STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 206358 Recorder's Court
AARON KIMBER, Defendant-Appellant.	LC No. 96-008776

Before: Doctoroff, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant was sentenced to life in prison without the possibility of parole. We affirm, but remand for a corrected judgment of conviction and sentence.

I

Defendant's convictions arise from a deadly altercation between himself and William Gaines. On the night of June 16, 1996, defendant spent the better part of the evening drinking beer and smoking crack cocaine with the victim's granddaughter. At some point, defendant and the granddaughter went over to the victim's home. Defendant claims that during the time they were at the victim's home, defendant, the victim, and the victim's granddaughter engaged in group sex. After about one hour, defendant and Ms. Gaines returned to the granddaughter's home. Sometime later, defendant went back to the victim's home.

In a statement given to the police, defendant admitted that after returning to the victim's home, he and the victim got into a fight, during which time he attacked the victim with a kitchen knife. Medical testimony established that defendant had inflicted thirty-seven cutting and stab wounds. The victim died as a result of these injuries. In that same statement, defendant claimed that he returned alone to the victim's house to locate a pager and a cap that he had left there earlier in the evening. According to defendant's statement, the victim tired of looking for the items and asked defendant to leave. When defendant resisted, a fight broke out. Defendant claimed that after having first been attacked with a

knife by the victim, defendant then "blinked out" and stabbed the victim without knowing how many times. While defendant denied in his statement that he had taken anything from the victim's home other testimony revealed that items stolen from the victim's house were recovered by police from the place where defendant said that he went after the killing. On June 19, 1996, the police entered the victim's home and found the victim's body in the basement. Defendant admits that he dragged the victim to the basement after the attack.

II

Defendant first argues that the trial court impermissibly impinged on his constitutional right to present a defense when it excluded from evidence certain photographic evidence and testimony that purportedly would have established that the victim had a longstanding and ongoing sexual relationship with his granddaughter. Specifically, defendant argues that the trial court's exclusion of this evidence undermined his defense into two ways. First, defendant asserts that he was prevented from effectively arguing to the jury that the victim had attacked defendant out of some sort of jealous rage. Second, defendant asserts that the evidence would have corroborated defendant's version of the killing, as relayed in the statement he gave to the police.

We see no error requiring reversal. When the issue of evidence regarding any previous sexual relationship between the victim and his granddaughter was first raised, defendant initially asserted that this evidence established the "type" of people the victim let into his home. We do not see how this is at all relevant to any fact of consequence. MRE 401. Next, defendant argued that it was relevant because it undermined the prosecution's theory that defendant had broken into the home when he returned and killed the victim. Specifically, defendant asserted that the evidence established that he had been invited into the home, which in turn shows that he had no need to break into the home later that evening. As did the trial court, we fail to see how such evidence is relevant to this point. *Id*. It is simply a non sequitor to conclude that because an individual had previously been in a home by invitation, he must necessarily not have broken into that same home at a later time. Finally, defendant argued that the evidence touched on the granddaughter's credibility. On this point, the trial court indicated that it was too early to decide the relevance of such evidence, as the granddaughter had not yet been called as a witness. Indeed, at the conclusion of this argument, defendant agreed that the issue of sexual relations between the victim and his granddaughter had nothing to do with the case other than how it might possibly impact on the issue of credibility. Defendant never raised the issue during his cross-examination of the granddaughter.

Defendant next revisited the issue when he asked that Janet Gaines, the victim's wife,[1] be excused from the courtroom during the testimony of two police officers who had worked on the case. Defendant argued that because he might want to recall Mrs. Gaines to determine whether she was aware of the alleged sexual relationship, defendant did not want her in the courtroom when the issue was raised during the questioning of the two officers. Deciding to play it safe, the court agreed to defendant's request. However, the court then asked defendant to specify just how the evidence was to be brought in during the questioning of the two officers. Defendant indicated that it would be brought up during cross-examination regarding the officers' knowledge of such a relationship. Although the court evidenced a great deal of skepticism, it nonetheless indicated that it would see if defendant could

somehow properly raise the issue during cross-examination. "I'm not going to preclude you," the court observed. "you may have something entirely in mind that I don't know about. But let's see."

Defendant did attempt to raise the issue during his cross-examination of the officer who took down defendant's statement:

> *Defense Counsel*: When you began questioning Mr. Kimber, were you aware of any pornographic pictures that were found in Mr. Gaines' home?
>
> *Prosecutor*: I'm going to object to the relevance, Your Honor. Mr. Kimber himself said it had nothing to do with that. This is just a back door way to taint the witness –
>
> *Defense Counsel*: Mr. Kimber, this is a statement of truth as to Mr. Kimber, but he did not write the statement. No one else was in the room but [the witness] and Mr. Kimber.
>
> *Trial Court*: Yes, but I don't see any – at this point in time, I don't see any relevance to what he's read into the record, the statement.
>
> *Defense Counsel*: Are you sustaining the objection?
>
> *Trial Court*: Yes.

MRE 611(b) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination." This evidentiary rule plainly confers on the trial judge the discretion to limit the scope of cross-examination to matters testified to on direct examination. Additionally, the rule just as plainly indicates that the acceptable scope of cross-examination in Michigan is a broad one. We believe that breadth of this scope does allow a criminal defendant to bring up on cross-examination matters relating solely to any affirmative defense being argued by defendant. We review a trial judge's decision regarding the scope of cross-examination for an abuse of discretion. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995).

As the above passage shows, defendant did not attempt to argue during his cross-examination of the officer that the evidence was relevant because it relates to his claim that the victim first attacked defendant. Rather, defendant appears to have attempted to argue that the evidence was somehow relevant to the validity or accuracy of the statement. As did the trial court, we fail to see how such evidence is relevant to this issue. MRE 401. Further, absent any argument from defendant regarding the relevance to an affirmative defense,[2] we do not believe the trial court abused its discretion in its handling of the scope of cross-examination. *Morton*, *supra* at 334.[3]

III

Defendant next argues that the trial court erred by allowing an endorsed witness, Kay Green, to be deleted from the prosecution's witness list because the prosecution and police did not exercise due diligence in attempting to locate her and produce her at trial. We disagree.

MCL 767.40a; MSA 28.980(1) reads as follows:

> (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 officials.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (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. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.
>
> (6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party.

The day before Green was set to testify, the prosecution informed the court that Green could not be found. A due diligence hearing was held the next day, at the conclusion of which the court found that although the prosecution's attempts to locate Green were late in the proceedings, they had nonetheless done "everything they could do under the circumstances."

Since the res gestae statute was amended in 1986, there has developed a body of seemingly contradictory case law addressing whether a prosecutor is still required at any point to use due diligence in identifying and producing res gestate witnesses for trial. See *People v Bean*, 457 Mich 677; 580 NW2d 390 (1998); *Wolford, supra*; *People v DeMeyers*, 183 Mich App 286; 454 NW2d 202 (1990); *People v Calhoun*, 178 Mich App 517; 444 NW2d 232 (1989). Of these cases, we believe *Wolford* is most instructive for the case at hand.

In *Wolford*, a prosecution witness, who had been served with a subpoena, failed to appear as scheduled at the start of trial. *Wolford, supra* at 482. Subsequent attempts to locate the witness were unsuccessful. *Id.* The trial court ruled that the prosecution's failure to produce the witness was excused given "that the prosecutor had exercised due diligence in attempting to produce" the witness. *Id.* The *Wolford* Court concluded that "[u]nless the prosecutor seeks to delete a witness from his witness list as provided in MCL 767.40a(4); MSA 28.980(1)(4), we hold that the prosecutor is obliged to exercise due diligence to produce the witness." *Id.* at 484.

We believe the distinction drawn in *Wolford* means that when the prosecutor seeks to employ MCL 767.40a(4); MSA 28.980(1)(4) to delete a witness from the prosecutor's witness list, the due diligence standard is inapplicable. Instead, the witness can be deleted in one of two ways: (1) by leave of the court upon a showing of good cause; or (2) by stipulation of the parties. However, if the prosecutor has not formally moved to delete a witness, and in circumstances where the prosecutor tries to locate the witness after learning of the witness's disappearance because the prosecutor still desires to call the witness at trial, then the prosecutor must exercise due diligence to produce the absent witness. Cf. *Bean, supra* at 689. In the case at hand, the prosecutor did attempt to locate Green after learning of her disappearance. Accordingly, we apply the due diligence standard.

The officer in charge of the case and an investigator for the Wayne County Prosecutor's Office testified that, between the two of them, they checked Green's last known address, spoke with her neighbors, checked with the phone company, checked a second address obtained through Secretary of State, and contacted the morgue, jail, hospital, and Detroit and Highland Park Police Departments, all without success. Under these circumstances, we conclude that the trial court's finding that the prosecutor exercised due diligence was not clearly erroneous. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). In any event, defendant fails to persuade us that he was prejudiced by Green's nonappearance. See MCL 769.26; MSA 28.1096; *People v Rode*, 196 Mich App 58, 68; 492 NW2d 483 (1992) ("An abuse of discretion can be found where the defendant is able to show prejudice as a result of . . . amendment of the witness list."), rev'd on other grounds *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994).[4]

IV

Finally, defendant contends that there was insufficient evidence of premeditation and deliberation presented to sustain a conviction for first-degree premeditated murder. Again, we disagree. This Court reviews the sufficiency of the evidence by viewing the evidence in the light most favorable to the prosecution and determining if a rational trier of fact could have found that the elements of the crime were proved beyond a reasonable doubt. *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998). "'To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971). Premeditation and deliberation may be inferred from, among other things, "the defendant's actions before and after the crime," *id.* at 300, and "the circumstances of the killing itself," *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Viewed in a light most favorable to the prosecution, we conclude that sufficient evidence was produced at trial to support defendant's conviction. For example, the testimony of the victim's granddaughter supports the reasonable inference that defendant had been casing the victim's home earlier in the evening. The evidence that the victim suffered twenty-seven cutting wounds and ten stab wounds is unimpeachable, and it is undisputed that defendant inflicted those wounds, while only suffering a small cut or scratch himself. The defensive wounds on the victim, when combined with the relatively unscathed condition of defendant, not only demonstrates that defendant was not attacked first, but that the only resistance offered was a futile attempt to fend off defendant's attack. The evidence also establishes that immediately subsequent to committing this killing, defendant dragged the victim's body into the basement and then stole the victim's television set, VCR, and a box of video tapes.

Finally, we note the trial court failed to clearly articulate that although one first-degree murder conviction was being vacated as part of a merger of the murder convictions, the remaining conviction was supported by two theories: felony murder and premeditated murder. Consequently, we remand this case so that the trial court can modify the judgment of conviction and sentence to indicate that the sole first-degree murder conviction is supported by these two theories. *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998).

Affirmed, but remanded for a corrected judgment of conviction and sentence. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.

[1] Janet Gaines is not Kimberly's birth mother.

[2] It is not the responsibility of the trial court to supply a party with the proper grounds for admitting evidence.

[3] The transcript also indicates that the officer had no personal knowledge of any longstanding sexual relationship:

> *Defense Counsel*: Officer . . . , did you inquire further into any activities that took place when Mr. Kimber was at Mr. Gaines' house with Mr. Gaines' granddaughter?
>
> *Witness*: No, I did not. All the information I have is in the statement.

[4] Even if the standard was "good cause," we conclude that the circumstances of the case at hand satisfy this requirement.