

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UMAR HASAN ABDULLA,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 188686

Ingham Circuit Court

LC No. 95-068673

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering, MCL 750.110; MSA 28.305, and of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He now appeals as of right, and we remand for further proceedings.

In the early morning of February 20, 1995, someone broke the window of the front door at a bait and tackle shop, and stole a cash register. An unidentified person called the 911 Center at 1:03 a.m. that morning to report that he saw the break-in. Responding to information received from the police dispatcher that a gray Audi was involved in the break-in, a police officer followed defendant's car a few hours later. After several officers removed defendant from the car, the officers found paper currency and coins inside the car, and a cash register drawer and a hammer in the trunk.

Defendant's alibi was that, at the time of the break-in, he was at an apartment with Otha Haywood, and that defendant had loaned his car to several individuals. Haywood was listed as an alibi witness on defendant's amended notice of alibi, and Haywood had been served with a subpoena while incarcerated at the Ingham County Jail on unrelated charges. Haywood was released from jail prior to defendant's trial date, and on the third day of trial (a Friday) defense counsel informed the trial court that Haywood had not appeared. Defense counsel requested that the court adjourn for the day at the close of the prosecution's proofs so that a search could be made for Haywood. The trial court agreed, adjourned the case until Monday, and issued a bench warrant for Haywood's arrest.

On Monday, defense counsel made a detailed record about his own attempts and the attempts of the Lansing Police Department to locate Haywood. Defense counsel then presented defendant's

case with two witnesses. The first witness, who lived with defendant's step-father, testified that defendant came to her home about 1:45 a.m. on February 20, 1995, and drove her to the store to buy beer. The second witness, defendant's wife, testified that a gray Audi was registered in her name, and that defendant had allowed the car to be rented.

After the prosecution's closing argument, and at some point during defense counsel's closing argument on Tuesday, the trial judge learned from her assistant that Haywood was present in the courtroom. Defense counsel, who apparently did not immediately realize that Haywood was present, completed his closing, and the court then instructed the jury. Defense counsel then noted that Haywood was in court, and asked that the proofs be re-opened to permit Haywood to testify. The trial court denied the request, noting that Haywood failed to appear on the first two dates he was to appear and that he failed to appear on time for the third date. The case then went to the jury, which found defendant guilty.

I

Defendant contends that the trial court's ruling denied him a fair trial and his Sixth Amendment right to compulsory process to secure the attendance of witnesses in his favor, because Haywood's testimony would have established defendant's alibi. In addition, Haywood would have been the only defense witness who was not related in some way to defendant. On the facts of this case, we believe that Haywood should have been permitted to testify and we remand to permit him the opportunity to do so.

We rely chiefly upon *People v Pullins*, 145 Mich App 414; 378 NW2d 502 (1985), where we found that a trial court abused its discretion in refusing to grant a continuance of trial for one day to permit an alibi witness to testify. "While the matter of a continuance is within the sound discretion of the trial judge, a defendant also has a right to call witnesses in his defense, and a constitutional right to compulsory process to obtain witnesses in his favor." *Id.*, at 417 (citations omitted.) As we noted in *Pullins*:

When the inconvenience of defendant's request (a continuance to the next day) is balanced against defendant's rights (to a fair trial and for compulsory process for witnesses in his favor), we can only conclude that the trial court abused its discretion. Potts [the alibi witness] would have been the only witness unrelated to defendant to testify for the defense. If Potts's testimony corroborated defendant's story, it may have established a reasonable doubt as to defendant's guilt. The interest of the state in complete discovery and a fair trial for the defendant outweighs the minor negative effect such a delay would have had on the trial process here. Potts's testimony was imperative to defendant's defense and could not be considered cumulative. We find defendant was denied his rights to a fair trial and to compulsory process. *Pullins*, 145 Mich App at 417-418.

Here, the trial court had already granted a continuance (on Friday), as requested by defense counsel, and the court had issued a bench warrant for Haywood. The court's error occurred on Tuesday -- by

failing to allow Haywood to testify when he arrived late (but prior to the rendition of a verdict). According to the notice of alibi, Haywood's testimony would not have been cumulative because testimony of the other two defense witnesses did not support defendant's alibi. Haywood was properly served with a subpoena and defendant was entitled to rely on the power of the subpoena and, in the event of Haywood's breach of his obligation to honor the subpoena, governmental assistance, both executive and judicial, in securing Haywood's presence at trial. Defendant's rights to a fair trial and compulsory process were violated by the trial court's refusal to allow Haywood to testify. We note that this analysis of the constitutional right of compulsory process as weighed against the inconvenience of reopening the proofs is consistent with the manner in which other courts have handled similar problems. See *Paoni v United States*, 281 F 801 (CA 3, 1922); *Johnson v Johnson*, 375 F Supp 872 (ED Mich, 1974); *Dickerson v Alabama*, 667 F2d 1364 (CA 5, 1982). We further note that some of the present difficulty could have been alleviated if the trial court *sua sponte*, or on motion of defense counsel, had allowed the defense to make an offer of proof, calling Haywood to the stand outside the presence of the jury to see what relevant and material evidence he might proffer. The prosecutor should also have taken steps to protect the record in some fashion.

However, on the record as it exists, we have no alternative but to remand this matter for a *Pearson*¹-type hearing at which Haywood may be examined and cross-examined to determine whether a viable alibi defense otherwise unavailable and not cumulative of other evidence can be presented. If so, a new trial shall be ordered by the trial court; if not, in the absence of other reversible error (see below), defendant's conviction is affirmed.

II

Defendant also contends that the trial court erred by permitting the prosecution to use a 911 tape about a breaking and entering which occurred two days prior to this incident and in which the caller identified the license plate number on the gray Audi at issue here. We find no abuse of discretion. The evidence was relevant to show that a gray car with license plate number HRG 465 was involved in both offenses. The probative value of the evidence was not outweighed by unfair prejudice because other evidence was presented to establish defendant's identity, and the jury was given a cautionary instruction. MRE 402, 403 and 404(b). *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Remanded with directions.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Kathleen Jansen

¹ *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979).