

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS GEORGE SCHUSTER,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 250931

Sanilac Circuit Court

LC No. 03-005672-FC

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Following a four-day jury trial, defendant was convicted of two counts of first-degree murder, supported by the theories of premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b). The convictions resulted from the killing of defendant's mother, Ursula, and stepfather, James Kenny. The trial court sentenced defendant to life imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that his right to confront the witnesses against him was violated by the reading of Craig Johnston's preliminary examination testimony into the record. We disagree. At trial, a prosecutor may use the transcribed testimony of an unavailable witness taken at a preliminary examination. *People v Bean*, 457 Mich 677, 683; 580 NW2d 390 (1998); MRE 804(b)(1). A witness is unavailable if the prosecution is unable to procure the witness's presence by way of due diligence. *Bean, supra* at 683-684; MRE 804(a)(5). This Court reviews a trial court's determination of due diligence for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). An abuse of discretion has occurred if an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant relies primarily on *Barber v Page*, 390 US 719; 88 S Ct 1318; 20 L Ed 2d 255 (1968), to support his argument that the prosecution should have availed itself of the uniform act to secure the attendance of witnesses from without the state in criminal proceedings, MCL 767.91 *et seq.*, to procure Mr. Johnston's testimony at trial. However, in *Barber*, the court found that the prosecution had made absolutely no effort to obtain the presence of the witness at trial. *Barber, supra* at 723. In the instant case, a detective called a telephone number associated with Mr. Johnston and left several messages, served Mr. Johnston's son with a subpoena, and spoke to Mr. Johnston's father, William Johnston. Moreover, the detective only became aware the day before the trial began that Mr. Johnston would not be present. Defendant's counsel conceded

that Mr. Johnston's absence became apparent only "a couple days" before trial, and she stated that she "certainly [did not] want an adjournment." Under these particular circumstances, no abuse of discretion occurred with respect to the trial court's ruling.

Defendant next argues that the trial court abused its discretion by deeming a letter purportedly written by defendant properly authenticated pursuant to MRE 901(b)(2). We disagree. "[T]he requirement of authentication as a condition precedent to admissibility 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *People v Howard*, 226 Mich App 528, 553; 575 NW2d 16 (1997), quoting MRE 901(a). "Under MRE 901(b)(2), authentication of a writing may be based on '[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.'" *Howard, supra* at 553, quoting MRE 902(b)(2). Defendant's sister, Monika Watson, testified that she was positive that the handwriting in the letter belonged to defendant, despite the fact that she hadn't seen his handwriting in four or five years. The familiarity with defendant's handwriting was not acquired for purposes of litigation. Moreover, that Watson had not seen defendant's handwriting in four or five years, yet was still certain that it belonged to defendant, preponderates toward a finding that she was familiar with defendant's handwriting.

Defendant relies primarily on *Howard* to support his argument that the authentication of handwriting under MRE 901(b)(2) must be supported by some other independent evidence. In *Howard*, the handwriting in question was in an appointment book that bore the name of a murder victim, Terry Lamb. *Howard, supra* at 553. Terry Lamb's son testified that he had seen his mother use the appointment book hundreds of times and that he had found it in his mother's book bag, which was found in his mother's car. *Id.* However, nowhere in *Howard* did this Court state that independent evidence, aside from the proffered authentication under MRE 901(b)(2), was *required* to authenticate the handwriting in the appointment book. Even if a corroboration requirement were implied, it has been met in the case at bar. Monika Watson testified that she found the letter in a bedroom of the Kennys' home along with defendant's other belongings. Therefore, the trial court did not abuse its discretion in deeming the letter properly authenticated. *Howard, supra* at 553.

Lastly, defendant argues that the admission of certain hearsay testimony deprived him of a fair trial. Because defendant's counsel did not object to the testimony, this issue is not preserved for review, and it is forfeited unless defendant establishes clear error affecting his substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant also argues that his trial counsel's failure to object amounted to ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, defendant must show "(1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Moore*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Defendant bears the heavy burden of overcoming the presumption of effective assistance of counsel. *Id.* at 76.

Various witnesses testified that defendant had solicited their help in cashing checks drawn on the Kennys' bank account and that defendant had tried to sell them the Kennys' new cordless phone. Additional trial witnesses testified that defendant bought and used heroin. Two witnesses said that they helped defendant bandage cuts on his hands. Kirk Suchy testified that

defendant stated that “I should have burnt the trailer down.” Lisa Suchy testified that she heard defendant state, “I think I killed my parents.” Richard Lowery, defendant’s cellmate in the Sanilac County Jail, testified that defendant had confessed the killings to him in great detail, going so far as to act out the motions of how he stabbed the Kennys to death. Moreover, defendant’s DNA was found in several of the blood samples taken from the Kennys’ home, including those taken from knives found in the sink and wastebasket. James Kenny’s DNA was present in samples taken from defendant’s watchband. Also, defendant’s fingerprint was found in a blood stain on a kitchen counter.

Because of the substantial amount of evidence of defendant’s guilt, he cannot show outcome-determinative plain error with regard to the evidence in question. Therefore, the unpreserved hearsay argument and the ineffective assistance of counsel claim must fail.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter