STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 246334 Wayne Circuit Court
ERIC M. STEWART, Defendant-Appellant.	LC No. 01-007870-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to consecutive sentences of 336 to 600 months' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that certain eyewitness testimony should not have been presented to the jury. The witness testified at a preliminary examination but refused to testify at trial. Defendant conceded, for the purpose of the former testimony exception to the hearsay rule, MRE 804(b)(1), that the witness was unavailable and that there had been sufficient cross-examination at the preliminary examination. However, the witness's subsequent refusal to testify included some suggestion that his original testimony might have been perjurious. Therefore, defendant argues, the testimony was unreliable and its admission violated his Confrontation Clause rights.

In *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court significantly altered the rule regarding admission of prior testimony by an unavailable witness. Before *Crawford*, the Court had held in *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), abrogated by *Crawford*, *supra*, that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

Crawford rejected the notion that a court should examine whether the prior testimony bore sufficient indicia of reliability. "Where testimonial statements are at issue," the *Crawford* Court observed, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford, supra*, 124 S Ct 1370. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* In the instant case, the witness's prior testimony was subject to the "crucible of cross-examination." Given the witness's unavailability, the rule of *Crawford* is satisfied. Therefore, we see no error in the admission of the prior testimony at trial.

Defendant next argues that he was entitled to have an adverse-witness instruction given regarding a witness the prosecution had endorsed but failed to produce at trial. This witness had allegedly failed to pick defendant out of a lineup. If a prosecutor endorses a witness under MCL 767.40a(3), the prosecutor must exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If the prosecutor fails to produce that witness and the trial court finds that the prosecutor did not exercise due diligence, an adverse-inference instruction should be read to the jury. *Id*. at 388-389. Due diligence requires an attempt to do everything reasonable to secure the witness, not everything possible. *Id*. at 391.

At the due diligence hearing, the trial court noted that it would have preferred that "another effort" had been made to locate the witness. Nonetheless, it denied defendant's request for the instruction.

This Court reviews "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *Eccles, supra*, 260 Mich App at 389. An abuse of discretion in a criminal case "occurs when the lower court's decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *People v Yost*, 468 Mich 122, 126-127; 659 NW2d 604 (2003), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The lower court record establishes that the prosecution did pursue leads in trying to secure the witness's attendance at trial. See *Muilenberg v The Upjohn Co*, 169 Mich App 636, 643-644; 426 NW2d 767 (1988). There is no evidence that the prosecution waited too long before attempting to locate the witness. See *People v Dye*, 431 Mich 58, 67-70; 427 NW2d 501 (1988). Further, despite the lack of evidence that the lineup had actually taken place, the prosecution stipulated that it did and that the missing witness had failed to identify defendant. Under these circumstances, we conclude that there was no error requiring reversal.

Defendant next argues that the prosecutor engaged in several instances of misconduct, one of which defendant objected to, the remainder of which defendant did not. The objected-to remark is preserved for appeal, and is reviewed de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Appellate review of the alleged prosecutorial misconduct to which defendant did not object is for plain error affecting substantial rights. *Id*.

Defendant argues that the prosecutor made an improper "civic duty" argument and injected issues broader than the guilt or innocence of defendant when the prosecutor referred to

the killing as "another shooting in Detroit" that would probably not be prominently featured in the media. This argument is unpreserved. In context, it is clear that the prosecutor was not asking the jury to do its civic duty to stem the tide of crime in the city. Rather, the prosecutor was asking the jury to take the case and its responsibility seriously despite the fact that the case might be considered relatively insignificant compared to crime that is prominently reported.

Defendant also argues that the prosecutor improperly vouched for his case by stating that he wanted the missing witnesses present in court and that the prosecution had done all it could to bring them in. This argument is also unpreserved. Defendant argues that the prosecutor implied that the missing witnesses would have presented more evidence against defendant. However, the prosecutor was fairly entitled to respond to defendant's arguments that the prosecution was attempting to "sweep the case under the carpet" and that the prosecution did not want the witnesses present. See *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003).

Thus, with respect to the unpreserved errors, we conclude that defendant has failed to establish error, plain or otherwise. Further, any potential errors were cured by the court's instruction to the jury that it should decide the case based on the evidence presented and that counsels' arguments are not evidence. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001); *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant also argues that the prosecutor impermissibly shifted the burden of proof to defendant by stating that no facts disproved the eyewitness's preliminary examination testimony. This argument was properly preserved. A prosecutor does not shift the burden of proof by pointing out weaknesses in a defendant's case, even if the prosecutor notes that certain evidence is "uncontroverted" or "uncontested." *People v Fields*, 450 Mich 94, 112, 115; 538 NW2d 356 (1995). Further, the prosecution's statement was a fair response to defendant's assertion in closing argument that the eyewitness's testimony contained lies and was unworthy of belief. *Jones, supra*. In any event, as with defendant's unpreserved assertions of misconduct, any potential error was cured by the court's jury instructions. *Thomas, supra*.

Finally, defendant argues that he was denied effective assistance of counsel because counsel did not move to present to the jury the eyewitness's supplemental testimony, in a colloquy that took place at trial, outside the presence of the jury, in which the eyewitness stated that he might have lied in his preliminary examination testimony. Because defendant failed to move for a new trial or an evidentiary hearing, review of this issue is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id*. A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below an objectively reasonable standard and that if counsel had not made those errors there is a reasonable probability that the outcome would have been different. *Ackerman, supra* at 455. Defendant has a heavy burden of disproving the presumption that assistance of counsel was effective. *LeBlanc, supra* at 578.

Defendant's claim is not that trial counsel's defense strategy was incompetent, but rather that counsel failed to *execute* that strategy in a competent manner. Specifically, counsel's strategy was to discredit Ortiz's testimony, on which the prosecution heavily relied. Defendant

admits that trial counsel attempted to exclude Ortiz's testimony altogether, but argues that, when the trial court ruled it admissible, counsel was ineffective in failing to introduce the separate-record colloquy that took place at trial.

Although defendant's trial counsel did not explicitly ask the court to read the colloquy with Ortiz to the jury, counsel did argue that the jury should know if threats or inducements were given to the witness, complained that the jury would not hear the witness testify that part of his prior testimony might be untrue, pointed out that the prosecution is required to afford all testimony of its witnesses, and concluded that "if the transcripts are read alone, this jury will never know that this guy was given inducements, promises, threats. They will never know that he said to the world as [sic that] part of my exam transcript is false." Counsel did not, however, cite MRE 806, which is entitled Attacking and Supporting Credibility of Declarant, and argue that the colloquy was admissible to impeach Ortiz's credibility. The trial court stated, regarding Ortiz's statements at trial:

> [T]his Court had the benefit of listening to the testimony of this witness yesterday and the Court was able to judge his demeanor.
>
> And the Court found that his statements were incredible. The Court does recognize that he literally used every excuse imaginable not to testify.
>
> And the Court finds that his testimony, that brief testimony, was just so unreliable that it's unworthy of belief. The Court believes that the transcript can properly be used under rule 804.

We conclude under these circumstances that, presuming trial counsel's failure to make an explicit motion to admit the colloquy was objectively unreasonable, defendant has failed to "show that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

The colloquy with Ortiz at trial (September 17, 2002) concerned alleged threats and promises, and whether he was told to lie:

> THE WITNESS: Um, prosecutor at the beginning made me a promise and then threatened me at the end. See this wasn't by this prosecuting attorney but I've been messed with since the year 2000 over this case.
>
> And I've been lied to and threatened over this case.
>
> * * *
>
> In District Court where I was made a promise and lied to. Then I made it to Circuit Court where I was threaten [sic] to give more time.
>
> So I'm at the point where they keep flopping me anyway I'm doing time and I'll run with it. But you're not going to scared [sic] me that's what I'm trying to say.

I've been licked up for three and a half years I'm not worried about it no more that's what I'm trying to say.

* * *

[THE PROSECUTOR]:

Q: Mr. Ortiz, do you remember being brought to Court to testify on July 11th, 2001 at the District Court before Judge Randon?

A: Was this the second time around I went to Court?[1]

Q: Yes.

A: Yeah, I think I do.

Q: And at that time rather than testify you just held up five fingers, correct?

A: Yes.

Q: And in conversation you told the Court that there were promises made to you by the Prosecutor's office that were not kept, correct?

A: Yes, sir.

Q: Okay.

And that there were - -

A: Threats made too.

Q: - - and after promises were not kept threats were made, correct?

A: Yes.

Q: And that you didn't want to testify because you believe promises had been made and broken and that threats had been made, correct?

A: Yes.

BY [DEFENSE COUNSEL]

[1] Ortiz testified at the first preliminary exam, where certain other witnesses were not available. A second preliminary exam was held, and at that exam Ortiz first refused to testify, apparently on the basis that promises had been made that had not been kept.

Q: Mr. Ortiz, in addition to those fears and concerns is there some testimony that if you were to render testimony in this case you feel that would be in some way incriminating to you and subjected to you [sic]?

A: If done all over again I would do it different, I would say it all different, yes I would.

THE COURT: What do you mean stay [sic] it all different?

THE WITNESS: Because I was coerced I was - - how would you say it, I don't know how to pronounce this I was suckered into this.

THE COURT: How do you mean suckered into this?

THE WITNESS: By promises.

THE COURT: What kind of promises? You and I have never seen each other?

THE WITNESS: Help with penitentiary time.

THE COURT: What do you mean help?

THE WITNESS: Help with the time I'm doing now. If I help them kinda like you scratch my back I scratch your back.

THE COURT: Okay.

THE WITNESS: Which two flops later it never happened. And I make it to circuit court and I have another prosecutor in circuit court tell me that he's going to give me more time than I'm doing now.

So my cure for it all do what you gotta do.

THE COURT: He told you he'd give you more time if you didn't testify?

THE WITNESS: That's as far as I can do, you Honor. I mean being scared is out the door I lost that two years ago my freedom it's been over three years now what you going to do to me I'm sorry.

THE COURT: Did they tell you what to say?

THE WITNESS: They put some words in there, yes.

THE COURT: Did he tell you - -

THE WITNESS: It wouldn't have went down the way it did if you can understand what I'm saying.

THE COURT: I don't know anything about the testimony.

THE WITNESS: It happened so long ago I'm not familiar with everything that was said either because they have us do a lot of stuff in the penitentiary.

We go to school, we work, we go to assault offender classes and I have a lot on my mind that I have to deal with these last three years incarcerated for MDOC.

They keep you [sic] mind so busy on those let alone something that happened two years ago or three years ago. But I don't remember everything I said that day but it never took place the way it did.

That's all I'm trying to say.

THE COURT: I'm still kind of loss [sic] on this.

THE WITNESS: Yeah, I don't even remember the prosecuting attorney's name either. . . .

THE COURT: That's not important. What's important to me is what was said. Were the promises and threats did that have anything to do with what you said in Court?

THE WITNESS: The promises, yes.

THE COURT: Explain that.

THE WITNESS: It's like I was promised something and I was asked was I promised anything and I said no, that was one of the things, do you understand that I'm saying? That's perjury to [sic].

THE COURT: Okay.

THE WITNESS: But - -

THE COURT: What else?

THE WITNESS: - - just little stuff like that but it's - - I don't remember exactly to be truthful I can't remember exactly what was said I remember saying that day this is two years ago.

I'm not influenced on no drugs or nothing but it's been a long time ago.

THE COURT: More specifically, when you were asked were you promised anything - -

THE WITNESS: It was a no because I was told to say no.

THE COURT: - - what else were you told or were you told to say anything else?

THE WITNESS: I can't remember, exactly. I'd have to go over transcripts and stuff like that. I can't remember exactly what was said to the number I just remember bits and pieces I have a lot of stuff that they make us do in prison.

I don't even dream about home no more to tell you the truth I dream about prison life if you can understanding [sic] that.

THE COURT: Well, what I'm just trying to get at because you did say that you were told to say if you were asked whether promises were made you were told to say no?

THE WITNESS: I remember that part, yeah.

THE COURT: Okay. What else do you remember?

THE WITNESS: I wouldn't be able to tell you I'd have to - - this took place two years ago I believe.

* * *

[Additional iteration that defendant did not wish to testify because of the unfulfilled promises of time reduction and the threats of additional time.]

THE COURT: And they told you to say that - -

THE WITNESS: If asked if anybody promised me anything to say no it was one of the things I remember. I remember that for sure.

THE COURT: Did they ask you to lie?

THE WITNESS: Not on forward straight out forward but it would help me get time reduction if I helped them with their case more or less just you scratched their back and they'd scratch my back.

THE COURT: But did they tell you to lie?

THE WITNESS: Yeah, but not in so many words just come out blatantly and say it's just you help me I help you.

THE COURT: Did you lie?

THE WITNESS: I might have. I might have. I don't know exactly what I said back then this is two years ago.

The gist of Ortiz's testimony during the colloquy is that before he first testified, he had been promised help with the sentence he was serving, and that instead of receiving that help after testifying at the preliminary examination, he was brought back to court for further testimony, and, when he pressed for the promised help with his sentence, he was threatened with having to serve additional time. Importantly, Ortiz never actually testified that he had lied about the events

surrounding the murder. He did state that he had lied when he was asked whether he had been promised anything and he answered "no," and that he gave that answer because he had been told to say "no." However, the preliminary examination testimony read to the jury at trial does not appear to include Ortiz's assertion that he had not been promised something in return for his testimony. Further, while there are some indications in the colloquy that Ortiz might have testified the way he did because of the promises, or that he would not have testified the way he did had he not been promised help with his sentence, the court pursued that inquiry, clearly seeking to ascertain whether Ortiz had lied at the preliminary examination. When Ortiz finally answered that question, the answer was equivocal. Ortiz stated that he might have lied, but he could not remember what he actually said two years before.

We also note that in addressing the admissibility and reliability of the preliminary exam testimony, the prosecutor observed that a day and a half after the event, Ortiz gave a statement to police that was consistent with his testimony at the preliminary exam. Thus, had counsel had the colloquy read to the jury for impeachment purposes, it is likely that the prior consistent statement would have been presented for rehabilitation. In sum, we are satisfied that even if counsel's performance was deficient for failure to move the admission of the colloquy, the admission would not have affected the outcome of the trial. Accordingly, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White