STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2009
v	No. 286952 Wayne Circuit Court
RICHARD PAGE MCCLAIN, Defendant-Appellant.	LC No. 07-023859-FC

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals of right from his bench trial convictions of first-degree felony murder, MCL 750.316(1)(b)(murder committed in the attempted perpetration of a robbery), assault with intent to rob while armed (two counts), MCL 750.89, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm in the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, 25–50 years' imprisonment for each of the assault with intent to rob convictions, 3–7 years' imprisonment for the felon in possession conviction, and the mandatory two-year consecutive sentence for the felony-firearm conviction.[1] We affirm.

I. Production of Witness

Defendant first claims he is entitled to a new trial because the prosecution failed to exercise due diligence to locate and produce a requested witness, Isaac Bannerman. Because this issue was raised in the trial court and the court made a dispositive ruling, it is preserved for appellate review. *People v Cain*, 238 Mich App 95, 108, 122; 605 NW2d 28 (1999). This Court reviews a trial court's findings of due diligence for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992); *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing

[1] The assault with intent to rob and the felon in possession sentences were enhanced pursuant to MCL 769.10 because defendant was an habitual offender.

court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003)(citations omitted). A court's factual findings underlying its discretionary determination are reviewed for clear error. MCR 2.613(C); *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004).

MCL 767.40a provides, in relevant part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> * * *
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. . . .

"Before its amendment in 1986, MCL 767.40[] was interpreted to require the prosecutor to use due diligence to endorse and produce all res gestae witnesses." *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). After the amendment, the prosecutor's obligation was

> replaced by a scheme that 1) contemplates notice at the time of filing the information of known witnesses who might be called and all other known res gestae witnesses, 2) imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses as they become known, and 3) directs that that list be refined before trial to advise the defendant of the witnesses the prosecutor intends to produce at trial. The prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. [*Id.* at 288-289.]

The prosecution complied with MCL 767.40a(1) by listing Bannerman's name on their pretrial witness list. This list states, in relevant part: "The witnesses the People intend to produce at trial, pursuant to MCLA 767.40a(3), are designated by an "X" in the boxes to the left." The box to the left of Bannerman's name is not checked. Recognizing that the prosecution did not intend to produce Bannerman at trial (and aware that he was not produced at the preliminary examination), the defense filed a letter dated March 13, 2008, requesting assistance in securing Bannerman's presence at trial and providing his home address.

According to the testimony of the officer-in-charge at a pretrial hearing, he was requested by a fax dated March 26, 2008, to assist defense counsel in locating Bannerman. The officer testified that he started looking for Bannerman in February of 2008, and had made between four

and six visits to Bannerman's home between then and the time of trial. The officer had spoken with Bannerman at that address before the preliminary examination and Bannerman "stated that he did not want to be involved any longer, and did not want to press charges either against [defendant] supposedly firing shots at him." Every time the officer returned to the address and spoke with Bannerman's sister and mother, they informed him that Bannerman was not at home. When the officer received a witness detainer issued by the court (the day before the trial when he returned from vacation), he provided it to the department's fugitive apprehension team; they apparently tried and failed to locate Bannerman. It appeared that Bannerman did not want to be located. The trial court ruled that the police had exercised "due diligence" in attempting to locate the witness. The parties stipulated that Bannerman's statement to the police would be admitted as evidence.

The statute requires that the prosecution or the police provide "reasonable assistance . . . to locate and serve process upon a witness." MCL 767.40a(5). It does not require due diligence. Nevertheless, the trial court ruled that the police had satisfied the due diligence standard. Due diligence requires that the police do everything reasonable, not everything possible, to locate absent witnesses. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). To the extent there is a difference between "reasonable assistance" and "due diligence," an issue that is not presented in this appeal and which we do not decide, this Court is satisfied that the efforts of the police satisfied both standards.

Moreover, the statute requires that the reasonable assistance be directed at locating and serving process on the witness, not actually producing the witness for trial.[2] The repeated efforts of the police to locate Bannerman satisfied the reasonable assistance requirement. Defendant does not challenge the trial court's factual findings, so there is no showing that the trial court's discretionary determination was based on clearly erroneous findings. The trial court's determination that the efforts of the police satisfied due diligence and that, given that the missing witness's statement was to be introduced in the trial, there was no basis for further relief, was within the principled range of possible outcomes. *Babcock*, *supra* at 269. Therefore, the trial court's ruling was not an abuse of discretion.

Finally, even if the efforts of the police failed to satisfy the statute, reversal of defendant's conviction would not be appropriate. Failure to provide "reasonable assistance" is a violation of a statutory requirement, not a constitutional mandate. "[P]reserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' 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).

[2] There is language in *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995), and in *People v Koonce*, 466 Mich 515, 521; 648 NW2d 153 (2002), suggesting that the prosecution and police still have an obligation to produce the requested witness at trial. However, this language is inconsistent with the plain language of the statute that requires only that the police or prosecution provide "reasonable assistance to locate and serve process upon a witness"; the statute says nothing about producing the witness at trial. By inference, the statute places the burden of producing the witness on the defense because it is the party seeking production.

Defendant wanted Bannerman to testify because his description of defendant's clothing differed from the other victim. Admission of Bannerman's statement provided the evidence that defendant hoped to obtain from Bannerman's live testimony. However, as the prosecutor points out on appeal, Bannerman's statement also provided (as, presumably, would his live testimony) significant detrimental evidence. First, it put defendant at the location of the fatal shooting around the time it occurred. Additionally, it demonstrated that defendant had a malicious temperament, because he allegedly shot at Bannerman and his companions immediately before and immediately after the attempted robbery. Most importantly, it placed in defendant's possession a handgun of the very caliber that matched the bullet recovered from the deceased victim. Given this evidence, the failure of the police to locate Bannerman did not result in outcome-determinative error.

II. Sufficiency of the Evidence

Defendant next contends the facts found by the trial court established only that the shooting occurred during a struggle, and this factual conclusion would only support a verdict of involuntary manslaughter because there was insufficient evidence that he acted with malice, the element necessary to elevate the killing to murder.[3] We disagree.

This Court reviews a conviction de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), to determine if it is supported by sufficient evidence by "view[ing] the evidence in a light most favorable to the prosecution and determin[ing] whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant was charged with first-degree felony murder based on his attempt to commit a robbery. MCL 750.316(1)(b). To establish that the victim's death was a first-degree murder, the prosecutor was required to prove that defendant committed murder during the course of a completed or attempted enumerated felony. *Id*. The crime of murder requires proof that a defendant acted with malice; that is, that the defendant acted with the intent to kill, with the intent to inflict great bodily harm, "or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 728, 733; 299 NW2d 304 (1980). Malice may be inferred "from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. at 729.[4] "Thus, whenever a killing occurs in the perpetration or attempted perpetration of an

---

[3] At trial, defendant claimed as his sole defense that Day misidentified him as the assailant. The defense theory was not that defendant was admittedly the assailant but there was insufficient proof of guilt of felony murder because he acted without malice or because the handgun accidentally discharged. The trial court could not have been expected to resolve defense theories that were never asserted by defendant.

[4] Or, as our Supreme Court recently noted, "the fact that the defendant committed a felony may still be *relevant*, even if not dispositive, evidence that the defendant acted with malice." *People v Holtschlag*, 471 Mich 1, 10 n 6; 684 NW2d 730 (2004)(emphasis in original). Defendant (continued…)

inherently dangerous felony . . . , in order to establish malice the jury may consider the 'nature of the underlying felony and the circumstances surrounding its commission.'" *Id*. at 729-730, citing *People v Fountain*, 71 Mich App 491, 506; 248 NW2d 589 (1976). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The question we must resolve is fairly simple: considered in a light most favorable to the prosecution, did defendant's actions sufficiently establish that he acted with malice? Since malice *may* be inferred from the use of a deadly weapon, *Aaron*, *supra* at 729-730, the trial court could properly conclude that defendant's act of accosting the victims, pointing a handgun at them, ordering them not to move and to surrender their money, and then discharging the handgun[5] during a struggle with one of the victims, demonstrated that defendant acted with malice. Considered in a light most favorable to the prosecution, it was a reasonable conclusion that defendant discharged his weapon to make Jones stop struggling with him, and that he intended to either kill Jones or cause him great bodily harm, or that defendant acted in "wanton and willful disregard of the likelihood that the natural tendency of [his] behavior [would be] to cause death or great bodily harm." *Aaron*, *supra* at 730.

Indeed, Bannerman's statement (which was admitted into evidence by stipulation) related that defendant shot at Bannerman and his companions immediately before, and immediately after, he attempted to rob the victims. Considering the evidence in a light most favorable to the prosecution, the trial court reasonably concluded that defendant discharged his weapon to make Jones stop struggling with him, and that he intended to either kill Jones or cause him great bodily harm, or that he acted in "wanton and willful disregard of the likelihood that the natural tendency of [his] behavior [would be] to cause death or great bodily harm."

Defendant would suggest that the handgun discharged accidentally or because of his gross negligence. While either explanation is possible, defendant did not claim below that one or the other explanation was what occurred, and there was no evidence offered to support them. Moreover, both explanations are inconsistent with this Court's responsibility to interpret the facts "in a light most favorable to the prosecution." *Wolfe*, *supra* at 515. Interpreted in the correct

---

(…continued)

claims that *People v Richardson*, 409 Mich 126, 143-144; 293 NW2d 332 (1980), holds that "[m]alice cannot be inferred simply by the use of a deadly weapon." However, that is not the holding of *Richardson*. Our Supreme Court stated that it was improper to instruct a jury that the law implies malice from an unprovoked, unjustifiable, or inexcusable killing. *Id*. at 144. The Court instead emphasized that "[t]he necessary factual element of malice may be permissibly inferred from the facts and circumstances of the killing, but it can never be *established as a matter of law* by proof of other facts." *Id.* (emphasis in original), citing *Maher v People*, 10 Mich 212, 218 (1862) and *People v Martin*, 392 Mich 553, 560-562; 221 NW2d 336 (1974); see also *People v Aaron*, 409 Mich 672, 736 n 5; 299 NW2d 304 (1980)(Ryan, J., concurring).

[5] Defendant possessed the handgun when the struggle began, and he possessed it when the struggle ended. Considered in a light most favorable to the prosecution, therefore, the facts suggest that defendant discharged the weapon.

manner, this Court concludes there was sufficient evidence that defendant acted with malice when he discharged the weapon and fatally injured the victim.

III. Double Jeopardy

Lastly, defendant claims that if this Court upholds his first-degree felony murder conviction, it must set aside his assault with intent to rob while armed sentences because convictions for both felony murder and the underlying predicate felony violate the constitutional prohibition against being placed twice in jeopardy.

Defendant did not challenge his sentences in the trial court on the basis that they violated the prohibition against double jeopardy. Therefore, this issue is unpreserved for appellate review. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). This Court "review[s] an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. at 682; citations omitted.

The federal and state constitutional prohibitions against being twice placed in jeopardy[6] provide "three related protections: (1) [they] protect[] against a second prosecution for the same offense after acquittal; (2) [they] protect[] against a second prosecution for the same offense after conviction, and (3) [they] protect[] against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). This third protection, the "multiple punishments" protection, is the one implicated by defendant's argument.

The prosecution correctly observes that in *People v Ream*, 481 Mich 223, 225, 240; 750 NW2d 536 (2008), a case not mentioned by defendant, our Supreme Court recently held that "convicting and sentencing a defendant for both felony murder and the predicate felony does not necessarily violate the 'multiple punishments' strand of the Double Jeopardy Clause." The key determinant is whether each offense contains an element not contained in the other. *Id*. Where that qualification is satisfied, the Double Jeopardy Clause's prohibition against multiple punishments is not violated.

First-degree felony murder contains an element not contained in assault with intent to rob while armed: the killing of a human being. MCL 750.316(1)(b); *Ream*, *supra* at 241. Correspondingly, assault with intent to rob while armed contains two elements not contained in first-degree felony murder: (1) the intent to rob, and (2) the defendant being armed. MCL 750.89; *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Therefore, under the *Ream* multiple punishment analysis, the double jeopardy prohibition is not violated by defendant's convictions and sentences for both offenses. Accordingly, defendant's argument is meritless and his sentences must be affirmed.

---

[6] US Const, Am V provides, in relevant part: "No person shall . . . be subject for the same offense to be twice placed in jeopardy of life or limb . . . ." Const 1963, art 1, § 15 provides: "No person shall be subject for the same offense to be twice put in jeopardy."

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens