

Summary of SC89429, *State of Missouri v. Vincent McFadden*

Appeal from the St. Louis County circuit court, Judge Gary M. Gaertner Jr.
Argued and submitted Sept. 5, 2012; opinion issued Jan. 29, 2013

Attorneys: McFadden was represented by Janet M. Thompson of the public defender's office in Columbia, (573) 882-9855; and the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man sentenced to death for a woman's murder challenges his sentence but not the sufficiency of the evidence supporting his conviction. In a 6-0 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri affirms the judgment. The trial court did not err or abuse its discretion in allowing the state to strike, for cause, certain prospective jurors from the jury pool or in not ordering a mistrial because a juror in this case did not indicate he recognized the defendant although he was a prospective juror in an earlier trial involving the man. The trial court did not err or abuse its discretion in allowing certain arguments by the prosecutor or in allowing certain evidence to be admitted. The man has not shown the trial court should have granted him a new trial based on the state's questioning of one witness. The trial court did not err, abuse its discretion or subject the man to double jeopardy in allowing the state to present certain evidence, during the penalty phase of this trial, regarding a prior murder for which the man had been convicted. The trial court did not err in submitting certain jury instructions regarding statutory aggravating circumstances, mitigating circumstances and unanimity. Further, the death penalty in this case complies with all statutory proportionality requirements.

Facts: Vincent McFadden confronted Eva Addison in May 2003 and told her that she and her sisters needed to leave town. Shortly thereafter, the sisters arrived in that location. Before they could leave, McFadden returned, pointed a gun at Leslie Addison and pulled the trigger, but the gun did not fire. Before leaving the area, he said one of the women needed "to die tonight." Leslie walked away to call for a ride. McFadden returned, and Eva watched as he shot her sister several times. Leslie died of a gunshot wound to her head. Following a jury trial, McFadden was found guilty of first-degree murder and armed criminal action. During the penalty phase, the state submitted six statutory aggravating circumstances to the jury based on McFadden's previous serious assaultive convictions for first-degree murder, assault and armed criminal actions for the 2002 killing of Todd Franklin. The jury found beyond a reasonable doubt that McFadden had committed each of the aggravators as alleged and assessed a sentence of death. McFadden appeals, challenging the sentence but not the sufficiency of the evidence supporting the conviction.

AFFIRMED.

Court en banc holds: (1) The trial court did not plainly err or abuse its discretion in sustaining the state's motion to strike, for cause, three prospective jurors from the jury pool. These

prospective jurors stated they could consider both life imprisonment and the death penalty but also testified that, if selected as the jury foreperson, they could not sign a death verdict. The trial court was in the best position to consider whether these prospective jurors fully could consider both punishments, and the fact that they could not sign the death verdict amounts to an admission that they may be unwilling to follow the law by holding the state to a higher burden of proof.

(2) The trial court did not plainly err in declining to overrule the state's strikes of 20 other prospective jurors who stated that their religious beliefs prevented them from imposing the death penalty. Although the state cannot strike prospective jurors for cause based on their expression of a conscientious objection to the death penalty, the state can strike prospective jurors if their beliefs would prevent them from following the court's instructions in a death penalty case. Here, most of the 20 plainly stated they would not consider the death penalty, while others voiced equivocal objections to the death penalty and never said they would follow the court's instructions without reservation.

(3) There is no basis for finding that the court plainly erred in declining to declare a mistrial based on the service of a juror in this case who had served as a juror in a trial regarding previous criminal charges against McFadden. The trial court here clearly and specifically asked the prospective jurors whether any of them recognized McFadden. Although the man indicated in a written questionnaire he previously had served in the jury pool for a trial for assault and armed criminal action, he did not indicate that he knew or recognized McFadden. McFadden has not proven, however, that the juror intentionally failed to disclose the fact that he was a prospective juror in McFadden's prior trial. He argues it is unreasonable to presume the juror failed to recognize McFadden from being questioned during jury selection at McFadden's prior trial three years earlier; it is equally plausible to assume that the man's memory had faded. If he had no recollection of McFadden, then there was no intentional nondisclosure, and McFadden offers no evidence to the contrary. Furthermore, McFadden failed to prove he was prejudiced in any way so as to warrant a new trial based on unintentional nondisclosure.

(4) The trial court did not err in not declaring a mistrial based on the state's argument, during the guilt phase of the trial, that Eva Addison consistently had identified McFadden as her sister Leslie's killer. Eva testified about where she was hiding and her ability to see McFadden but did not testify about her prior statements. During cross-examination, the defense attempted to show her view of the shooting was obstructed. In this context, the prosecutor – on redirect examination – elicited Eva's testimony about her prior consistent statements to police in which she identified McFadden as the shooter. This was not improper bolstering. Prior consistent statements are admissible to rehabilitate the witness. The trial court did not abuse its discretion in overruling McFadden's objections to the references to Eva's prior consistent statements.

(5) The trial court did not err in admitting evidence and argument regarding a recorded jailhouse conversation between McFadden, Eva Addison and an inmate known as "Slim."

(a) As this Court found during the appeal from McFadden's trial for Franklin's murder, in which the same recording had been admitted into evidence, here Eva Addison's testimony about the recording provided an adequate foundation to admit it, and because the recording contained McFadden's admissions, it properly was admitted into evidence

as an exception to the rule generally prohibiting hearsay (an out-of-court statement offered for the truth of the matter asserted in the statement).

(b) The trial court did not err in not declaring a mistrial on its own motion because of references in the recording suggesting that McFadden had threatened witnesses. Evidence of other crimes or misconduct is admissible when it is part of the circumstances or sequence of events surrounding the charged offense. Here, McFadden previously was charged with witness tampering, and his reference in the recording was an integral part of his statement telling Eva to say she did not witness her sister's murder. In addition, it was not error for the prosecutor to reference, in his opening statement, that he intended to introduce into evidence this recorded conversation. The prosecutor had a good faith basis for concluding the recording would be admissible, and it was. Further, the prosecutor did not improperly reference Eva's testimony that McFadden told her to take his name out of her description of the events or a related statement on the recording. The state is entitled to argue reasonable inferences from the evidence.

(6) McFadden has not demonstrated that the trial court abused its discretion or plainly erred in not ordering a new trial based on the prosecutor's questioning of Eva Addison. While the prosecutor did ask her a number of leading questions (which generally are impermissible because they suggest the desired answer to the witness), the trial court found that she was a "rough witness," noting it was difficult for the prosecutor to question her; it also urged the prosecutor not to lead the witness but to ask her open-ended questions. McFadden has not shown he was prejudiced.

(7) The trial court did not err or abuse its discretion in allowing admission of certain other evidence.

(a) The court did not err in admitting the testimony of a man who lived near where Leslie Addison was killed that he heard an argument between a man and a woman and heard the man make threatening statements to the woman but that he could not identify the man who made the statements. Although hearsay generally is not admissible, the man's testimony fell within the permissible exception to hearsay for "verbal acts," which allows a court to admit a statement that tends to show motive or intent to undertake the act that is the subject of the litigation. Here, the man's testimony was relevant because he overheard a man making threatening statements to a woman right before and in the same area as where McFadden shot and killed Leslie.

(b) The trial court did not abuse its discretion in overruling McFadden's motion to compel disclosure of Eva Addison's school and medical records. He contended they would cast doubt on her credibility because they would contain information about whether her eyes had been tested. McFadden failed to demonstrate more than a mere possibility that the records might be helpful, especially as Eva was able to read a clock during the prior trial involving the Franklin murder, she read a car rental agreement introduced into evidence and there was no other indication she had any visual impairment. Further, the trial court did not plainly err in allowing the prosecutor to argue

that Eva had good eyesight. The state is permitted to argue reasonable inferences from the evidence.

(8) Arguments and other statements the state made during the trial do not warrant reversal.

(a) The trial court did not plainly err in declining to declare a mistrial on its own motion in response to certain arguments the prosecutor made during jury selection. McFadden offers no support for how or why the prosecutor's introduction as working for the county's elected prosecutor prejudiced the jury panel, and as to the prosecutor's statements regarding mitigating and aggravating circumstances, the instructions were correct, the jury is presumed to follow the instructions and there is no indication here that the jury did not.

(b) No error resulted from statements and arguments the prosecutor made during the guilt-phase closing arguments. The prosecutor made the permissible statement that McFadden's defense did not contradict the state's evidence. The trial court intervened and prevented any argument that included an improper comment about McFadden's decision not to testify. Other arguments during the guilt-phase closing arguments were supported by the evidence, were reasonable inferences from the evidence, were based on the physical condition of the courtroom in which the trial was conducted, were permissible rhetorical flourishes based on the evidence or were rebuttal to McFadden's arguments.

(c) As to statements the prosecutor made during the penalty-phase closing arguments, McFadden failed to preserve most of his claims, and none have merit. The trial court sustained McFadden's objection to one statement and granted McFadden's request to instruct the jury to disregard the statement. As to another, which improperly implied that mitigating circumstances such as mental capacity should be downplayed, the trial court sustained McFadden's objection and instructed the jury properly about how to consider mitigating and aggravating circumstances. The jury is presumed to follow the instructions, and McFadden alleges no facts to overcome this presumption. The prosecutor's statements about the statutory aggravators and the jury's agreement to be fair and impartial in considering punishment were correct statements of the law, victim impact evidence pertaining to the consequences of McFadden's prior murder of Franklin was admissible to support the state's arguments regarding the statutory aggravators, and the prosecutor's argument that McFadden's family members are good people was legitimate to support the state's position that there were no mitigating factors here. The prosecutor's assertion of his opinion about the imposition of the death penalty in McFadden's case was based on the evidence presented. The prosecutor's characterization of McFadden's conduct as "evil" was supported by the evidence. A prosecutor is allowed to argue the defendant does not deserve mercy. Other arguments were matters of common knowledge, were in permissible rebuttal to statements made by defense witnesses, were permissible "send a message" arguments, or, though emotional, were permissible to help the jury understand and appreciate evidence that is likely to cause an emotional response. In addition, the prosecutor's statement during the penalty-phase closing arguments that

McFadden had demonstrated no remorse was a reasonable inference from the evidence in the case and was not an improper comment about McFadden's decision not to testify. Further, the prosecutor did not engage in improper personalization because he did not suggest a personalized danger to the jurors or their families but rather asked the jurors to consider the effect of the crimes on the victim's family members.

(9) The record does not demonstrate that the trial court erred or abused its discretion or that McFadden was prejudiced from the state's presentation, during the penalty phase of the trial, of evidence of the circumstances of Franklin's murder. The state presented eight witnesses who testified about the Franklin case as well as photographs of the Franklin murder scene. During the penalty phase, the state is not limited to proving the fact of a prior conviction. Rather, Missouri law provides that – in a capital case – the character and history of the defendant, including prior crimes committed by that defendant and the circumstances of those crimes, are admissible as relevant to sentencing. Further, although the trial court permitted the introduction of substantial amounts of evidence detailing the Franklin murder, it exercised its discretion to limit that evidence by restricting the scope of cross-examination of one witness and limiting the number of photographs the state introduced.

(10) The state's presentation of McFadden's motive to kill Franklin in the prior crime was not in error and did not subject McFadden to double jeopardy. In the prior trial regarding the Franklin murder, the state presented evidence that McFadden's motive for killing Franklin was that Franklin was a witness in a prior prosecution. That the jury rejected this evidence as insufficient to establish one of the statutory aggravators in the previous case does not constitute an acquittal. As such, the state was not barred from presenting the same evidence for the jury's consideration during the penalty phase here.

(11) The trial court did not err in submitting a jury instruction as to serious assaultive convictions that listed the statutory aggravators in six separately numbered paragraphs. This Court repeatedly has rejected the argument that statutory aggravators must be submitted in one paragraph. It is permissible to list them separately.

(12) The trial court did not err in instructing the jury that it was required to make a factual determination that his prior convictions were "serious assaultive" convictions. McFadden raised the same argument in the appeal of his conviction for the Todd Franklin murder. This Court rejected that argument then and rejects it again because the determination of whether a prior offense is "serious assaultive" is a question of law for the court to decide.

(13) The trial court did not err in submitting the instructions, both based on the Missouri approved instructions, dealing with mitigating circumstances and unanimity. This Court repeatedly has rejected the argument that these instructions improperly shift the burden of proof from the state to the defendant.

(14) The death penalty in this case complies with all statutory proportionality requirements.

(a) McFadden's death sentence was not imposed under the influence of passion, prejudice or other factor apart from the evidence presented. There was sufficient evidence

supporting each of the jury's multiple findings of statutory aggravating circumstances. When compared with other factually similar cases in which the death penalty was submitted to the jury – including those resulting in a sentence of life imprisonment without the possibility of parole – the sentence assessed here is not disproportionate. This Court's review does not include consideration of cases in which the death penalty was not submitted as an option to the jury or cases in which the defendant pleaded guilty in exchange for a sentence of life in prison without parole.

(b) That approximately one-third of the prospective jurors in this case were removed for cause because they could not consider the death penalty does not prohibit imposition of the death penalty. The opinion of one-third of one jury pool in one county does not establish conclusively a community “evolving standard of decency” that is of any constitutional significance.

(c) McFadden did not offer statistical evidence that the jury selection procedure systematically excluded black jurors. Although a defendant has a constitutional right to the unbiased selection of a jury drawn from a fair cross-section of a community, a defendant has to show that the under-representation of other groups was due to a systematic exclusion in the selection process. Here, the fact that 17.8 percent of the prospective jurors in his case were black while 21.8 percent of the population of St. Louis County is black is insufficient to establish a prima facie case of systematic exclusion.

(d) As noted above in Paragraph 7, certain arguments and other statements by the state were not improper. They did not rise to the level of prosecutorial misconduct affecting imposition of the death penalty.