STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2008
v	No. 274241 Wayne Circuit Court
DERRICK ANTHONY GRUBBS, Defendant-Appellant.	LC No. 05-009240-01

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to 15 to 35 years in prison. Because there was no outcome determinative evidentiary error, we affirm.

This case arises out of the shooting death of Gary Coleman. Coleman showed up, uninvited, at a picnic held at his ex-girlfriend's (defendant's current girlfriend) house. A confrontation occurred, and defendant shot Coleman. While defendant asserted that he shot Coleman in self-defense after Coleman attacked him, the jury found defendant guilty of second-degree murder.[1]

Defendant first argues on appeal that the trial court erred in excluding evidence of specific instances of conduct demonstrating that Coleman was known to be a violent person. Defendant asserts that such evidence was admissible to show that Coleman was the aggressor in the situation and to show that defendant acted in self-defense because defendant knew of Coleman's prior conduct before the incident. While we agree that the trial court abused its discretion in excluding the evidence, we find that the error was not outcome determinative.

[1] Defendant was originally tried for second-degree murder, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was convicted of the CCW and felony-firearm charges, but the jury could not reach a unanimous verdict on the second-degree murder charge, resulting in a hung jury. The instant appeal pertains only to defendant's retrial on the second-degree murder charge.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside of the range of principled outcomes. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). A court also abuses its discretion when it makes an error of law. *Id*. Nevertheless, a preserved, nonconstitutional error does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103.

"The actual violent character of the deceased, even though it is unknown to the defendant, is admissible as evidencing the deceased's probable aggression toward the defendant." *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998). Such evidence is admissible to help resolve "a controversy . . . regarding whether the deceased was the aggressor." *Id*. The question of whether Coleman was the aggressor in this situation was not at issue, however. The evidence concerning the incident reflects that Coleman punched defendant, and followed him thereafter. Without resolving any factual questions, the introduction of this evidence for purposes of showing that Coleman was the aggressor would be merely cumulative. MRE 403.

However, as previously indicated, defendant also claims that the evidence was admissible to show that defendant acted in self-defense. "[U]nlike evidence tending to show that the victim was the aggressor, the deceased's violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense." *Harris*, *supra* at 316. Because such evidence bears on the defendant's state of mind at the time of the act, prior knowledge of the victim's character is necessary. *Id*.

At trial, the court granted the prosecution's motion in limine to exclude any evidence concerning any alleged prior history of violence on the victim's part. The trial court excluded the evidence, over defendant's objection, based on the law of the case doctrine. The court stated that because the issue was previously considered and the trial court excluded the evidence at defendant's first trial, it was bound by the ruling of the first trial court on this same issue.

However, the law of the case doctrine dictates that an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. *Grievance Adm'r v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). The law of the case doctrine does not apply to decisions of a trial court. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 53; 698 NW2d 900 (2005). Moreover, "on retrial a case stands procedurally as if there had been no prior trial" and "a trial court is not required to follow another trial court's previous evidentiary rulings. *People v Daniels*, 192 Mich App 658, 670; 482 NW2d 176 (1991). Because the trial court's exclusion of the evidence was based upon its erroneous legal conclusion that it was bound by the ruling of the first trial court rather than an appellate court, (and the trial court provided no other basis for its ruling) the error constitutes an abuse of discretion. *Shahideh*, *supra* at 118.

Nevertheless, errors of this type merit reversal only if it is more probable than not that they were outcome determinative. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005); MRE 103(a)(1). An error is outcome determinative if it undermines the reliability of the verdict. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

Here, defendant did not dispute that he shot Coleman. His entire defense relied upon convincing the jury that he feared for his safety and acted out of self-defense. If it were more probable than not that defendant was unable to adequately present this defense, it would undermine the reliability of his conviction. In this case, however, the jury heard considerable evidence of Coleman's unprovoked aggression toward defendant. Nevertheless, self-defense requires defendant's use of deadly force be honestly and reasonably necessary under the circumstances. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). The jury evidently was not convinced that defendant's use of deadly force was necessary. We cannot say that it is more probable than not that the jury's verdict would have been different with the admission of further evidence that defendant knew Coleman was a violent person. Thus, the trial court's error in admitting this evidence does not require reversal.

Defendant next argues that the trial court improperly admitted the testimony of a witness at defendant's first trial who did not appear for defendant's second trial. The gist of defendant's argument is that the admission was in error because the prosecutor did not demonstrate due diligence in procuring the witness, Orlando Perry's, appearance at the second trial. We disagree.

We review the trial court's admission of evidence for an abuse of discretion. *Pattison, supra* at 615. A trial court's findings of fact are reviewed for clear error. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002); MCR 2.613(C).

Prior recorded testimony is admissible under MRE 804(b)(1) if the party against whom the testimony is offered had "an opportunity and similar motive to develop the testimony through cross-examination," and the witness is unavailable. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Unavailability requires that the witness be absent and that the prosecutor showed due diligence in its attempt to produce him. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998); MRE 804(a)(5). The test of due diligence is one of reasonableness and requires only that good-faith efforts were made to procure the witness. *Bean, supra* at 684. Defendant does not argue that he had no opportunity or similar motive to develop Perry's testimony at the first trial. The only issue for resolution, then, is whether the prosecution engaged in reasonable, good-faith efforts to produce Perry at the second trial.

Our Supreme Court has previously held that a party did not demonstrate due diligence where attempts to procure the appearance of a witness were tardy or incomplete. *Bean, supra* at 689-690; *People v Dye*, 431 Mich 58, 76-78; 427 NW2d 501 (1988). In *Dye*, attempts to locate the witnesses were delayed until shortly before trial even though the prosecutor knew that the witnesses were out-of-state and had an incentive to go into hiding. *Dye, supra* at 70-76. Indeed, the witnesses had been difficult to locate for the original trial. *Id*. In *Bean*, the police were given information that the witness had moved to Washington, D.C., but they continued to try to make contact with the witness at his abandoned local residence. *Bean, supra* at 690. They made no attempts to locate his new residence. *Id*. In both cases, the Court held that the failure to follow up on clear leads did not constitute good-faith efforts.

Here, a subpoena was mailed to Perry's known address a month before the trial. An officer made three attempts to personally serve the subpoena at that address, beginning two weeks before the trial. The officer made the attempts during the day but never found anyone at the house. Two phone calls were made to the house, in response to which Perry's mother indicated that Perry still lived at that address, was aware of the trial and expected it to be soon,

and would return shortly from a vacation. No indication was given that he had moved or intended to avoid the trial.

While the prosecutor did not make attempts to contact Perry until approximately one month before the trial, there was no indication that there would be any difficulty contacting him because he had testified at the first trial. When the officer followed up on the subpoena, he was given further affirmation that Perry's appearance could be expected. Perry apparently knew of the trial and was expected to return from vacation shortly before the trial was to begin. The Court in *Bean* emphasized that the test is "whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684. Had the prosecutor or the police any reason to suspect that Perry was deliberately evading them, there is no doubt that more stringent efforts could have been made. However, without such indication, it is not clear that the effort made was not in good faith. The trial court did not clearly err in concluding that the prosecutor demonstrated due diligence, and therefore, did not abuse its discretion in admitting Perry's prior trial testimony.

Defendant also cursorily claims that the admission of this hearsay testimony violates his constitutional right to confrontation. However, defendant presents no argument in support of the claim. A party waives an issue when it gives the issue cursory treatment on appeal. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, the use of properly admitted prior recorded testimony of an unavailable witness does not generally violate a defendant's right to confrontation. *Crawford v Washington*, 541 US 36, 61-62; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Meredith, supra* at 70-71. This argument is unavailing.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly