STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEEATRICE DEMAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
July 22, 2008

No. 278797
Oakland Circuit Court
LC No. 2007-212951-FC

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to serve concurrent terms of imprisonment of 15 to 40 years for armed robbery, and five to 15 years for home invasion. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor's theory of the case was that in the early morning hours of January 5, 2007, defendant and others invaded an apartment in Pontiac, inducing the victim to call 911, and the police to respond. The police came upon the victim, dressed in only a blanket, who stated that six persons, including defendant, had robbed him, the six displaying three firearms among them.

On appeal, defendant argues that the trial court denied him a fair trial by admitting certain hearsay evidence, and by allowing testimony from the preliminary examination to substitute for live testimony from the missing complainant. Defendant additionally argues that the prosecutor failed to produce sufficient evidence of defendant's guilt.

I. Hearsay

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). Where the admission of evidence requires determination of an underlying fact, that determination is for the court. MRE 104(a). A trial court's factual findings are reviewed for clear error. MCR 2.613(C). If a declarant is unavailable for cross-examination, the erroneous admission of hearsay against a criminal defendant is a constitutional error in that it violates the defendant's right of confrontation.

People v Tanner, 222 Mich App 626, 632; 564 NW2d 197 (1997), citing US Const, Am VI; Const 1963, art 1, § 20.

Hearsay, meaning testimony as to another person's unsworn, out-of-court assertions offered to prove the truth of the matters asserted, is presumptively inadmissible, subject to several exemptions and exceptions provided by the rules of evidence. MRE 801-805. Among the exceptions is one for an excited utterance, meaning "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2).

In this case, a police officer testified that he responded to the scene in question just a few minutes after receiving a call concerning unknown trouble. The officer continued that he encountered the blanket-wrapped victim, whom the officer described as appearing "uneasy" and speaking nervously. When the prosecutor asked the witness what the victim said upon getting back into his apartment, codefendant's counsel interposed a hearsay objection.[1] After additional questioning, the prosecuting attorney asserted that he had established the foundation for an excited utterance. The trial court overruled the objection, and continued to do so as the instant defendant's attorney sought to challenge the basis for the witness's impressions. The police witness then reported that the victim "indicated that he had been in the shower and came downstairs to the basement . . . and he heard noises coming form the back door . . . and he heard the door break open and several subjects came down the stairs where he was . . . with guns and demanding money from him." The officer continued that the victim provided the names of the assailants, one of them being that of defendant.

On appeal, defendant first attacks that testimony on the ground that it improperly bolstered the anticipated testimony of a prosecution witness. See *People v Hallaway*, 389 Mich 265, 276-277; 205 NW2d 451 (1973). However, this was not among the objections raised below. See MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Moreover, the witness in question was not in court that day, and did not testify in person at trial. For these reasons, we decline to entertain this argument further.

Defendant then attacks the testimony as failing to qualify as an excited utterance. Defendant concedes that there was evidence that the police arrived within 30 minutes of the incident in question, but argues that there was no evidence that the victim was in a shocked, distressed, or otherwise upset state of mind when he made the challenged statements. In addition to the brief time interval involved, the police witness described finding the victim clad in only a blanket, and appearing "nervous" and "uneasy." Further, on cross-examination by codefendant's counsel, the witness reiterated that the victim appeared nervous and upset. Those indications, coupled with the victim's having been robbed by multiple intruders, with multiple firearms, afforded the trial court a solid basis for determining that the statements attributed to the victim-declarant related to a startling event while that declarant was still under the stress of the event.

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[1] We deem codefendant's counsel's objection as preserving this issue on defendant's behalf as well. See *People v Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972).

II. Res Gestae Witness

Complainant was endorsed as a witness, and appeared under subpoena during jury selection, but failed to appear for the remainder of trial. The prosecuting attorney reported that the police had contacted the county morgue, the county jail, and three local hospitals, and that complainant's name was put through apparently the law enforcement information network, but that none of these searches turned up that witness. The prosecutor requested a one-day adjournment in hopes of locating him, but the trial court determined there had been no reason to anticipate the disappearance, and that the prosecution had exercised due diligence in the matter, and so declared complainant an unavailable witness, and allowed presentation of his testimony from the preliminary examination.

The issue whether a defendant was denied a fair trial by the failure of the prosecutor to present a res gestae witness[2] is not preserved for appellate review unless the defendant has raised the issue below in a motion for posttrial evidentiary hearing or in a motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Neither having taken place in this instance, this issue comes to this court unpreserved.

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Once a prosecution witness is endorsed, the prosecutor is obliged to exercise due diligence in producing that witness unless the witness is stricken. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 467 (1991).[3] "A trial court's determination of due diligence is a factual matter and the court's findings will not be reversed unless clearly erroneous." *Id.*

Defendant argues generally that the trial court erred in concluding that the prosecution had exercised due diligence to produce complainant in this instance. We conclude that the trial court did not clearly err in regarding the prosecution's efforts upon complainant's unexpected nonappearance, which included searching the area morgue, jail, and hospitals, along with recent law enforcement data, as constituting due diligence. Moreover, we note that when complainant failed to appear, there was no agitation to produce or locate him on the part of the defense. See MCL 767.40a(5).

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[2] A res gestae witness is "[a]n eyewitness to some event in the continuum of the criminal transaction and one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." Black's Law Dictionary (6th ed, 1990), p 1305, citing *People v Baskin*, 145 Mich App 526, [530-531]; 378 NW2d 535, 537 (1985).

[3] But see *People v Bean*, 457 Mich 677, 694; 580 NW2d 390 (1998) ("to the extent that opinions from the Court of Appeals have resurrected 'due diligence' as a statutory obligation, they are in error") (Boyle, J., concurring in part and dissenting in part).

Complainant's preliminary examination testimony included, on codefendant's attorney's cross-examination, that he could not identify his assailants because they had covered their faces, but instead determined who they were from his understanding of other activities on their part. Defendant points to the witness's statements admitting he could not make a positive visual observation on the occasion in question, and argues that had that he testified the same way at trial, defendant's acquittal would have been assured. However, returning to the preliminary examination transcript, complainant, on cross-examination by defendant's own attorney, elaborated that he personally knew defendant, being from the same neighborhood, and going "way back."

Defendant asserts that he was denied his right of confrontation at trial of the only potential exculpatory witness. However, given that complainant consistently named defendant as among the offenders, defendant's confidence that the defense would have elicited exculpatory testimony at trial seems inapt. Moreover, the witness was subjected to vigorous cross-examination in the preliminary examination, which was part of the transcript testimony admitted at trial. There was no denial of the right of confrontation.

III. Sufficiency of the Evidence

When reviewing the sufficiency of evidence in a criminal case, we must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Review is de novo. *Id.*

In this case, defendant bases his challenge to the sufficiency of the evidence on complainant's testimony, incorporated from the preliminary examination, about not having been able to identify his assailants visually because their faces were covered, and on his challenge to the identification of defendant through hearsay testimony. Because we concluded above that the hearsay identification was properly admitted as an excited utterance, and that the trial court properly allowed complainant's earlier testimony to stand in for that now-missing witness's trial appearance, which testimony included vigorous cross-examination but which also turned up that complainant has a basis other than facial recognition for identifying defendant, we conclude here that defendant's challenge to the sufficiency of the evidence must fail.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello