

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ DELANO BAKER,

Defendant-Appellant.

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UNPUBLISHED

October 30, 2008

No. 278951

Wayne Circuit Court

LC No. 06-014398-01

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), stalking, MCL 750.411h, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of life for the murder conviction, two to five years for the felon-in-possession conviction, and one year for the stalking conviction, to be served consecutive to a five-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of murdering his estranged wife, Tamiko Singleton, during the early morning hours of August 10, 2006. Defendant first argues that the evidence was insufficient to identify him as the person who shot and killed Singleton. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). This Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *Id.* at 37.

The evidence showed that defendant had a history of threats and violence against Singleton. Singleton eventually moved out of defendant's home and moved in with her mother, but defendant continued to follow and call her. During the day before Singleton was killed, defendant began following her and calling her repeatedly on her cell phone. He sent one text message that stated, "Until the day you die, you will always be Mrs. Tamiko Baker." On the

night Singleton was shot, defendant confronted her at a store. After Singleton rebuffed defendant's effort at reconciliation, defendant told her to "watch her back." Later that night, Singleton died as the result of a gunshot in the head. A witness testified that, after hearing a gunshot, he observed defendant leaving the area of the shooting and placing an apparent gun in his waist area. Defendant got into a vehicle and sped off. Although it was dark outside, the witness testified that the area was illuminated by a street light, that defendant walked right near him, and that he looked at defendant several times. The witness knew defendant from seeing him with Singleton on prior occasions.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the person who shot and killed Singleton beyond a reasonable doubt. The credibility of the identification testimony was a matter for the trier of fact to resolve and this Court will not resolve it anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant next argues that the trial court erroneously admitted Singleton's April 7, 2006, police statement regarding defendant's assault of Singleton on April 6, 2006. Defendant argues that the admission of this evidence violated his constitutional right of confrontation. We agree, but conclude that the error was harmless.

A defendant has the right to confront the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant is unavailable at trial and the defendant had a prior opportunity for cross-examination. *People v Jambor (On Remand)*, 273 Mich App 477, 487; 729 NW2d 569 (2007).

In this case, the prosecutor conceded that Singleton's prior police statement was testimonial, but argued that the forfeiture by wrongdoing doctrine allowed its admission. The trial court agreed, concluding that defendant forfeited his right to confront Singleton by killing her. In *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006), this Court discussed the doctrine of forfeiture by wrongdoing, explaining:

MRE 804(b)(6) provides an exception to the hearsay rule for a statement by a declarant made unavailable by the opponent. If the declarant is unavailable as a witness, the rule allows admission of "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b)(6). MRE 804(b)(6), adopted in 2001, is nearly identical to FRE 804(b)(6), except that the Michigan exception applies if a party "has engaged in or *encouraged* wrongdoing" rather than "engaged or *acquiesced* in wrongdoing" (emphasis added). These rules are a codification of the common-law equitable doctrine of forfeiture by wrongdoing, first recognized in *Reynolds v United States*, 98 US 145; 25 L Ed 244 (1879). Under the doctrine, a defendant forfeits his or her constitutional right of confrontation if a witness's absence results from wrongdoing procured by the defendant. [Citation and footnote omitted.]

As explained in *Reynolds*, *supra* at 158:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Defendant argues that the doctrine is not applicable in this case because there was no evidence that he killed Singleton in order to prevent her from testifying. Although plaintiff asserts that such a showing is not required,<sup>1</sup> the United States Supreme Court recently held otherwise in *Giles v California*, \_\_\_ US \_\_\_, 128 S Ct 2678; 171 L Ed 2d 488 (2008). In *Giles*, the Supreme Court concluded that the forfeiture doctrine applies only if a defendant's actions were undertaken for the purpose of preventing the witness from testifying. *Id.* at 128 S Ct 2683. In this case, the trial court agreed with the prosecutor that the rule applied broadly in situations involving a defendant's alleged wrongdoing, without considering whether defendant's actions here were intended to prevent Singleton from testifying. Because the trial court failed to require a showing that defendant intended to prevent Singleton from testifying, and there was no evidence suggesting that defendant killed Singleton for that purpose, the trial court erred in concluding that defendant forfeited his right to confront Singleton.

When a constitutional error is preserved, a new trial is required unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). In this case, the impact of Singleton's April 7, 2006, police statement was to show that defendant had previously assaulted Singleton and threatened her. However, there was other evidence of defendant's history of violence and threats toward Singleton. Singleton's mother testified that she observed bruises on Singleton's body and that Singleton moved in with her because she was tired of being beaten by defendant. Further, the disputed evidence involved an assault that occurred more than four months before Singleton was killed. The impact of this evidence paled in comparison to the evidence of defendant's conduct during the day and hours shortly before Singleton was killed. The evidence showed that during the day before Singleton was killed, defendant began following her around and repeatedly calling her on her cell phone, causing her to become frightened and concerned for her safety. Defendant also sent threatening text messages to Singleton, including that, "Until the day you die, you will always be Mrs. Tamiko Baker." Defendant was also observed driving up and down the street of the house where Singleton was staying on the night she was killed. Defendant later followed Singleton to a party store, confronted her, and asked her to take him back, but she refused his request and told him that he was embarrassing her.

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<sup>1</sup> The prosecutor conceded at oral arguments that *Giles* "cuts a major hole in our argument on appeal," that the "reasoning of *Giles* undercuts our argument," and that the "theory of admissibility relied on by the lower court cannot survive on appeal."

Defendant's conduct caused Singleton to call the police and report that defendant was stalking her. Shortly before Singleton was shot, she received a phone call from defendant, who told her, "Bitch, you better watch your back."

Furthermore, the principal issue for the jury to resolve at trial was defendant's identification as the person who shot Singleton. The evidence of defendant's April 6, 2006, assault of Singleton was not particularly helpful in resolving that issue. Although evidence of defendant's volatile relationship with Singleton was probative of defendant's motive and intent, as explained previously, there was ample other evidence of defendant's history of violence and threats toward Singleton apart from the April 6 assault, including, most significantly, compelling evidence of defendant's threatening conduct and rebuffed attempt at reconciliation shortly before Singleton was shot. Identification testimony was provided by a witness who was familiar with defendant and who testified that he observed defendant fleeing the area of the shooting and placing an apparent gun in his waist area. The disputed evidence did not aid the jury in resolving the credibility of this identification testimony. It is clear beyond a reasonable doubt that a rational jury would have found defendant guilty of the charged offenses even without the evidence of the April 6 assault. Therefore, the erroneous admission of Singleton's April 7, 2006, police statement does not require reversal.

Defendant next argues that the trial court erred in refusing to suppress a witness's photographic identification of defendant, and subsequent in-court identification, on the ground that the police improperly conducted a photographic showup, instead of a live lineup. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Defendant argues that the police were required to conduct a live lineup, instead of a photographic showup, because he was in custody at the time of the identification procedure. When an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists. *Id.* at 298; *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Circumstances that might justify use of a photographic showup include: (1) it is not possible to arrange a proper lineup, (2) there is an insufficient number of persons available with the accused's physical characteristics, (3) the case requires immediate identification, (4) the witnesses are distant from the location of the accused, and (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification. *Anderson, supra* at 186-187 n 22; *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

In this case, defendant was not in custody in Wayne County for the murder charges when the photographic showup was conducted. Instead, he was in custody in Macomb County on an unrelated domestic violence warrant. The trial court found that there was no valid reason to request defendant's presence at a lineup in Wayne County because he had not been identified as a suspect in the murder case yet. Because there was a legitimate reason for conducting a photographic showup instead of a live lineup, the trial court did not err in denying defendant's motion to suppress the witness's pretrial and in-court identifications.

Finally, defendant argues that the trial court abused its discretion by refusing to give a missing witness instruction, CJI2d 5.12, after the prosecution failed to produce two witnesses, Christopher Calhoun and Antoine Owens, for trial. We disagree.

This Court reviews a trial court's determination of due diligence and the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

As this Court explained in *Eccles*, *supra* at 388,

a prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. [Citations omitted.]

The trial court conducted a due diligence hearing to determine the efforts made to locate the two witnesses. The evidence showed that the police checked several known addresses in an attempt to locate the witnesses, but were unsuccessful in securing their presence. There was also evidence that both witnesses appeared to be avoiding the authorities. Christopher Calhoun had told a relative that he did not want to get involved, and there was an outstanding probation warrant for Antoine Owens's arrest. Although defendant asserts that additional efforts could have been made to locate the witnesses, due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Because the evidence showed that reasonable efforts were made to locate the witnesses and secure their presence, the trial court did not abuse its discretion by declining to give the missing witness instruction.

Affirmed.

/s/ Bill Schuette  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald