STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2012
v	No. 302650 Berrien Circuit Court
TERRANCE EUGENE DAWSON, Defendant-Appellant.	LC Nos. 2010-003429-FC; 2010-003430-FC; 2010-003431-FC; 2010-003358-FC; 2010-003359-FC

Before: M.J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

The prosecution charged defendant in five separate cases involving defendant's alleged abduction at gunpoint of five separate victims during the summer of 2010. After granting defendant's motion to waive his right to a jury trial, the trial court held a single bench trial. The trial court convicted defendant of five counts of kidnapping, MCL 750.349, five counts of possession of a firearm by a felon, MCL 750.224f, and five counts of felony-firearm, MCL 750.227b. Additionally, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b (case nos. 2010-003430-FC and 2010-003358-FC); two counts of felonious assault, MCL 750.82 (case nos. 2010-003431-FC and 2010-003359-FC); and one count of assault with intent to commit murder, MCL 750.83 (case no. 2010-003429-FC). Defendant appeals as of right all of his convictions. We affirm.

I. JURY WAIVER

Defendant first argues that he did not knowingly, intelligently, and voluntarily waive his right to a jury and, thus, the following bench trial violated the Sixth Amendment. We disagree. This issue is unpreserved because defendant did not raise the issue before the trial court. See *People v Antkoviak*, 242 Mich App 424, 430; 619 NW2d 18 (2000). Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"Both the federal and state constitutions guarantee a defendant the right to a jury trial." *People v Mosly*, 259 Mich App 90, 95; 672 NW2d 897 (2003). "However, with the consent of the prosecutor and the approval of the trial court, a defendant may waive his right to a jury trial.

In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made." *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009) (citations omitted). In Michigan, the procedure by which a defendant waives his right to a jury trial is governed by MCR 6.402(B). *Mosly*, 259 Mich App at 95. MCR 6.402(B) provides the following:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

In this case, at the hearing on defendant's motion to waive his right to a jury trial, defendant informed the court that he wished to waive his right to a jury trial:

> *The Court:* [S]o, if we can go ahead and give [the jury trial waiver form] to [defendant], and take a few moments and go through that.
>
> All right, [defendant], sir, you've had the opportunity to discuss this matter with your attorney . . . at length –
>
> *The Defendant:* Yeah.
>
> *The Court:* – and you do wish to waive your right to a jury trial, sir?
>
> *The Defendant:* Yes.

We find that although the trial court referenced defendant's right to a jury trial, it did not explicitly "*advise* the defendant in open court of the constitutional right to trial by jury." MCR 6.402(B) (emphasis added). Moreover, while the trial court confirmed with defendant that he had discussed the matter with his trial counsel and "wish[ed] to waive [his] right to a jury trial," the trial court did not specifically ask defendant if he understood his right to a jury trial. Accordingly, we find that the trial court did not fully comply with the specific language of MCR 6.402(B). However, the mere finding that the trial court failed to comply with MCR 6.402(B)'s procedural rules does not warrant reversal.

> [A] trial court's failure to follow procedural rules for securing a waiver of the right to a jury trial does not violate the federal constitution nor does it require automatic reversal. Indeed, compliance with the court rules only creates a presumption that a defendant's waiver was voluntary, knowing, and intelligent. If a defendant's waiver was otherwise knowingly, voluntarily, and intelligently made, reversal will not be predicated on a waiver that is invalid under the court rules because courts will disregard errors that do not affect the substantial rights of a defendant[.] [*Mosly*, 259 Mich App at 96 (citations omitted).]

In this case, the record supports the conclusion that defendant "understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Id.* In addition to the facts provided above, defendant wrote to the trial court on two separate occasions before trial. The

first letter was received by the court on August 31, 2010, and stated the following:

> I am confirming the fact that, i [sic] talked it over with my attorney and we agreed on me having a bench trial. Due to heavy media coverage, newspaper, and internet attention, everyone has gotten full details concerning my case. This decision was thought through carefully. Earnest White shall confirm this on my behalf.

Later, another letter was sent to the trial court. This letter was dated October 15, 2010, and was signed by both defendant and his attorney:

> I, Terrance Dawson, defendant/juvenile in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending[.] I fully understand that under the laws of this state I have a constitutional right to a trial by jury.

Accordingly, we find no plain error in the trial court allowing defendant to proceed without a jury trial.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his conviction of assault with intent to murder Shunichi Aquikey Hunt in lower court case no. 2010-003429-FC. Specifically, defendant argues that the prosecution failed to prove beyond a reasonable doubt that defendant acted with the requisite intent. We disagree.

A criminal defendant does not have to take any particular action in order to preserve for appeal a challenge to the sufficiency of the evidence. *People v Patterson*, 428 Mich 502, 505; 410 NW2d 733 (1987). A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

Assault with intent to murder, MCL 750.83, requires proof of three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The trial court may base its finding of an actual intent to kill on a broad scope of evidence. See *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). "The intent to kill may be proven by inference from any facts in evidence." *Id.* A fact-finder may infer an actual intent to kill "from the nature of the defendant's acts constituting the assault." *People v Brown*, 267 Mich App 141, 149 n 5; 703 NW2d 230 (2005) (quotations and citations omitted). Such considerations include "the temper or disposition of mind with which they were apparently performed [and] whether the instrument and means used were naturally adapted to produce death." *Id.*

In this case, Hunt testified that she attempted to escape defendant but fell during her flight. According to Hunt, while she was on the ground, defendant approached her with his gun aimed at her head. Hunt testified that she covered her face with her arms and asked defendant not to shoot her, to which he replied "Bitch, please" and shot her in the arm. The fact that defendant used a gun, an instrument "naturally adapted to produce death," to commit his assault against Hunt supports an inference that defendant acted with an actual intent to kill Hunt. *Id*. Further, the fact that defendant aimed at her head before she covered her face with her arms and ultimately shot her arm supports the intent to kill. Hunt's testimony that defendant said "Bitch, please" before firing the gun also evidenced that he performed the assault with a "temper or disposition of mind" that supports an inference of an actual intent to kill. See *id*. Therefore, the evidence was sufficient to support beyond a reasonable doubt the finding that defendant had the requisite intent to kill.

III. RIGHT TO CONFRONT WITNESSES

A

Defendant next argues that the trial court violated his Sixth Amendment right to confront his accuser by admitting Anderson's preliminary examination testimony. We disagree.

While the trial court's decision to admit evidence is reviewed for an abuse of discretion, *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010), constitutional issues are reviewed de novo, *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). A trial court's factual findings, including whether the prosecution exercised due diligence in attempting to serve an absent witness with a subpoena is reviewed for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

"Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him or her." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). "The Sixth Amendment 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). Statements made during a preliminary examination are testimonial and implicate the defendant's Sixth Amendment right of confrontation. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

In this case, the trial court admitted Anderson's preliminary examination testimony under MRE 804(b)(1). MRE 804(b)(1) provides that the hearsay rule does not exclude a declarant's former testimony if the declarant is unavailable and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

MRE 804(a)(5) states that a declarant in a criminal case is "unavailable" where she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." "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. The trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (citation omitted).

In this case, Officer Jared Graves testified that he went to Anderson's last known place of residence in order to serve her with a subpoena to appear at trial, but Anderson was no longer living there. Thereafter, Officer Graves sent Anderson a Facebook message, telling her to contact him "ASAP." Anderson never contacted Officer Graves. Detective Wes Smigielski testified that, on four or five occasions during the month-and-a-half leading up to trial, he went to a house where he believed Anderson might be living. Detective Smigielski was never able to locate Anderson or serve her a subpoena to appear at trial, so he twice left his business card with his cellular telephone number at the house. Detective Smigielski testified that, after his third attempt to serve her the subpoena, Anderson called him from an unknown telephone number and told him that she refused to appear at trial because of threats she had received and her fear of seeing defendant again. Nevertheless, Detective Smigielski continued his attempts to serve Anderson with the subpoena.

After considering the above facts, we conclude that the trial court did not clearly err in finding that the prosecution established due diligence in attempting to serve Anderson. The prosecution pursued all specific leads regarding Anderson's whereabouts and continued to try and serve her while knowing she was avoiding service. Moreover, the fact that the prosecution's efforts to serve Anderson with a subpoena began at least six weeks before the trial date evidences due diligence. See *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995) (noting that "the prosecution had shown due diligence in attempting to locate and produce [the witness]" because, in part, the record indicated that the prosecution's "efforts to locate [the witness] began at least a month before the retrial"); *People v Conner*, 182 Mich App 674, 682; 452 NW2d 877 (1990) ("[T]he prosecution's efforts to serve [the witness] commencing six weeks in advance of the trial were timely.").

We similarly find that the trial court did not clearly err in determining that defendant had a prior "opportunity and similar motive to develop" Anderson's testimony by cross-examination. "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). In determining whether the prosecution had a "similar motive" under MRE 804(b)(1), a trial court should consider:

> (1) whether the party opposing the testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue; (2) the nature of the two proceedings-both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities). [*Id*. at 278 (internal quotation omitted).]

Although a preliminary examination's purpose and standard of proof do not mirror that of a trial, a defendant has a similar motive to cross-examine the witness at the preliminary examination. *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998); *People v Adams*, 233 Mich App 652, 659; 592 NW2d 794 (1999). In this case, defendant's trial counsel cross-

examined Anderson at the preliminary examination and elicited testimony that she was on medication at the time of the alleged incident, that she was the only witness to the alleged incident, and that she only saw a glimpse of her abductor's face. At trial, the prosecution introduced Anderson's preliminary examination testimony for the same purpose that it introduced her testimony at the preliminary examination. We find that defendant's interest and motive in discrediting Anderson's preliminary examination testimony was similar to his interest and motive at trial. *Meredith*, 459 Mich at 67; *Adams*, 233 Mich App at 659. Thus, the trial court did not abuse its discretion in admitting Anderson's preliminary examination testimony under MRE 804(b)(1).

Likewise, defendant's claim that his rights under the Confrontation Clause were violated fails for similar reasons. The Confrontation Clause bars the admission of out-of-court testimonial statements only when the declarant is unavailable to testify and where defendant did not have a prior opportunity to cross-examine the declarant. *Crawford*, 541 US at 59, 68; *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). As just discussed, the declarant, Anderson, was unavailable and defendant had a prior opportunity to cross-examine Anderson. Accordingly, admission of the testimonial out-of-court statement did not violate the Confrontation Clause.

B

Defendant next argues that reversal is warranted because the trial court violated the Confrontation Clause and MCR 6.006(C)(2) by permitting two of the prosecution's witnesses to testify via video technology. Specifically, defendant claims that his right to confrontation was violated when prosecution witnesses Doug Westrate (fingerprint expert) and Stuart Michael Burritt (firearms expert) testified via video technology. We disagree.

Regarding any alleged violation of defendant's constitutional right to confrontation, defendant waived the issue. "'[W]aiver is the intentional relinquishment or abandonment of a known right.'" *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted). Waiver differs from mere forfeiture, which has been described as the failure to make the timely objection. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Additionally, the waiver of a right extinguishes any error and prevents appellate review of a claimed deprivation of that right. *Id.* While some constitutional rights cannot be waived by counsel alone, many fundamental rights can be waived without a defendant personally making the waiver. *Id.* at 218. "There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel." *People v Buie* ("*Buie III*"), ___ Mich ___; ___ NW2d ___ (Docket No. 142698, decided May 24, 2012), slip op, p 11.

The Supreme Court adopted the following rule regarding the waiver of confrontation by counsel: "[I]f the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Id.*, slip op at 19. Before the first witness testified via video, the following exchange took place:

> *[THE PROSECUTOR]*: Pursuant to MCR 6.006, the – provision C that permits video and audio proceedings in trials with concern [sic – consent] of the

> parties, it's my understanding [defense counsel] is consenting to such video and audio testimony for two lab experts from the Grand Rapids MSP crime lab.
>
> *THE COURT*: Okay.
>
> *[DEFENSE COUNSEL]*: That is correct, your Honor.
>
> *THE COURT*: Okay. We've discussed this in chambers yesterday at the status conference. So, with that stipulation, thank you, [defense counsel] and [prosecutor]. Please proceed . . . .

We conclude that there is nothing on the record to overcome the presumption that the waiver was reasonable trial strategy. This was similar to the situation in *Buie*, where the issue of trial strategy "was never addressed, much less rebutted." *Id.*, slip op at 22. Additionally, there is no objection from defendant on the record regarding the use of the video and audio technology. Accordingly, defense counsel's waiver of the right to confrontation was valid, which extinguished any error. Accordingly, defendant is precluded from raising the issue on appeal.

Defendant additionally argues that the trial court violated MCR 6.006(C)(2) by allowing Westrate and Burritt to testify through video technology. "Pursuant to the plain language of MCR 6.006(C)(2), a trial court may take witness testimony by two-way, interactive video technology if: (1) the defendant is either present in the courtroom or has waived the right to be present, (2) there is a showing of good cause, and (3) the parties consent." *People v Buie* ("*Buie I*"), 285 Mich App 401, 417; 775 NW2d 817(2009). In this case, defendant was present in the courtroom when Westrate and Burritt testified through two-way, interactive video technology. Thus, the first requirement of MCR 6.006(C)(2) was met. In regard to MCR 6.006(C)(2)'s consent requirement, "it may be permissible for a lawyer to consent to the use of two-way, interactive video technology on behalf of his or her client[.]" *People v Buie (After Remand)* ("*Buie II*"), 291 Mich App 259, 273; 804 NW2d 790 (2011). In this case, defendant's trial counsel consented to the use of video technology, and there is no indication that defendant ever objected to this agreement.

We also find that the good-cause requirement of MCR 6.006(C)(2) was satisfied. Defendant's attempt to import the constitutional standard from *Craig*, that the cause be "necessary to further an important public policy" or "state interest," has been rejected by our Supreme Court. *Buie III*, ___ Mich at ___, slip op at 23. Instead, "'[g]ood cause' simply means a satisfactory, sound, or valid reason. *Id.*, citing *Random House Webster's College Dictionary* (1997) (quotations omitted). "Moreover, under the court rule there is no need to identify a corresponding state interest; any sound reason is sufficient." *Buie III*, ___ Mich at ___, slip op at 23.

As the Supreme Court in *Buie III* noted, because the court rule uses the permissive language, "may," the trial court's decision to allow the testimony via video technology is reviewed for an abuse of discretion. *Id.*, slip op at 24. When both parties consent to the use of video testimony, the trial court cannot abuse its discretion in allowing the testimony. *Id.* Implicit with such a decision is "that convenience, cost, and efficiency were sound reasons for using video testimony," thereby satisfying MCR 6.006(C)(2)'s good-cause requirement. *Id.*

Therefore, the requirements of the court rule were satisfied in the present case, "and the use of the video testimony was proper." *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro