

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DEMETRIUS ROBERTSON,

Defendant-Appellant.

UNPUBLISHED

July 17, 2008

No. 276092

Wayne Circuit Court

LC No. 2006-004182-FC

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of torture, MCL 750.85, kidnapping, MCL 750.349, assault with intent to do great bodily harm less than murder, MCL 750.84, and conspiracy to torture, MCL 750.157a and MCL 750.85. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to prison terms of 15 to 25 years for the torture conviction, 15 to 25 years for the kidnapping conviction, 5 to 15 years for the assault with intent to do great bodily harm less than murder conviction, and 15 to 25 years for the conspiracy to torture conviction. Defendant appeals as of right. We affirm.

Defendant first contends the trial court erred in admitting evidence that two outstanding warrants for defendant's arrest unrelated to this case existed at the time he was taken into custody. The propriety of a trial court's admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Under MRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that two outstanding warrants for defendant's arrest existed at the time he was apprehended was not relevant to any fact at issue, and the trial court abused its discretion by admitting the evidence. However, the wrongful admission of evidence is considered a nonconstitutional error, and therefore a defendant is only entitled to relief if he can demonstrate that it is more probable than not the admission resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Here, the evidence of defendant's guilt was overwhelming. The victim described in detail the events that caused his injuries. He stated that, while in the house, he was beaten with a pole, cut several times, tied up, doused in rubbing alcohol, and set on fire. The physical evidence discovered at the scene supported his description of the events. Officer Paul Houtos' testimony

established that defendant was in severe pain when police arrived at the scene, and the photographs admitted at trial demonstrate the injuries caused by the assault. Defendant's account of what happened changed several times during the course of his statement to the police. He initially stated that he was not present at the house, but then stated that he walked into the house as the victim was being set on fire and that he assisted the victim by putting out the flames. Finally, defendant stated that his friends attacked the victim to retaliate because the victim had recently shot defendant. In light of this evidence, defendant has failed to demonstrate that it is more probable than not that the admission of the evidence resulted in a miscarriage of justice.

Defendant next asserts that the trial court erred by failing to instruct the jury regarding a missing witness as a result of the prosecution's failure to produce Roger Brodowski. We disagree. A trial court's determination that due diligence was exercised and that a missing witness instruction is not warranted is reviewed for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

A prosecutor is required to exercise due diligence to produce an endorsed witness at trial. *Eccles, supra* at 389. Should the prosecutor fail to produce the witness, the trial court must determine whether due diligence was exercised. *Id.* If due diligence was not exercised, the defendant is entitled to an instruction indicating that the witness's testimony would have been unfavorable to the prosecution. *Id.* If due diligence was exercised, no such instruction is necessary. *Id.* "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Detective Daniel Klik testified at a due diligence hearing that Brodowski had been evicted from his residence two days after the incident. Klik located a second address for Brodowski, who was apparently renting a home, and attempted to serve him with a subpoena on three separate occasions, but Brodowski was never present at the home. Klik talked to Brodowski's neighbors, who were unaware of his location, but informed Klik that the primary renter of the home was Michael Cristini, who had been evicted. Brodowski, who left no forwarding address, was last seen on September 15, 2006, approximately two-and-a-half months before trial commenced. Klik also utilized the assistance of Lieutenant Glen Brymer and his staff, who were also fruitless in their search for Brodowski. The trial court did not abuse its discretion in determining the prosecutor exercised due diligence.

Defendant next contends the trial court erred in admitting photographs of the victim's injuries. We disagree.

When a party challenges the propriety of the admission of photographic evidence, this Court first must determine whether the evidence was relevant, and, if it was, must then determine whether the probative value was outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995). Photographs are not inadmissible simply because they are gruesome or because a witness could have testified regarding their contents. *Id.* at 76.

Here, defense counsel emphasized that the victim was high on cocaine and intoxicated from alcohol at the time the incident occurred. Defense counsel implied that the victim lacked credibility and that his account of the night could not be believed. The photographs, therefore,

served to corroborate the victim's story that he was cut multiple times and suffered injuries to various portions of his body, and were clearly relevant.

We must next determine whether the probative value of the photographs was outweighed by their tendency to cause unfair prejudice. The trial court opined that the photos were rather mild. None of the victim's wounds were particularly deep, nor was there an excessive amount of blood. After hearing the victim's account of being slashed with a razor, beaten with a pole, doused in alcohol and set on fire, the jury may have actually been underwhelmed by the images. The pictures, therefore, were not more prejudicial than probative and the trial court did not abuse its discretion in admitting them into evidence.

Defendant next contends that he was denied a fair trial by the prosecutor's reference during opening statements to a fact that he knew could not be proven at trial. We review unpreserved claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When a prosecutor indicates during opening statements that he intends to prove a particular fact and then fails to do so at trial, reversal is not warranted unless the defendant can show bad faith or prejudice. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997). Here, defendant contends that the victim's testimony at the preliminary examination that someone "went across" his throat with a knife, but that it did not draw blood, did not support the prosecutor's remark during opening statement the victim's throat was "cut." We find no bad faith in this remark. The use of the phrase "went across" could lead someone to believe that his neck was actually cut. While the victim stated at the preliminary examination that the knife did not draw blood, he also described making gargling sounds and falling down after the knife went across his throat. Additionally, the victim's neck appears to be injured in photographs taken of the victim after the incident. Further, the victim testified at trial that the wound caused by the knife was not very deep, thus acknowledging that a wound resulted.

Defendant also has failed to establish that he was prejudiced by the remark. As described above, the prosecutor presented substantial evidence implicating defendant in this crime, including defendant's own statement to police. As such, he cannot establish that the prosecutor's statement had any meaningful impact on the jurors. Defendant has failed to show plain error affecting his substantial rights.

Next, defendant asserts the trial court's failure to administer an oath to prospective jurors before voir dire amounts to a structural error requiring automatic reversal. Defendant's unpreserved claim is reviewed for plain error affecting the substantial rights of the defendant. *Carines*, *supra* at 763-764.

Under 6.412(B), "Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn." Defendant asserts that the remedy for the trial court's failure to abide by the above quoted rule is automatic reversal of his convictions as the error was structural. "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Examples of structural errors include: failure to provide proper instruction to the

jury on the elements of the charged offense, completely denying counsel to a defendant, racially discriminatory grand jury selection proceedings, defective instructions on reasonable doubt, denial of a defendant's right to self-representation, denial of the right to a public trial, and the presence of a biased trial judge. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Furthermore, a finding of a structural error represents the exception, not the rule. *Id.* at 51.

Defendant has failed to persuade this Court that a trial court's failure to swear in potential jurors before voir dire amounts to a structural error, as it is not clear that such a failure weakened the trial framework, infected the truth gathering process, or prevented the trial from serving the function of determining guilt or innocence. Defendant merely concludes that the error was structural without any true analysis and then asserts that he is entitled to relief. Because it is established that this Court should only declare structural errors in exceptional circumstances, and because defendant has failed to explain why this situation is exceptional, we conclude that defendant is required to demonstrate prejudice as a result of the trial court's failure to swear in potential jurors before voir dire. Defendant has not attempted to demonstrate prejudice and therefore has failed to establish plain error that affected his substantial rights.

Defendant next contends that his rights were violated when the trial court amended the original Judgment of Sentence to reflect that defendant was sentenced as an habitual offender, second offense. We disagree. Defendant's unpreserved claim is reviewed for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764.

Under MCR 6.435(A), "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it." Several facts indicate that the omission of defendant's status as a habitual offender from the first Judgment of Sentence was a clerical error. Primarily, the trial court sentenced defendant to 5 to 15 years' imprisonment for the assault with intent to cause great bodily harm less than murder conviction. This sentence could have only resulted had the court first concluded that defendant was a second habitual offender. A habitual offender notice was filed with the court before trial, and the Presentence Investigation Report classified defendant as a second habitual offender and recommended that he be sentenced accordingly. The trial court was therefore well informed of defendant's habitual offender status. The omission of this fact from the original Judgment of Sentence was mere clerical error and the subsequent correction was within the court's power.

Finally, defendant contends that the cumulative affect of the various trial errors denied him a fair trial. When determining whether cumulative error denied a defendant a fair trial, this Court only aggregates actual errors. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). This Court has concluded that the trial court erred in admitting evidence that multiple warrants for defendant's arrest existed at the time of the alleged offense and that the trial court erred in failing to administer an oath to potential jurors prior to voir dire. Taken individually, neither of these errors justifies granting defendant relief. Similarly, when aggregated, these minor issues did not result in an unfair trial. As described above, defendant could not establish that the evidence regarding his outstanding warrants prejudiced him as there was overwhelming evidence presented at trial to establish his guilt. Furthermore, defendant made no attempt to demonstrate that the failure to administer an oath to potential jurors resulted in unfair prejudice. These errors were not in any way related to one another nor did the presence of one error

magnify the effect of the other error. There is no indication that these errors combined to result in an unfair trial. Defendant is not entitled to relief.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Pat M. Donofrio