STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY ARTHUR,

Defendant-Appellant.

UNPUBLISHED
April 14, 2000

No. 210005
Recorder's Court
LC No. 97-501605

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317; MSA 28.549.[1] He was sentenced to life imprisonment and appeals as of right. We affirm.

On March 6, 1997, Saudah Favors was residing in a Highland Park home with her relative, Stephanie Cheeks, and four of Cheeks' five children. At approximately 1:30 a.m., Favors awoke to the sound of Stephanie screaming. Favors attempted to enter Stephanie's bedroom, but the door was pushed closed. Favors heard a man say "[i]f she come in I'm going to kill her." Favors went to the children to try and calm them down, then returned to her room. Back in her room, Favors heard the man tell the twins, Ramon and Demetrius, to "go in the room and lay down." Favors heard "banging and hitting" as Stephanie continued to scream for Favors. She also heard Stephanie say "Charles, stop." Favors heard the man leave the home, but did not see him. Favors locked the door and entered Stephanie's bedroom where she lay on the floor in a puddle of blood. Favors tried to pull the telephone cord only to learn that it had been wrapped around Stephanie's neck. A steak knife was discovered under Stephanie's arm, and it was later determined that she had been stabbed twenty-two times, including one four-inch wide "big slicing" on the neck, fourteen stab wounds to the chest, three stab wounds to the back, three to the left forearm, and one to the left upper arm. Favors left the home and ran to the home of her guardian, Erma Scott, to call 911. When the two arrived back at the home, police were present on the scene. Favors was not allowed to re-enter the home, and the children were brought out by police. Prior to leaving the scene, Scott asked Ramon who had done this to Stephanie. He responded that "Greg" had pushed his mother into the room.

Defendant, Stephanie's former neighbor, awoke later in the morning on March 6, 1997. He told friends and relatives that he had "dreamed" that he had killed his "friend Stephanie." However, based on the cuts on his hands, defendant stated that it "must not have been a dream." Defendant also recalled taking off his bloody clothes and placing them in a dumpster behind the Bargain Basket Supermarket. Defendant directed relatives to the home in Highland Park where Stephanie lived, but relatives found that no one was home. Defendant was taken to Detroit Receiving Hospital where he again gave details about his "dream." Defendant was taken into police custody and once again repeated the circumstances surrounding his "dream." Defendant also told police that he had walked to Stephanie's home where they talked and got into a shoving match. Officers were able to recover clothing stained with Stephanie's blood from the dumpster behind the supermarket.

Defendant first argues that the trial court erred in admitting the hearsay statement by Ramon that identified "Greg" as the man who pushed his mother into the room. We disagree. The decision regarding admission of evidence rests within the trial court's discretion and will only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998). Furthermore, close questions arising from the trial court's discretionary evidentiary ruling should not be reversed simply because the reviewing court would have ruled differently. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Ordinarily, a decision regarding a close evidentiary question cannot be an abuse of discretion. *Id.*

In the present case, the trial court admitted the statement pursuant to MRE 803(2) as an "excited utterance." MRE 803(2) allows for the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception "allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *Smith, supra* at 550, quoting 5 Weinstein, Evidence (2d ed), § 803.03[1], pp 803-819. A statement is admissible under MRE 803(2) if there was (1) a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event. *Smith, supra* at 550.

Defendant contends that Ramon's statement was inadmissible under the excited utterance exception because there was no evidence, other than the hearsay statement itself, that Ramon was in a position to observe the startling event. That is, the prosecution cannot "bootstrap" by using the statement itself to prove that Ramon observed the startling event. In *People v Henrickson*, 459 Mich 229, 237-238; 586 NW2d 906 (1998) (Opinions of Kelly, J. and Brickley, J.), the Supreme Court held that corroboration of a hearsay statement admitted under the present sense impression or excited utterance exception should be required. The sufficiency of the corroboration depends on the particular circumstances of each case. *Id.* Under the facts of this case, ample evidence was presented to establish, independent of Ramon's statement, that the murder of his mother took place. Favors testified that she awoke in the middle of the night when she heard Stephanie screaming. Favors tried to enter the

room to render assistance, but the door was pushed closed. Favors could hear "banging and hitting," and the children were crying. Favors heard the perpetrator instruct the twins, Ramon and Demetrius, to go in the room and lay down. When police arrived on the scene in response to the 911 call, Ramon was present in the home. Based on this evidence, it appeared that Ramon had the opportunity to personally observe the matter of which he spoke. *People v DeWitt*, 173 Mich App 261, 267; 433 NW2d 325 (1988) citing *People v Kent*, 157 Mich App 780, 788; 404 NW2d 668 (1987). Because we hold that the trial court did not abuse its discretion in admitting Ramon's statement pursuant to MRE 803(2), we need not decide whether the statement was also admissible under MRE 803(24).

Defendant next argues that the trial court erred in concluding that the prosecutor had exercised due diligence in its efforts to locate witness Bradford Mallory and in admitting Mallory's testimony from the preliminary examination at trial. We disagree. The trial court's determination regarding due diligence will not be disturbed on appeal unless a clear abuse of discretion is shown. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The Sixth Amendment of the United States Constitution and § 20 of article 1 of the Michigan Constitution of 1963 grant an accused the right "to be confronted with the witnesses against him."[2] The purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial. *Bean, supra* at 682; *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988). The right of confrontation is an important right because it enables the trier of fact to judge the witnesses' demeanors. *Bean, supra* at 682; *Dye, supra* at 64.

When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause requires a showing that the declarant is unavailable, as well as that the declarant's statement bears satisfactory indicia of reliability. *People v Meredith*, 459 Mich 62, 67-68; 586 NW2d 538 (1998). In the instant case, the prosecution contended that Mallory was unavailable, and that his preliminary examination testimony should be admitted as evidence pursuant to MRE 804(b)(1) which provides for admissibility, when the declarant is unavailable, of:

> [t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The Confrontation Clause is not violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution exercised due diligence to produce the absent witness.[3] *Bean, supra* at 682-683. Whether the prosecution made a diligent, good-faith effort[4] to produce a missing witness is an evaluation that depends on the particular facts and circumstances of each case. *Id.* at 684. The test is one of reasonableness, and the focus is whether diligent good faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Id.*

In *People v Briseno*, 211 Mich App 11, 12; 535 NW2d 559 (1995), a drug courier, Ernesto Gonzalez, was caught following a traffic stop with marijuana. Gonzalez, acting in cooperation with law enforcement officers, called Tim Miller to notify him of the delivery of marijuana. Gonzalez and Miller

made arrangements to store the vehicle that had the marijuana concealed in a special bumper. The defendant was the third man involved in the drug conspiracy. Following his conviction for conspiracy to deliver marijuana, the defendant asserted that his right to confrontation was violated where the prosecutor failed to make diligent efforts to secure the production of Gonzalez as a witness at trial. *Id.* at 14.

Police testified regarding the efforts to locate Gonzalez. A personal visit was made to the last known address. There, police spoke to Gonzalez' mother. She told them that she had not seen her son since the start of the trial. While Gonzalez had told his mother that he was going to California, he had not left a telephone number or address. A new address could not be located. Additionally, there was no indication that Gonzalez had received a California driver's license. While Gonzalez had left a telephone number with authorities and assured them that he could be reached, attempts to contact him at that number were fruitless. Gonzalez had also assured the court that he would remain in contact with his attorney, but Gonzalez failed to do so. In response, the defendant gave numerous examples of possible methods of locating Gonzalez. However, this Court held that the trial court's finding that the prosecution had exercised due diligence was not clearly erroneous and admission of the preliminary examination testimony at trial was proper. *Id.* at 15-16.[5] Furthermore, we held that authorities were not required to exhaust all avenues for locating a witness, but had a duty only to exercise a reasonable, good-faith effort in locating him. *Id.* at 16.

The present case is factually similar to *Briseno*. Here, Mallory was personally served with the subpoena requiring his presence at trial. Mallory indicated to police that he would appear and that he only required a telephone call. Prior to trial, the prosecutor tried to telephone Mallory, but was unable to reach him. The prosecutor, coupled with police assistance, attempted to call Mallory twenty times since trial began on November 5, 1997. When it was apparent that Mallory could not be reached, a bench warrant was issued for his arrest on November 10, 1997. On November 10, 1997, police officers were sent to Mallory's last known address, but did not get a response. On November 11, 1997, a court holiday, the prosecutor personally went to Mallory's address and observed a vehicle believed to be Mallory's. He reported his findings to police. Police arrived on the scene and were able to make contact with Paul Johnson, who was in the house. While Johnson denied officers entry into the home, he reported that Mallory was out of town with his son. Based on these facts, we cannot conclude that the trial court abused its discretion in admitting the preliminary examination testimony of Mallory at trial. *Briseno*, *supra*.

We note that decisions by our Supreme Court have reversed convictions based on the prosecution's failure to exercise due diligence. However, those cases have involved disparate facts. In *Bean, supra* at 685-686, police attempted to locate Martex Pryor, a *res gestae* witness, by placing unsuccessful phone calls. Ultimately, Pryor's relative, Carolyn Brown, provided police the name of Pryor's mother and reported that he had moved with his mother to Washington, D.C. for government employment. The police did not attempt to confirm this information with Washington, D.C. authorities and ended their local search after being told of the move.

Furthermore, in *Dye, supra* at 62-63, three witnesses, fellow members of a motorcycle club, provided the only evidence that the defendant had murdered the victims. Although it was alleged that

the defendant was the killer of the victims, the three witnesses helped the defendant cleanup the clubhouse after the killings. The three witnesses testified under a limited grant of immunity, and all three left the state after the killings. The witnesses were difficult to produce for the first trial because each had gone into hiding. While awaiting the first trial, they were in protective custody for fear of reprisal from other "bikers." The threats continued after their release from protective custody. Furthermore, the witnesses may have feared prosecution because they were only given limited immunity although all three were admitted accomplices after the fact to the murders. *Id.* at 67.

In *Dye*, a mistrial was declared on March 17, 1983. On May 13, 1983, the court set the defendant's retrial for August 22, 1983. As of May 13, the prosecution had not made any efforts to contact the witnesses. No efforts were undertaken although the prosecution knew that the witnesses intended on leaving the state and had incentives to go into hiding. *Id.* at 67-68. Review of our Supreme Court authority reveals that it addressed res gestae witnesses who had incentives to avoid testifying at trial in order to elude repercussions for their testimony.

Unlike the above cited cases, here, Mallory was not an eyewitness to Stephanie's murder. Rather, he was present *with other members of defendant's family when defendant began to recall details of his "dream."* There was no indication that Mallory posed a flight risk. There is no indication that his testimony at the preliminary examination was compelled. He acknowledged personal service and expressed a willingness to testify when notified by telephone. There was no indication that the prosecutor needed to maintain contact with Mallory between the time of the preliminary examination on April 29, 1997, and the commencement of trial on November 5, 1997. Accordingly, we cannot conclude that the trial court abused its discretion in allowing the use of Mallory's preliminary examination testimony. In any event, we note that the vast majority of Mallory's preliminary examination testimony was cumulative to the testimony provided by other witnesses. Therefore, any arguable error was harmless beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993).

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] Defendant was charged with one count of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a) and one count of first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b). The trial court granted the prosecution's motion to dismiss the felony-murder count prior to trial. The jury convicted defendant of the lesser offense of second-degree murder.

[2] The Sixth Amendment applies to the states through the Fourteenth Amendment. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

[3] Because MRE 804(b)(1) is a "firmly rooted hearsay exception," the reliability requirement with respect to preliminary examination testimony is satisfied "without more." *Meredith, supra* at 69-71; *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999).

[4] Michigan courts have interchangeably used the terms "due diligence" and "good faith" in this context, but the difference is a matter of semantics and either form may be used. *Bean, supra* at 682-683 n 11.

[5] In *Briseno, supra*, we held that a finding of due diligence is a finding of fact such that it will not be set aside absent clear error. *Briseno, supra* at 14. However, the court also noted that the ultimate decision to admit evidence was reviewed for an abuse of discretion. *Id.* In the present case, the trial court did not make express findings regarding the credibility of witnesses. Furthermore, the due diligence "hearing" was limited to sworn testimony from Detective Howard regarding fruitless attempts by police to contact Mallory. The remaining information regarding due diligence came from the prosecutor who was not duly sworn prior to making the statements. Defense counsel did not object to the manner in which the due diligence "hearing" was conducted and does not take issue with the credibility or truthfulness of the statements made in support of attempted contact. Rather, defendant's argument is limited to whether the actions taken were sufficient to meet the due diligence standard.