

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGERS J. CARTER,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 241509

Wayne Circuit Court

LC No. 01-007869

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to two years' imprisonment for the felony-firearm conviction and two years' probation for the felonious assault conviction. We affirm.

I. Facts and Procedure

Daniel Clark testified that he was at his fiancé's house when defendant approached him and threatened him with a handgun, demanding that he obtain the money to pay back a debt he owed to defendant. Clark testified that defendant told him that he would be back for the money. In contrast, defendant's alibi witness testified that defendant was at a different location when the alleged confrontation occurred. Clark also testified that, later that day, defendant called him on the telephone and made threats, demanding that Clark pay the money. Clark recorded this conversation. At trial, the prosecution introduced this tape, and it was admitted into evidence. The trial court convicted defendant of felonious assault and felony-firearm, relying heavily on the taped telephone conversation. Defendant moved for a new trial, arguing that the tape was inadmissible because it was inaudible and the prosecution failed to lay a proper foundation. Defendant also argued that the trial court erred in finding that defendant's alleged statements on the tape satisfied the elements of the crimes charged. The trial court denied the motion, ruling that the tape was admissible evidence.

II. Admissibility of the Tape Recording

Defendant argues that the trial court abused its discretion in denying his motion for a new trial, because the tape-recorded telephone conversation was improperly admitted into evidence. "A trial court may grant a new trial to a criminal defendant on the basis of any ground that would

support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B).” *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A trial court’s decision whether to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Id.* “This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief.” *Id.* This issue also involves the admission of evidence, which is similarly reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant argues that the tape was improperly admitted because it was inaudible and the prosecution did not authenticate it before admitting it.¹ MRE 901 governs the authentication of evidence:

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

“The authenticity of an exhibit such as tape recordings is to be determined in light of MRE 901.” *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991). In *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969), aff’d 386 Mich 204 (1971), this Court set forth seven factors to be considered in determining the authenticity of exhibits.² Defendant argues that, under these

¹ Defendant did not object to the admission of the tape at trial.

² The seven factors set forth in *Taylor, supra* at 383-384, are:

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seven factors set forth in *Taylor*, the trial court abused its discretion in admitting the tape recording. However, the seven-part test set forth in *Taylor* was rejected by the Supreme Court in *Berkey*, on the ground that the *Taylor* test was superseded by the adoption of the Michigan Rules of Evidence. *Berkey, supra* at 48-50. In *Berkey*, the Supreme Court concluded that “[w]hile the elements of the seven-part [*Taylor*] test are important considerations, we believe that they are matters that should ordinarily be addressed to the finder of fact.” *Berkey, supra* at 52. While the Supreme Court acknowledged that consideration of the *Taylor* factors in some circumstances might possibly lead to the exclusion of recorded conversations, notwithstanding testimony that identifies the voices on the tape, the Court held that the trial court need not consider the seven *Taylor* factors in determining authenticity. *Berkey, supra* at 50-53. “A tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.” *Berkey, supra* at 50.

In the present case, the prosecution offered the tape as a recording of a telephone conversation between defendant and Clark. Clark identified the voices on the tape as those of himself and defendant. Defendant’s attorney conceded at trial that it was defendant’s voice on the tape recording. Additionally, defendant’s attorney referred to defendant’s statements on the tape, indicating that they were audible. Defendant never argued at trial that the voices on the tape were inaudible or that it was not his voice on the tape. Because Clark, a knowledgeable witness, identified defendant’s voice on the tape, MRE 901 was satisfied, and the trial court did not abuse its discretion in admitting the tape. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion for a new trial.

Defendant also claims he was denied effective assistance of counsel by his attorney’s failure to object to the admission of the tape recording. “To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel’s performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the federal and Michigan Constitutions.” *People v Briseno*, 211 Mich App 11, 16-17; 535 NW2d 559 (1995). Because we conclude that the tape recording was properly authenticated under MRE 901, defendant has failed to demonstrate that his counsel’s performance was deficient, and his argument must fail. *Id.* at 17.

III. Trial Court’s Findings of Fact

Defendant also argues that the trial court clearly erred in finding that defendant’s statements in his telephone conversation with Clark satisfied the elements of the crimes. The

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“(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.” [*Id.*, quoting 58 ALR2d 1024, 1027.]

trial court's findings of fact are reviewed for clear error. MCR 1.613(C); MCR 6.001(D); *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999), aff'd 462 Mich 71 (2000). A finding of fact is clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

Here, the trial court found that defendant's statements in his telephone conversation with Clark established that he confronted Clark and that he had a gun during the confrontation. The trial court further found that defendant told Clark that he would return with the weapon if he was not paid according to schedule. Defendant argues that these findings are clearly erroneous, because defendant never admitted that he had a weapon, that he committed the crime, or that he was going to go back to see Clark again if he was not paid according to schedule. We disagree. In the taped telephone conversation, Clark asked defendant if he was going to kill him, and defendant responded affirmatively. When Clark asked defendant why he came over and pulled a gun on him, defendant responded that he was "coming back." Clark later yelled at defendant for pulling a gun on him at his fiancé's house, and defendant responded, "I'll pull a gun out on you at a police station" As Clark yelled at defendant, defendant stated, "Daniel, if I hang this phone up, I'm coming back." Defendant also threatened to kill Clark if he did not pay the money or if he went to the police. In light of this evidence, we cannot conclude that the trial court's finding that defendant confronted Clark with a gun was clearly erroneous.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood