

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD GILBERT, JR.,
a/k/a REGGIE JONES,

Defendant-Appellant.

UNPUBLISHED
February 6, 1998

No. 195595
Recorder's Court
LC No. 95-001849

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of eight to fifteen years' imprisonment for the voluntary manslaughter conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions were the result of his second trial, as the first trial ended in a hung jury. Defendant was convicted of the shooting death of sixteen-year-old Tammy Remilong. Tammy was a friend of defendant's mother, Joyce Gilbert. At the time of her death, Tammy was assisting Joyce flee from the home of her estranged husband, Reginald Gilbert, Sr. Joyce and several friends broke into Reginald's home, while he was in church, in an attempt to retrieve Joyce's belongings. While Joyce was in the home looking for her clothes, she was warned that defendant and two other men were approaching, so she fled in Tammy's pickup truck. Tammy was driving the truck and Joyce was a passenger, when defendant allegedly drove along side of the truck, and fired several shots which struck and killed Tammy.

Defendant first argues that the trial court abused its discretion in refusing to admit into evidence a letter allegedly written by Joyce to defendant apologizing for telling lies about him. Joyce was declared unavailable to testify at the instant trial; therefore, her testimony from defendant's first trial was read into evidence. Defendant contends that, because a reading of Joyce's testimony did not capture

her incredible demeanor, the trial court should have admitted the letter as impeachment evidence. Defendant also argues that the trial court denied defendant his right to confront Joyce in refusing to admit the letter. We disagree.

Defendant impeached Joyce with the letter at defendant's first trial. The jury at the instant trial heard this testimony as well as a colloquy between Joyce and the trial court, where the court admonished Joyce for her uncooperative nature, and where the court appointed an attorney to represent Joyce because the court was going to hold her in contempt for her refusal to testify and "selective memory." The jury in the first trial did not hear this colloquy. Therefore, we conclude that the letter, which was otherwise hearsay evidence, was not necessary for further impeachment, and the trial court did not abuse its discretion in refusing to admit it for this purpose. MRE 801(c); MRE 802; MRE 613(b); *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993); *People v Hyland*, 212 Mich App 701, 707-708; 538 NW2d 465 (1995); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We also conclude that the trial court did not deny defendant his right to confront Joyce in refusing to admit the letter, where the impeachment testimony from the first trial was read to the instant jury, along with testimony of Joyce's uncooperative demeanor, and where the evidence was otherwise hearsay. See *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Next defendant argues that the trial court erred in finding that the prosecutor exercised due diligence in attempting to locate Joyce to testify at the instant trial. Defendant contends that, because the prosecution failed to check all of the local psychiatric facilities or take further measures in attempting to locate Joyce, it did not use reasonable, good faith efforts. We disagree.

A trial court's finding as to whether a party used due diligence to secure a declarant's presence at trial is a finding of fact that will not be set aside absent clear error. MCR 2.613(C); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Former testimony of a witness is admissible in a subsequent proceeding where the witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at the time. MRE 804(b)(1); *Id.* The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure the declarant's presence. MRE 804(a)(5); *Id.*

Here, testimony from the officer in charge of the case indicated that he repeatedly checked with known addresses, utility companies, jails, hospitals, friends, and the morgue in an attempt to procure Joyce for trial for the prosecution. Therefore, we conclude that reasonable, good faith efforts were made to secure Joyce's presence, and the trial court's finding regarding the prosecutor's due diligence was not clearly erroneous. *Briseno, supra* at 14. The prosecutor was not required to show that more stringent efforts may have procured Joyce for trial. *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs