STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 23, 2004
v	No. 251171 Calhoun Circuit Court
LARRY DEONTA SHIPP, Defendant-Appellant.	LC No. 02-002492-FH

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of assault with intent to commit great bodily harm less than the crime of murder, MCL 750.84. Defendant argues that he was denied due process of law when his trial continued after he left the proceedings during jury selection, that the trial court abused its discretion by finding the prosecution used due diligence to produce at trial two of its endorsed witnesses, and that the trial court abused its discretion by finding a sufficient evidentiary foundation existed to permit the admission into evidence of a video tape of the crime. We conclude defendant waived his rights to be present at his trial and all constitutional rights requiring his presence at trial for their exercise. We also find the trial court did not abuse its discretion with respect to the other trial issues it ruled upon. We affirm.

Defendant first argues that the court violated his constitutional right to be present at trial by conducting his trial in his absence. Defendant contends that he was never advised of his constitutional right to be present at trial, so the record does not support the conclusion that he voluntarily, intelligently, and knowingly waived it. We do not agree.

We review de novo the proper application of a statute. *People v Krueger*, 466 Mich 50, 53; 643 NW2d 223 (2002). Likewise, this Court reviews constitutional issues de novo. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003).

A defendant has a constitutional, statutory, and common law right to be present at his trial. Const 1963, art 1, §§ 17, 20; MCL 768.3; *Krueger, supra* at 51; *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). Generally, this right extends to every stage of trial where a defendant's substantial rights may be affected. *People v Bowman*, 36 Mich App 502, 510; 194 NW2d 36 (1971). But a defendant waives his right to be present by his voluntary absence from the courtroom after trial has commenced. *People v Swan*, 394 Mich 451, 452; 231

NW2d 651 (1975); *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). "A valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right." *Id*.

This trial began when the trial court called the case for trial at 9:05 a.m. at the time and place previously noticed. Although defendant was not present, he entered the courtroom within minutes. The court and counsel began discussing some witnesses problems because the case had not been the highest on the list of cases scheduled for trial that morning. The proceedings recessed at 9:17 a.m., but reconvened later that day at 1:53 p.m. when prospective jurors were sworn for purpose of voir dire. Defendant was present at that time and introduced to the venire. Jury selection continued until both counsel expressed satisfaction with the composition of the jury. At that point, the court recessed the trial from 3:25 p.m. until 4:08 p.m.

When the record was reopened after the recess, defendant was not present. Defense counsel reported he had searched for defendant without success in and around the courthouse. Defense counsel then stated he had spoken to defendant by cell phone and advised defendant to come to court right away. According to counsel, defendant said he had gotten scared, gone outside to have a cigarette, and just kept walking. Counsel also noted defendant told him he would turn himself in the next morning. Counsel asked that the case be adjourned for the day to see if defendant would appear in the morning. But the trial court determined that defendant's absence was voluntary and without good cause, and, therefore, ruled that the trial would proceed as planned with initial jury instructions and the prosecutor's opening statement. The trial court granted defense counsel's request to either reserve his opening statement until the trial reconvened the next morning or until the close of the prosecutor's case. The jury was then sworn, the trial court gave its initial instructions to the jury, and the prosecutor delivered his opening statement. The trial was adjourned until 8:30 a.m. the next morning.

The next morning, defendant was still absent. Defense counsel moved to adjourn the trial, but the trial court ruled it would not reverse its ruling from the day before because defendant's absence was his own decision and with full notice that his trial had commenced.

We find that defendant knowingly and voluntarily waived his constitutional, statutory, and common-law right to be present at his trial, along with all trial rights that require defendant's presence for their exercise. *Swan*, *supra* at 452; *Woods*, *supra* at 479. Accordingly, the trial court did not commit error warranting reversal by completing defendant's trial in his absence.

Defendant attempts to avoid the application of the general rule of waiver stated in *Swan* by arguing that because that jury had not yet been sworn when he absconded, jeopardy had not yet attached, and the trial court should have simply issued a bench warrant rather than proceed with the trial. Although defendant correctly states the point when jeopardy "attaches" in a jury trial for purposes of the Double Jeopardy Clause's protection against multiple prosecutions, *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002), he cites no authority for the proposition that the swearing of the jury marks the commencement of trial for determining whether defendant has waived his right to be present. Accordingly, defendant has abandoned this argument. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

We also find defendant's position lacks merit. The swearing of the jury to hear a particular charge against an accused is the logical point at which the defendant's valuable right to have a particular tribunal complete his trial arises. See *Lett, supra* at 214. Yet, nothing at this point of the trial pertains to the two elements necessary for a valid waiver of the right to be present at trial: (1) specific knowledge of the right and (2) an intentional decision to abandon the right. *Woods, supra* at 479. A defendant's right to be present at his trial extends to all occurrences when his substantial rights may be affected, from impaneling a jury through reception of a verdict. See, *Bowman, supra* at 510, and *United States v Diaz*, 223 US 442, 454-455; 32 S Ct 250; 56 L Ed 500 (1912). Thus, for purposes of his right to be present, defendant's trial had commenced when defendant was present during jury selection. The trial court did not clearly err by finding defendant had notice (knowledge) that his trial had begun, and that defendant voluntarily absented himself from the trial without good cause. Accordingly, defendant waived his right to be present because he (1) had specific knowledge of his right to be present at trial and (2) intentionally and voluntarily decided to abandon this constitutional, statutory, and common-law right. *Swan, supra* at 452; *Woods, supra* at 479.

Next, defendant asserts the trial court erred by finding that the prosecution used due diligence to produce two endorsed, res gestae witnesses: Jermal Laurencin and Joe Warton, Jr. Defendant also contends the trial court erred procedurally by not taking testimony at a due diligence hearing before making its ruling. We find no abuse of discretion in the trial court's substantive ruling, nor error warranting reversal in the procedure the trial court employed.

Although defendant preserved his claim that the prosecution was not sufficiently diligent in its efforts to produce the two endorsed witnesses, he failed to preserve for appeal his claim that the trial court employed inadequate procedure in its inquiry into the prosecutor's diligence. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, defendant did not include this issue in his questions presented on appeal, and by not arguing its merits so, has abandoned any claim that the trial court erred by not giving the adverse witness instruction. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *Griffin, supra* at 45.

This Court reviews a trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). An abuse of discretion occurs when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998).

Unlike the former res gestae witness statute, MCL 750.40a no longer imposes a duty on the prosecutor to discover, endorse and produce all res gestae witnesses. *Burwick, supra* at 288-289. Instead, the Legislature has "eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses and has addressed defense concerns to require the prosecution to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *Id*. at 289. Nevertheless, if a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial even if the endorsement was not required. *People v Eccles*, 260 Mich App 379, 388; 677

NW2d 76 (2004). But the prosecutor may be excused from this requirement if he exercises due diligence to produce the witness. *Id*.

Furthermore, "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 750.40a(4). A prosecutor's inability to produce an endorsed witness after diligent effort constitutes "good cause" for the trial court to grant the prosecutor's motion to strike an endorsed witness. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000), lv den 463 Mich 1002; 624 NW2d 918 (2001). Due diligence is the attempt to do everything reasonable, not everything possible, to produce the witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

The record reflects that on the first day of trial the prosecutor advised that the prosecution could not locate Laurencin and moved to strike him as an endorsed witness. The trial court denied the motion, ruling that the prosecutor would either have to produce the witness or show due diligence in its attempts to locate him.

At the close of the second day of trial, the prosecutor advised the court that Warton had been served with a subpoena and presented the court with a proof of personal service. The prosecutor also stated he had spoken to Warton by telephone and believed that Warton had been convinced to appear and testify. Further, on the prosecutor's motion, the trial court authorized bench warrants for both witnesses. The prosecutor also presented a proof of service to the trial court that Laurencin had been served with a subpoena for trial.

On the third day of trial, the prosecutor again noted that his office had not been able to further contact either witness, and the witnesses were not in jail. The trial court ruled that the prosecutor had shown due diligence and would not give an adverse witness instruction.

We find sufficient evidence on the record of the prosecution's efforts to produce the two witnesses, so that we cannot say that the trial court's decision was so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or that an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the trial court's ruling. *Gadomski, supra* at 33. Accordingly, we find that the trial court did not abuse its discretion by ruling that the prosecution had exercised due diligence and had shown good cause to strike the two endorsed witnesses. *Burwick, supra* at 291; *Canales, supra* at 577.

This Court reviews for plain error affecting his substantial rights defendant's unpreserved claim that the trial court erred by not formally taking testimony at a due diligence hearing. *Eccles*, supra at 382, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if the trial court's procedure was plain error and affected substantial rights, reversal would still not be warranted. On this record, it cannot be said that the procedure resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings in the trial court, independent of defendant's guilt or innocence. *Id.* at 763-764.

In sum, we conclude that the trial court did not abuse its discretion by finding the prosecutor exercised due diligence in its attempts to produce Laurencin and Warton, and thus,

did not abuse its discretion finding good cause to strike Laurencin and Warton as endorsed prosecution witnesses. Further, defendant has failed to meet his burden of showing unpreserved alleged procedural error merits reversal. *Carines*, *supra* at 763-764.

Last, defendant argues that the trial court abused its discretion by finding the prosecutor presented sufficient foundation evidence to permit admitting a video tape recording of the offense into evidence. We conclude the trial court did not abuse its discretion because the prosecution presented sufficient evidence "to support a finding that the matter in question is what its proponent claims." MRE 901; *People v Berkey*, 437 Mich 40, 50-52; 467 NW2d 6 (1991).

Defendant preserved this issue by objecting at trial that the prosecutor had not shown that the video tape was the original recording or an unaltered copy. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

We review the trial court's decision to admit or exclude evidence for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Likewise, whether an item of evidence is sufficiently authenticated to permit its admission in evidence is also reviewed for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; ___ NW2d ___ (2004). The trial court abuses its discretion only if an unprejudiced person considering the facts on which the trial court acted would say that there is no justification or excuse for the trial court's decision. *Id*.; *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Layher*, *supra* at 761.

In support of his argument that the trial court abused its discretion, defendant relies primarily upon *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969), and its progeny. In *Taylor*, this Court, quoting 58 ALR2d 1024, 1027, held that the foundation criteria necessary to admit sound recordings are:

> "(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement."

But in *Berkey*, *supra* at 49-50, our Supreme Court held that the *Taylor* court's seven-part test had been superseded by the Michigan Rules of Evidence, specifically by MRE 901. Pertinent to the case at hand, MRE 901(a) states the general rule that "authentication or identification 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." Further, by way of illustrations, MRE 901(b)(1) provides that the general rule is satisfied by testimony from a witness with knowledge "that a matter is what it is claimed to be," and MRE 901(b)(4) provides that evidence may be authenticated by distinctive characteristics, such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

In *Berkey,* our Supreme Court held that sufficient foundation testimony had been presented by a neighbor, who identified the voices on audio recordings of altercations between a murder victim and her estranged husband, the defendant. The Court held that "MRE 901 requires no more." *Berkey, supra* at 50.

In fact, less foundation testimony was presented in *Berkey* than in the present case because the neighbor "was not present when the tapes were made, did not know what tape recorder was used, did not personally know who made the tapes, did not know whether the tapes contained entire conversations or only portions of conversations, did not know whether the tapes had been changed or altered in any way, had no way of personally determining whether the tapes had been changed or altered, and did not know whether the statements contained on the tape had been made voluntarily and without inducement." *Id*. at 46. The *Berkey* Court acknowledged that "the elements of the seven-part test are important considerations," but "they are matters that should ordinarily be addressed to the finder of fact." *Id*. at 52. Further, the *Berkey* Court opined:

> It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly. [*Id*.]

In the present case, two witnesses with knowledge, the victim and Termain Armstrong, testified that they observed Jermal "JoMo" Laurencin video taping at the party where the assault occurred, each witness identified persons present at the time of the assault, and they testified that the video tape fairly and accurately depicted the party and the people present. This testimony satisfied the requirement of MRE 901(a) by providing "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b)(1). Moreover, the testimony of all of the prosecution witnesses taken together established sufficient distinctive characteristics of the video's content, substance, and internal patterns, in conjunction with the circumstances, to authenticate the video tape. MRE 901(b)(4). The trial court correctly ruled that defendant's objections to admission of the video tape affected the weight the jury might accord the evidence, not its admissibility. *Berkey, supra* at 52. Consequently, the trial court did not abuse its discretion by finding the prosecutor had presented sufficient foundation evidence to permit the admission of the video tape as evidence. MRE 901; *Ford, supra* at 460-462.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood