STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY TORRES,

Defendant-Appellant.

UNPUBLISHED
September 22, 1998

No. 199855
Recorder's Court
LC No. 95-009518

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was tried on charges of first-degree murder, MCL 750.316; MSA 28.548, and felony-firearm. His first trial resulted in a mistrial, because the jury was deadlocked. The instant convictions are the result of a retrial on the same charges. Defendant was sentenced to ten to twenty years' imprisonment for the second-degree murder conviction, and to two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant first argues that he was denied his constitutional right to confrontation[1] when the trial court allowed the testimony of two prosecution witnesses from defendant's first trial to be read into the record during the prosecution's case in the retrial. Specifically, defendant contends the trial court erred in finding due diligence in the prosecution's attempt to locate the missing witnesses. We disagree. Because a finding of due diligence is a finding of fact, this Court will not set it aside absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

A defendant is not denied his constitutional right to confrontation when a transcript of a witness' prior testimony is read into the record upon a showing that (1) the witness is unavailable and (2) the prior testimony bears sufficient indicia of reliability. See *Ohio v Roberts*, 448 US 56, 65-66; 199 S Ct 2531; 65 L Ed 2d 597 (1980); *People v Dye*, 431 Mich 58, 64-65 (Levin, J), 93 (Brickley, J); 427 NW2d 501 (1988). To establish unavailability, the proponent must establish that he has made a diligent, good faith effort to obtain the witness' presence at trial. *Dye*, *supra* at 66. Whether the

prosecution has made such an effort depends on the particular facts of the case. *Id.* at 67. Due diligence is a question of reasonableness and does not turn on whether the prosecution would have been able to produce the witness through the use of more stringent measures. *Briseno*, *supra* at 14.

In this case, the uncontroverted testimony of Police Investigator Shari Oliver at the mid-trial due-diligence hearing indicated that the search for the two witnesses in question began several days before the trial, and that the efforts made to locate them included visits to last known addresses, contact with relatives, and telephone calls to various hospitals, jails, and other agencies. Accordingly, the trial court's finding that the prosecution had exercised due diligence in its attempt to locate the witnesses was not clearly erroneous. Cf. *Briseno*, *supra* at 13-16 (explaining that trial court did not err in finding due diligence where police reasonably explored every lead that came up in the investigation); *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992) (explaining that trial court erred in finding due diligence where prosecution made no effort to locate witness until the first day of trial). Moreover, because the record indicates that the witnesses were thoroughly cross-examined by defense counsel during defendant's first trial, their testimony, which was admitted pursuant to the former-testimony exception to the hearsay rule, bore sufficient indicia of reliability. See *Roberts*, *supra* at 66, 72-73; *People v Conner*, 182 Mich App 674, 683-684; 452 NW2d 877 (1990). Therefore, defendant is not entitled to relief on this issue.

Next, defendant argues that he was denied the effective assistance of counsel when his trial counsel stipulated to have the testimony of three defense witnesses from the first trial read into the record during defendant's case in the retrial, when they could have been located for the retrial. We disagree. To properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because defendant failed to do so in this case, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

A criminal defendant attempting to prove that trial counsel was ineffective bears a heavy burden. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

In this case, defendant's claim of ineffective assistance of counsel fails on both prongs of the *Strickland* test. First, considering the fact that defendant's first trial resulted in a deadlocked jury, defendant failed to overcome the presumption that use of precisely the same testimony in the retrial

constituted sound trial strategy. Second, defendant has failed to show that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. Consequently, defendant is not entitled to relief on this issue.

Finally, defendant argues that the trial court abused its discretion when it allowed the admission of "irrelevant and prejudicial" evidence regarding defendant's alleged gang membership. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Generally, all relevant evidence is admissible. However, relevant evidence may be excluded in situations where the danger of unfair prejudice substantially outweighs the probative value of the evidence. MRE 402 & 403; *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). In this case, the testimony regarding defendant's gang affiliation was relevant to show (1) why the prosecution's main witness, Tekiyo Brown, did not come forward immediately and identify defendant as the shooter, and (2) corroboration between the prosecution witnesses. Accordingly, we hold that the trial court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] See US Const, Ams VI & XIV; Const 1963, art 1, § 20.