence. “The decision to admit or exclude photographs is within the sole discretion of the trial court.”³⁹ A trial court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice. . . .”⁴⁰ Evidence is not unfairly prejudicial merely because it is found to be damaging to a party’s case.⁴¹ The term

³¹ MCL 767A.5(5)

³² MCL 767A.7.

³³ *People v Seals*, 285 Mich App 1, 9-10; 776 NW2d 314 (2009).

³⁴ MCR 7.215(J)(1).

³⁵ *Seals*, 285 Mich App at 9-10.

³⁶ *Id.* at 7-9.

³⁷ *Id.* at 7-8.

³⁸ *Id.* at 8-9; MCL 767A.6(1).

³⁹ *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995).

⁴⁰ MRE 403.

⁴¹ *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

“unfair prejudice” has been defined to mean “an undue tendency to move the tribunal to decide on an improper basis . . . an emotional one”⁴²

We find that the trial court did not abuse its discretion when it admitted the three autopsy photographs into evidence. As with any such evidence, although the photographs were graphic, they did not have an undue tendency to influence the jury to decide the case on an improper basis.⁴³ The pathologist referred to the photographs during his testimony to explain the nature and extent of the victim’s injuries.⁴⁴ Such evidence was probative with regard to the issue of Sparkman’s intent to rob the victim,⁴⁵ as the photographs helped illustrate the size and locations of the victim’s bullet wounds, the paths of the bullets and the range of firing. We specifically reject the argument posited by Sparkman that the autopsy photographs were inadmissible because the pathologist could explain his opinion solely on the basis of the autopsy as photographs may be used to corroborate a witness’s testimony and “are not excludible simply because a witness can orally testify about the information contained in the photographs.”⁴⁶

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997); *Mills*, 450 Mich at 76.

⁴⁵ *Id.* at 71.

⁴⁶ *Id.* at 76.