STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON SPENCER LIBBY,

Defendant-Appellant.

UNPUBLISHED
March 6, 1998

No. 190087
Recorder's Court
LC No. 88-006972-FC

Before: Holbrook, Jr., P.J., and White and R.J. Danhof*, JJ.

PER CURIAM.

Following a second jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. The convictions arose from defendant's shooting of two men, one fatally. Defendant was sentenced to serve prison terms of twenty to forty years for the murder conviction and three to ten years for the assault conviction. He appeals as of right and we affirm.

Defendant first argues that he was denied a fair trial when the trial court ordered trial to commence in the absence of three res gestae witnesses and without instructing the jury regarding the missing witness instruction. We disagree. Defendant was granted a new trial after the prosecutor failed to produce three endorsed res gestae witnesses at his first trial. The prosecutor, however, did not endorse those witnesses for the second trial. Defendant concedes that the prosecutor is under a lesser burden regarding res gestae witnesses following the amendment of MCL 767.40a; MSA 28.980(1), see *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995), but argues nonetheless that the trial court should have given the missing witness instruction as a judicial sanction for the prosecution's failure to provide reasonable assistance in locating and serving the witnesses. CJI2d 5.12. The missing witness instruction provides for instructing jurors that the appearance of a missing witness "was the responsibility of the prosecution," and that they "may infer that this witness's testimony would have been unfavorable to the prosecution's case." The commentary to the instruction suggests that, in the CJI Committee's "best judgment," the instruction provides an available remedy where the trial court finds

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that the prosecution failed to provide reasonable assistance to the defense in locating and serving an identified witness. CJI2d 5.12, commentary, p 5-29.

Here, the trial court did not find that the prosecution had failed to provide reasonable assistance to the defense in locating and serving the three res gestae witnesses. Instead, following the testimony of the investigating officer regarding the unsuccessful efforts that had been made to locate the witnesses, the trial court ordered further specific lines of investigation. The investigator agreed to comply with these orders. Accordingly, given that the trial court did not expressly conclude that the prosecution had failed to provide reasonable assistance to the defense in locating and serving the witnesses, we find no error by the trial court in ruling that CJI2d 5.12 was inapplicable under these facts.[1]

Defendant next argues that the prosecutor failed to exercise due diligence to produce one of the victims of the assault, and that he was denied his right of confrontation when the trial court admitted the victim's testimony from defendant's first trial. We find no merit to these arguments. This Court will not overturn a trial court's determination of due diligence absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A finding is clearly erroneous if the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 334 (1986).

The prosecutor listed assault victim Joseph Hall as a witness he intended to call at the second trial. When efforts to locate Hall before trial were unsuccessful, the prosecutor sought to admit Hall's testimony from defendant's first trial. In clarifying the prosecution's duties under the amended version of MCL 767.40a; MSA 28.980(1), the Michigan Supreme Court recently noted that "[t]he prosecutor has a constitutional obligation to . . . exercise due diligence before using prior testimony of a missing witness." *Burwick, supra* at 290, n 12. "The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

According to testimony at the due diligence hearing, an officer executed a search warrant at Hall's girlfriend's house where Hall allegedly lived. The officer found some tax records and some phone bills in Hall's name. Hall's girlfriend was not cooperative, but indicated that she had not seen Hall in over a year and that the phone bill was in his name because she had had financial difficulties. A few days before trial, a former attorney for Hall indicated that Hall might be interested in having his outstanding warrants dismissed in exchange for his testimony. The prosecutor would not offer a deal. We agree with the trial court that Hall probably knew the police were looking for him and that he intentionally did not want to be found. On this record, we hold that the trial court properly concluded that the prosecution was duly diligent in attempting to secure Hall's presence at the retrial, and that Hall was "unavailable" pursuant to MRE 804(a)(5). See *People v Watkins*, 209 Mich App 1; 530 NW2d 111 (1995). Cf. *People v Dye*, 431 Mich 58, 68; 427 NW2d 501 (1988) (once the prosecution learned of the defendant's retrial date, its efforts to produce the res gestae witnesses were tardy and incomplete). Where a witness is found to be unavailable for trial, the witness' former testimony may be used in lieu of the witness' presence. MRE 804(b)(1). At defendant's first trial, Hall testified under oath and defendant had a full and fair opportunity to cross-examine him. Accordingly, we conclude that defendant's right of confrontation was not violated by the use of Hall's prior testimony.

In this context, defendant next argues that the prosecutor denied defendant a fair trial when he read verbatim a paragraph from Hall's prior testimony during his closing argument to the jury. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). A prosecutor is free to relate the facts adduced at trial to his theory of the case, and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). The testimony which the prosecutor quoted during his closing argument was properly a part of the evidence adduced at trial. We find no error in the prosecutor using the evidence in his closing argument.

Next, defendant argues that the trial court's decision, on the second day of trial, to excuse the prosecutor from producing the medical examiner who examined the deceased victim's body and allow the prosecutor to substitute another medical examiner in his place constituted an abuse of discretion. We disagree. A prosecutor may add or delete a witness from the witness list at any time upon leave of the court for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4). Contrary to defendant's argument, the prosecutor was not required to exercise due diligence in order to add or delete the medical examiner from the witness list. *Burwick, supra* at 291; *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). The prosecutor informed the court that the examiner who he originally intended to call was unavailable for trial because he was on sabbatical in Thailand. Defendant's objection that the substitute medical examiner would not be able to testify about whether the murder victim was possibly a drug addict was overruled by the trial court, which found the issue of the victim's possible drug use to be irrelevant to whether defendant committed murder. We find no abuse of discretion by the trial court in permitting the substitution.

Defendant next argues that the prosecutor failed to lay a proper foundation for admission of past recollection recorded evidence. Again, we disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Briseno, supra*, 211 Mich App 14. Defendant claims that the prosecutor committed this error twice, once with witness Kenney and once with witness Smith, who were both eyewitnesses to the crime. Our review of the record indicates that the prosecutor properly impeached Kenney with her prior inconsistent statement. MRE 613. Kenny initially testified that defendant did not say anything when he shot the victims. The prosecutor then impeached Kenney with her prior statement to the police in which she indicated that defendant said, "I hate Highway Men." After the impeachment, Kenney changed her trial testimony and indicated that defendant did say, "I hate Highway Men," after he shot the victims. The statement then became substantive evidence. The prosecutor's follow-up question regarding what tone of voice defendant used in making the statement was entirely proper.

With regard to Smith, the trial court did admit her prior statement to the police as substantive evidence. We conclude from our review of the record that the prosecutor did lay a proper foundation for admission of the statement as a past recollection recorded. Initially, the prosecutor attempted to impeach Smith with her prior inconsistent statement. Smith then indicated that she really could not

remember what defendant said at the time of the assault, so whatever she told the police immediately after it occurred was probably correct. The prosecutor then established that the incident was fresh in Smith's mind when she gave her statement to the police, that her statement was accurate, that Smith had a better memory of the incident at the time it happened than at the time of trial, and that Smith would adopt the police statement as her own for purposes of trial. This foundation satisfied the requirements of MRE 803(5), and Smith's prior police statement was correctly read into the record as a past recollection recorded.

Finally, defendant argues that his sentence of twenty to forty years for second-degree murder was disproportionate because he was fifty-five years of age at the time of sentencing. We disagree. Defendant's sentence is presumed proportionate because it is within the recommended guidelines range. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). This Court has found a sentence to be proportional that left the defendant ineligible for parole until his early nineties. *People v Weaver (After Remand)*, 192 Mich App 231, 235; 480 NW2d 607 (1991). Accord *People v Kelly*, 213 Mich App 8, 12; 539 NW2d 538 (1995). Moreover, while defendant's lack of a criminal record and intoxication at the time of the offense were relevant factors to be considered by the sentencing court, we find no abuse of discretion by the court in imposing a twenty-year minimum sentence.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof

[1] To the extent defendant challenges the court's implied finding that the prosecutor provided reasonable assistance, we conclude that the court's determination was not clearly erroneous.