

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

INDIA TAYLOR,

Defendant-Appellant.

UNPUBLISHED

August 16, 2012

No. 301662

Wayne Circuit Court

LC No. 10-007792-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of assault with intent to commit great bodily harm less than murder, MCL 750.84. Defendant was initially convicted of the above as well as felonious assault, MCL 750.82. Defendant was sentenced to 3 to 15 years' imprisonment for assault with intent to commit great bodily harm less than murder, and two to six years' imprisonment for felonious assault. Following a motion to remand filed in this Court, defendant's conviction for felonious assault was vacated by the trial court. Defendant was resentenced, and her conviction and sentence for assault with intent to commit great bodily harm remained the same. Because the trial court properly admitted the prior recorded testimony of Steven Williams into evidence and properly scored offense variable 14 at ten points, we affirm.

On January 31, 2010, defendant initiated a fight with Lokia Montgomery in a Wendy's parking lot. The two had been friends when an allegation over missing money caused a disagreement. The fight moved to the intersection of nearby roads and defendant's friends joined in the altercation. Two men, Steven Firchau and Steven Williams, witnessed the fight and pulled their respective cars over. Firchau intervened and the fight was stopped. However, defendant got back into her car and began driving toward Montgomery as she got up from the street. According to Montgomery, defendant's car hit her in the knees and knocked her back down. Defendant then left the area. Williams attempted to follow her to get the license plate number, but was unable to catch up to defendant's vehicle.

Defendant first claims that the trial court erred when it entered into evidence the prior recorded testimony of Steven Williams, a witness for the prosecution, because the prosecution failed to show due diligence in locating Williams and the admission of the prior recorded testimony violated the confrontation clause. We disagree.

A finding of due diligence in obtaining a witness is a finding of fact and will not be set aside on appeal absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). We review trial court's decision whether to admit evidence under a hearsay exception for an abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principle outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). At trial, defense counsel did not object to the admission of Williams's prior testimony on the grounds that its admission violated the confrontation clause. Therefore, that issue is not preserved for appeal. We review unpreserved constitutional error for plain error that affected defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

Prior recorded testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. *Briseno*, 211 Mich App at 14. MRE 804(a)(5) and (b)(1) state:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant-

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The test for due diligence for purposes of MRE 804(a)(5) is one of reasonableness— whether good faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it. *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

In this case, Williams did not appear in court on the day of trial, even though he was personally served two days before trial with a subpoena. The prosecution moved to have

Williams's prior testimony from a probation violation hearing for defendant read to the jury. The court held a due diligence hearing and admitted the prior recorded testimony of Williams into evidence.

The trial court did not abuse its discretion in allowing the prior recorded testimony to be read to the jury. Before trial, the prosecutor reasonably believed that Williams would appear. She spoke to him several times prior to the trial concerning his testimony. Williams was a stranger to all parties in the proceeding, and therefore, did not have reason to fear retaliation or prosecution as a result of his testimony. Additionally, Williams never indicated he would not appear in court. Just a few days before trial, the prosecutor spoke with Williams and he indicated he would be at trial. In *People v Conner*, 182 Mich App 674; 452 NW2d 877 (1990), the Court held that just because a witness is known to be reluctant does not give the prosecutor reason to believe that the witness will flee or be difficult to locate. *Id.* at 682. Because the prosecutor reasonably believed Williams would appear, there was no need for her to take extraneous efforts to ensure his attendance before trial.

On the morning of trial, the prosecutor spoke to Williams on the phone. After she spoke to Williams, she realized he may not come to court. The prosecutor requested, and the court issued, a bench warrant. A police car was sent to Williams's last known address, but he was not there. The police checked for Williams in the Law Enforcement Information Network and obtained no information. The prosecutor continued to call Williams, but he never answered his phone. Under the circumstances, the prosecutor's efforts on the day of trial were reasonable and constituted due diligence.

Defendant also claims that the admission of Williams's prior testimony violated her rights under the confrontation clause. The right to confrontation "bars testimonial statements by a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Williams's prior recorded testimony was properly admitted under MRE 804 because Williams was unavailable and defendant had an opportunity and similar motive to develop the testimony through cross-examination at the probation violation hearing for defendant. Therefore, there was no plain error and the admission of the evidence did not violate defendant's right to confrontation.

Moreover, even if the lower court erred in admitting the testimony of Williams, the error was harmless because the evidence did not prejudice defendant. The erroneous admission of evidence is harmless if it did not prejudice the defendant. *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998). There was substantial evidence against defendant presented at trial, including the testimony of the complainant and an eye witness. Therefore, the error was harmless and reversal is not necessary.

The trial court did not abuse its discretion in finding that the prosecution exercised due diligence in trying to locate Williams for trial and there was no plain error affecting defendant's right to confrontation. Therefore, the trial court did not err in admitting the prior recorded testimony of Williams at trial.

Defendant next asserts that there was insufficient evidence to score any points for offense variable (OV) 14, thus requiring resentencing. We disagree.

When scoring the sentencing guidelines, “[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision “for which there is any evidence in support will be upheld.” *Id.*

OV 14 addresses the offender’s role. 10 points are to be assessed if the defendant “was a leader in a multiple offender situation.” MCL 777.44 (1)(a). In determining whether an offender was a leader in a multiple offender situation, we must review the entire criminal transaction. MCL 777.44(2)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004).

Here, the evidence indicates that defendant and two of her friends, unknown to the victim, were in the defendant’s car along with the victim when the defendant began insisting that the victim had stolen money from defendant. When defendant pulled the car over and began searching the victim for the money, a fistfight broke out between the two. Defendant’s two friends exited the car and started after the victim to assist defendant in beating the victim. When the victim ran away from the affray, defendant’s friends chased her down and continued to beat her in the middle of the street. Defendant then caught up to the group and re-engaged in the fight, joining her friends in beating the victim. When the fight was broken up by a stranger, defendant and her friends all got back into defendant’s car and defendant drove the car at the victim, hitting her and knocking her down into the street. Defendant, then, was the impetus for the entire criminal episode. Defendant was the first to have physical contact with the victim and her two friends’ involvement were prompted and encouraged by her actions. The record thus supports the trial court’s finding that defendant was a leader in a multiple offender situation and its assessment of 10 points for OV 14.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly