

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATRINA ANNETTE MABIN,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 217564

Oakland Circuit Court

LC No. 97-155340-FH

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of felonious assault, MCL 750.82; MSA 28.277, and the trial court sentenced her to eighteen months' probation, with the first six months on electronic tether. Defendant appeals as of right. We affirm.

Defendant first contends that her constitutional right of confrontation was violated because the trial court admitted into evidence the victim's preliminary examination testimony where the prosecutor failed to show a good-faith and diligent effort to locate the victim for trial. This Court will not set aside a trial court's finding regarding due diligence absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). "Because the trial court has the discretion to admit evidence, we review its ruling on admissibility for an abuse of discretion." *Id.*

If a declarant is unavailable as a witness, testimony given at another hearing of the same or a different proceeding is admissible if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination. MRE 804(b)(1). A declarant is unavailable if she is absent from the hearing and the proponent of her testimony has been unable to procure her attendance by process or other reasonable means and, in a criminal case, due diligence is shown. MRE 804(a)(5). The admission of prior testimony is consistent with the constitutional guarantee of the right of confrontation if the requirements of MRE 804 are met. *People v Conner*, 182 Mich App 674, 680-681, 684; 452 NW2d 877 (1990). "The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial." *Briseno, supra*. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to

procure the testimony, not whether more stringent efforts would have produced it.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

In the present case, the trial court heard testimony from the officer in charge regarding his efforts to locate the victim for trial. It then put the case over for the weekend to give the officer additional time to locate the victim. The officer reported that his efforts were fruitless. Having reviewed the record, we find that the trial court’s determination that due diligence was shown is not clearly erroneous. The trial court did not abuse its discretion when it admitted the victim’s former testimony into evidence. *Briseno, supra*.

Defendant next contends that the prosecutor improperly elicited and commented upon testimony that defendant exercised her right to remain silent. This is a constitutional issue that we review de novo. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

During cross-examination, defense counsel elicited testimony from a police officer that defendant refused to make a statement at the scene. It was only after defense counsel elicited this testimony that the prosecutor elicited the same testimony on redirect examination. Because defendant created the error, she has waived appellate review of the issue. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Further, defendant has not shown that she maintained silence by invoking her Fifth Amendment privilege or after being advised of her *Miranda*¹ rights. Considered in this context, and observing that the prosecutor did not comment on defendant’s post-arrest silence in her closing argument, we conclude that defendant has failed to establish a violation of her rights or a right to relief. *People v Dixon*, 217 Mich App 400, 405-406; 552 NW2d 663 (1996); *People v Schollaert*, 194 Mich App 158, 165-167; 486 NW2d 312 (1992).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).