# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL SIERRA,

Defendant-Appellant.

UNPUBLISHED
November 13, 1998

No. 197536
Kent Circuit Court
LC No. 95-002781 FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANO ESQUIVEL,

Defendant-Appellant.

No. 197537
Kent Circuit Court
LC No. 95-002781 FC

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Before: Gage, P.J., and Reilly and Jansen, JJ.

JANSEN, J. (concurring in part and dissenting in part).

I concur with the majority that defendant Esquivel's convictions must be affirmed for the reasons set forth by the majority in docket no. 197537.

I respectfully dissent in docket no. 197536. I believe that it was error requiring reversal for the trial court to allow the police officers to testify as to Morales' identification testimony and to admit Morales' preliminary examination testimony where Morales was not produced by the prosecutor at trial. The error was not harmless. I would reverse defendant Sierra's convictions and remand for a new trial.

I

Defendant Sierra contends that the trial court's decision to admit testimony of the police officers that Morales, who did not testify at trial, identified Sierra as one of the perpetrators was erroneous. A trial court's determination of an evidentiary issue is generally reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

The trial court permitted the police officers to testify at trial, over the objections of both defendants, that Morales gave a description of the perpetrators about twenty to thirty minutes after the drive-by shooting while at the hospital with Villanueva. The description given at the hospital matched defendant Sierra. The trial court also permitted the officers to testify that, about thirty minutes after the incident, Morales identified defendant Sierra as one of the perpetrators during the on-the-scene identification. The trial court further permitted a detective to testify to a photographic lineup at which Morales identified defendants as the perpetrators. The trial court ruled that the identification testimony given at the hospital and at the arrest scene was permissible pursuant to MRE 803(1) (present sense impression), MRE 803(2) (excited utterance), MRE 803(24) (other exceptions), or MRE 804(b)(6) (other exceptions where declarant unavailable).

I would hold that the trial court abused its discretion in permitting the testimony concerning Morales' identification of defendant Sierra at the hospital, the identification of defendant Sierra as being one of the people in the van at the on-the-scene identification, and the photographic lineup testimony. Identification testimony is governed by MRE 801(d)(1)(C) which provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving the person. The trial court noted, correctly, that the police officers could not testify to Morales' identification testimony at trial pursuant to this court rule because Morales did not testify at trial and was not subject to cross-examination.

In an effort to allow the third-party identification testimony, the trial court admitted it under MRE 803(1), 803(2), 803(24), and 804(a)(6). The majority affirms the trial court's ruling on the basis of MRE 803(2) (excited utterance). However, because identification testimony is specifically governed by MRE 801(d)(1)(C), and because the terms of the hearsay exceptions relied on by the trial court do not apply, I find that the third-party identification testimony was erroneously admitted in this case.

Before the adoption of the Michigan Rules of Evidence in 1978, third-party testimony concerning an out-of-court identification statement was generally limited to rebuttal testimony tending to impeach the testimony of the identifying witness, or testimony of the circumstances surrounding the identification. *People v Sanford*, 402 Mich 460, 489; 265 NW2d 1 (1978). Further before the adoption of MRE 801(d)(1)(C), third-party testimony of a nontestifying witness' identification statement would have been inadmissible. *People v Hallaway*, 389 Mich 265, 276; 205 NW2d 451 (1973) ("Certainly, if Brown [an identifying witness] had not been a witness [at trial], it would have been clearly inadmissible for the officer to relate Brown's extra-judicial description of the robber.") Now, in light of MRE 801(d)(1)(C), third-party testimony of an out-of-court statement of identification is substantive nonhearsay evidence *if* the identifier testifies at trial and is subject to cross-examination. *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994). Recently, this Court in *People v Sykes*, 229 Mich App 254, 266-267; 582 NW2d 197 (1998), succinctly stated that the "rule in Michigan under MRE 801(d)(1)(C), as enunciated in *Malone* . . . is that third-party testimony of an out-of-court

statement of identification by an identifier/declarant is substantive nonhearsay evidence—and is admissible even if it goes beyond the simple facts and circumstances of the prior out-of-court statement of identification—if the identifier/declarant testifies and is subject to cross-examination."

In the present case, Morales did not testify at trial and was not subject to cross-examination. His out-of-court identification testimony, therefore, could not have been admitted through the testimony of the police officers. Moreover, it was error to rely on the other hearsay exception rules. Morales' identification statements did not describe or explain an event or condition made while perceiving the event or condition or immediately thereafter, compare MRE 803(1), nor did the identification statements relate to a startling event or condition made while Morales was under the stress of excitement caused by the event or condition, compare MRE 803(2). MRE 801(24) and MRE 804(a)(6) are also clearly inapplicable because the prosecutor did not make known to defendant in advance of trial that the identification testimony would be admitted at trial through the police officers.

Identification testimony is governed by a specific rule of evidence because the ramifications of identification testimony implicate the Confrontation Clause. US Const, Am VI; see also *United States v Owens*, 484 US 554; 108 S Ct 838; 98 L Ed 2d 951 (1988). There is a difference between a witness testifying, "That's the person that shot at me," and "A brown van drove by and several gunshots were fired from it." Under these circumstances, the identification statement directly implicates the defendant while the latter statement is merely one of narration describing the event or condition. Therefore, the rule of evidence specifically requires that the declarant testify at trial and be subject to cross-examination to satisfy such right-to-confrontation concerns. Therefore, Morales' identification testimony could only be admitted through third-party testimony if Morales testified at trial and was subject to cross-examination. Although any statement regarding the events of the shooting could have been admitted under the excited utterance exception to the hearsay rule, the statements of identification could not be included under the excited utterance rule.

This error cannot be deemed harmless and the Confrontation Clause concerns are evident where Morales, at his preliminary examination testimony, could not confirm whether these defendants were in the van at the time of the shooting or whether they fired the guns, but a police officer testified at trial that Morales identified defendants as the men who had the guns. Without the opportunity to cross-examine Morales at trial, the question whether Morales positively identified these defendants as the shooters, and the circumstances surrounding the identification, such as lighting and the fact that Morales was intoxicated at the time, could not be explored at trial. Thus, defendant Sierra was clearly prejudiced where the police officers testimony of Morales' identification statements was more detailed and incriminating than that testified by Morales at the preliminary examination and than contained in the police reports.

Accordingly, I would hold that it was error for the trial court to permit the police officers to testify to Morales' identification of defendant Sierra as one of the perpetrators where Morales did not testify at trial and was not subject to cross-examination.

II

Defendant Sierra also contends that the trial court erred in permitting the prosecutor to admit Morales' preliminary examination testimony where Morales did not testify at trial. Specifically, defendant Sierra argues that the prosecutor did not use due diligence in attempting to produce Morales for trial, and that the preliminary examination testimony should not have been admitted. I agree.

First, I disagree with the majority that this issue is not preserved for appellate review. At trial, defendant objected to the admission of Morales' identification testimony as being inadmissible hearsay. The first time there is an indication in the trial transcript that Morales would not testify at trial was on May 7, 1996, the fourth day of trial. The trial court questioned the prosecutor regarding Morales' whereabouts and the efforts to locate him. The prosecutor responded that Morales was missing. The prosecutor suspected, but was not certain, that Morales, an illegal Mexican immigrant, had attempted to return to his family in Mexico, but was detained by the border patrol. Although the prosecutor was aware before trial that Morales was missing, it was not until May 6, 1996, the third day of trial, that the prosecutor asked the police to contact Morales' employer to determine if the employer had any recent information concerning Morales' whereabouts. The employer then contacted Morales' family in Mexico, and the employer learned that Morales had been "picked up" by the border patrol and was being held "somewhere." The employer had additional information that Morales might be in the New Orleans area.

On this lead, the prosecutor had Detective Grable contact the border patrol in the New Orleans area and officials indicated to Detective Grable that there were approximately one hundred thousand illegal aliens in the United States being held in custody and that there was a two-month process before it could be determined if Morales was indeed being held as an illegal immigrant. The prosecutor further indicated to the trial court that "we have absolutely no information, other than the suspected belief of his family that he is in fact being held somewhere, presumably as an illegal alien." The trial court permitted Morales' hearsay identification statements to be admitted, finding that it would not be unfair to utilize the statements "in light of the absence of this witness, the efforts to find him, and the fact that it simply, under the circumstances, is not going to be possible to locate him."

Here, the trial court specifically inquired of the prosecutor of Morales' whereabouts and the efforts to locate him. The trial court ultimately concluded that the efforts to locate Morales were sufficient and that, under the circumstances, it was not going to be possible to locate Morales. Moreover, the question whether the prosecutor exercised due diligence before using prior testimony at trial is one of constitutional dimension because it implicates a defendant's right to confrontation.[1] See *People v Burwick*, 450 Mich 281, 290, n 12; 537 NW2d 813 (1995); *People v Dye*, 431 Mich 58, 64-65; 427 NW2d 501 (1988); *People v Conner*, 182 Mich App 674, 680-681; 452 NW2d 877 (1990). Appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Because defendant Sierra has presented a significant constitutional issue on appeal that could have been decisive of the outcome and that warranted discussion in the trial court, it has not been forfeited.

A transcript of prior testimony may be offered in evidence upon a showing that the witness is unavailable and that the testimony bears satisfactory indicia of reliability. *Dye, supra,* p 65; *Conner, supra,* pp 680-681. In order to establish the witness' unavailability, the proponent must prove that a diligent, good-faith effort was made to obtain the witness' presence at trial. *Dye, supra,* p 66; *Conner, supra,* p 681; MRE 804(a)(5). Our Supreme Court has recently readdressed the issue of due diligence in *People v Bean,* 457 Mich 677; 580 NW2d 390 (1998).

> The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. 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. [*Bean, supra,* p 684.]

In *Bean,* one police sergeant and two police investigators attempted to contact the missing witness. The police sergeant made several telephone calls, described as "unsuccessful," and the two investigators went to known addresses of the missing witness, but were not able to produce him for trial. One investigator also checked the Wayne County and Oakland County jails. Our Supreme Court held that this was not a case in which the police did nothing to attempt to locate the missing witness, but neither did they exercise due diligence. *Id.,* p 689. It was specifically noted that the police did not engage in efforts to attempt to locate the missing witness in the area to which he (and his mother) had apparently moved, which was out of state. *Id.,* pp 689-690.

Similarly, I find that the prosecution in this case did not exercise due diligence to locate Morales. In fact, the police in *Bean* did more to attempt to locate the missing witness than the police did in the present case. Here, the prosecution had a specific lead regarding Morales' location. One telephone call made by the detective to attempt to locate Morales' whereabouts does not constitute diligent good-faith efforts to locate the key prosecution witness in this case. Further, there was no indication that the prosecutor attempted to locate Morales in the Grand Rapids area, nor did the detective even telephone Morales' family in Mexico. The prosecutor's failure to begin searching for Morales earlier also precludes a finding of due diligence. The prosecutor certainly knew, in light of the scarcity of other witnesses against defendant, that Morales was an important witness. Yet, even though the prosecutor was aware before trial that Morales was missing, the prosecutor neglected to even commence any search effort until days after trial began. Due diligence requires that the prosecutor make some effort before trial to ensure Morales' availability to testify as the star witness against defendant Sierra. See *People v James (After Remand),* 192 Mich App 568, 571-572; 481 NW2d 715 (1992) (no due diligence where prosecutor made no effort to locate witness until first day of trial).

Accordingly, the prosecutor did not use diligent good-faith efforts to locate and produce Morales for trial. See, e.g., *Bean, supra,* pp 685-690; *Dye, supra,* (opinions of Levin, J., and Archer, J.); *People v Pearson,* 404 Mich 698, 717; 273 NW2d 856 (1979); *People v McIntosh,* 389 Mich 82, 86-87; 204 NW2d 135 (1973); *James, supra,* pp 571-572.

III

These errors in permitting the police officers to testify to Morales' identification statements of defendant Sierra and in permitting the prosecutor to introduce Morales' preliminary examination testimony without exercising due diligence to produce him at trial cannot be considered harmless. See *Bean, supra,* p 690. Morales was the only witness who provided any kind of identification testimony with respect to who was in the brown van at the time of the shooting. No other witnesses, including those who were present at the shooting, could identify anyone who was in the van at the time of the shooting. Further, as noted by counsel at trial, the preliminary examination transcript did not explore some of the identification issues that the police officers testified to at trial. Defendant had no opportunity to cross-examine Morales regarding his identification of him at trial. Moreover, Morales was intoxicated at the time of the shooting,[2] he stated at the preliminary examination that the van had tinted windows with the front window rolled down, only parking lights were on, there were no streetlights on where the van stopped (and it was midnight), and that four people were in the van but he did not see who had the guns. Thus, Morales' identification testimony would certainly have been subject to attack on cross-examination.

Because there was no properly admitted evidence at trial linking defendant Sierra to the shooting, the errors in this case in admitting the third-party identification testimony and the preliminary examination testimony of Morales cannot be deemed harmless and defendant Sierra is entitled to a new trial.

/s/ Kathleen Jansen

[1] This constitutional obligation derives from the Confrontation Clause of the Sixth Amendment of the United States Constitution and § 20 of article 1 of the Michigan Constitution of 1963.

[2] At the preliminary examination, Morales testified that he had consumed a case or a case and a half of beer during the course of the day. A police officer also testified that he could smell alcohol on Morales' breath at the hospital after the shooting.