STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM PHELPS,

Defendant-Appellee.

UNPUBLISHED
February 1, 2002

No. 234784
Wayne Circuit Court
LC No. 01-000520

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit great bodily harm less than murder, MCL 750.84. The prosecutor failed to produce the victim at trial, and after a due diligence hearing, the court ruled that the victim's prior recorded testimony from the preliminary examination was inadmissible and entered an order of dismissal. The prosecution appeals as of right. We affirm.

The prosecution's only issue is that the trial court abused its discretion when it refused to admit the victim's preliminary examination testimony at trial and dismissed the charges against defendant. We disagree. We review a trial court's determination whether a witness is unavailable for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). The trial court's factual finding underlying its due diligence decision will not be reversed unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A factual finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986).

The prosecution contends that Cecilia Barkley, the alleged victim, was unavailable, and that her preliminary examination testimony should have been found admissible. Under MRE 804(b)(1), the prosecution may present at trial the transcribed testimony of a witness from the preliminary examination if the witness is "unavailable," as defined by MRE 804(a)(5). MRE 804(a)(5) includes situations in which the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or

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

other reasonable means, and in a criminal case, due diligence is shown. Thus, the preliminary examination testimony can be used as substantive evidence at trial only if the prosecution exercised due diligence to produce the absent witness. *Bean, supra* at 682-683. Whether the prosecution demonstrated a good-faith, diligent effort depends on the facts and circumstances of each case. *Bean, supra* at 684. The test is one of reasonableness, not whether more stringent efforts would have produced the testimony. *Id*.

In *Bean*, our Supreme Court concluded that the steps taken by the police did not constitute due diligence because, although they went several times to the witness's last known address, the police did not attempt to follow up on a potential Detroit-area address when they had been told he moved to Washington, D.C. *Id*. at 689. The police simply tried the same unsuccessful sources repeatedly and made no effort to extend the search to the witness's mother or grandmother once they learned of the move.

In the present case, there were indications that Barkley would be difficult to find for trial from the very beginning. At the preliminary examination, Barkley gave her address as defendant's. She was ordered to leave defendant's residence, and the court requested that someone inquire about her plans for a new address. Douglas Potts, a detective with the Highland Park police and the officer in charge of the case, was present and responded on the record that Barkley was free to go despite this obvious indicator that the prosecutor needed to maintain contact with Barkley between the time of the preliminary examination and the commencement of trial. Potts testified that, after the alleged assault, Barkley became "a very transient person . . . [who] doesn't seem to keep any permanent address." Potts testified that he did speak to her when she called him and he thought she knew about the trial date; however, there is no indication in the record of whether he attempted to, or was able to, ascertain Barkley's address. The last time Potts spoke to Barkley was about 1½ months prior to the trial date. Potts made other attempts after that to contact her to be assured she would attend the trial. Potts checked the Wayne, Macomb, and Oakland County jails and could not find Barkley. He also called the utilities, specifically MichCon, Detroit Edison, and Ameritech, but found no leads on Barkley's whereabouts. Potts contacted the Social Security Office. Social Security informed Potts that Barkley did not receive SSI at that time, and that she received her last check in 1998. The address that they had on file from 1998 for Barkley was the Drop Door Shelter. Potts stated that Barkley was not there.

Potts was somehow aware of the existence of Barkley's grandmother and her phone number. However, the earliest contact Potts made with Barkley's grandmother that is indicated in the record was sometime after April 27, 2001, only six days before the beginning of the trial on May 2, 2001. Barkley's grandmother informed Potts that Barkley had been in Henry Ford Hospital and had been recently discharged. Potts contacted Henry Ford Hospital and learned that Barkley was discharged on April 27, 2001, and that the address Barkley used at the hospital was defendant's address. After learning that Barkley was still listing defendant's address as her own, Potts called defendant. Over the telephone, defendant denied that Barkley was residing with him. Despite the fact that defendant would benefit if Barkley could not be found for trial, Potts never went to the address. See *Bean, supra* at 685-688. Potts never physically checked to see if Barkley was there, never watched the area to see if she was entering and exiting the residence, and never asked neighbors if they had seen her around or had information on Barkley's whereabouts. *Id*.

This Court is mindful that 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.* at 684. However, the efforts in the instant case do not even reach those in *Bean*, *supra*, found insufficient to meet the requirement of due diligence. Accordingly, we cannot conclude that the trial court abused its discretion in disallowing the use of Barkley's preliminary examination testimony. *Id*. Furthermore, while it may be true that the trial court was bothered by the fact that it believed Barkley was shirking her responsibility to show up for trial, and possibly hid from the police to avoid service, the court made its determination based on the efforts of the prosecution, and did not err.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Janet T. Neff
/s/ Barbara B. MacKenzie