STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2000
v	No. 216732 Calhoun Circuit Court
ROMMEL RAY REED, Defendant-Appellant.	LC No. 98-001311-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of discharging a firearm from a motor vehicle, MCL 750.234a; MSA 28.431(1), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. He appeals as of right. We affirm.

I

Defendant argues that he was denied a fair trial because the prosecutor called the victim of the shooting to the stand, despite allegedly knowing that the victim would refuse to testify on Fifth Amendment grounds just as he had similarly refused to testify at defendant's first trial, which ended in a mistrial. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995).

At issue here is whether the victim's assertion of the privilege prejudiced defendant. In *People v Poma,* 96 Mich App 726, 732; 294 NW2d 221 (1980), this Court observed that "[w]hen the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken." Where possible prejudice comes into play is when the witness is an accomplice or codefendant or is intimately connected to the crime, although neither as an accomplice nor as a codefendant. *People v Gearns,* 457 Mich 170, 196; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity,* 460 Mich 484; 596 NW2d 607 (1999).

Thus, before deciding whether the trial court implemented the appropriate protective measures, our threshold question is whether the victim was a witness "intimately connected" with the shooting in this case. We reject defendant's argument that the victim obtained the status of intimate witness merely because he was the victim and therefore at the scene of the crime. "[F]or there even to be possible prejudice to the defendant, the witness must be substantially related to the criminal episode at issue" or a person "likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose." *Gearns, supra* at 196-197, quoting *Commonwealth v DuVal*, 453 Pa 205, 217; 307 A2d 229 (1973).

The victim in this case is not a person likely to be thought by the jury to be associated with the defendant in the shooting because he was the victim of the shooting. Therefore, his refusal to testify, despite his knowledge of the facts of the case, would not give rise to an inference of defendant's guilt. Without the critical element of the victim's status as an intimate witness, the possible prejudice to defendant did not exist.

II

Defendant argues that he was denied a fair trial when the victim's testimony from the preliminary examination was read into the record at trial. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Out-of-court statements offered for their truth are usually inadmissible hearsay. See MRE 801(c); MRE 802. However, hearsay testimony may be admitted when the declarant is unavailable. "Unavailability" as a witness includes the situation where the declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). If the declarant is unavailable as a witness, "[t]estimony given as a witness at another hearing of the same or a different proceeding, if 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" is not excluded by the hearsay rule. MRE 804(b)(1).

Here, defendant argues that the foundational requirements of MRE 804(b)(1) were not met because he conducted his cross-examination at the preliminary examination before he had a copy of the taped interview the victim had with an investigating police officer. Defendant asserts that his cross-examination would have been more effective had he had this tape at that point in time.

However, MRE 804(b)(1) on its face requires no more than that defendant had the "opportunity" and "similar motive" to cross-examine the victim. Indeed, in a case where evidence falls within a firmly rooted hearsay exception such as MRE 804(b)(1), reliability can be inferred "without more." *People v Meredith*, 459 Mich 62, 69; 586 NW2d 538 (1998). "[E]vidence properly within the former testimony hearsay exception is, by definition, not vulnerable to a challenge based upon the Confrontation Clause." *Id.* at 70, quoting *United States v McKeeve*, 131 F3d 1, 9 (CA 1, 1997).

Defendant had the opportunity to cross-examine the witness at the preliminary examination. Further, whether he possessed the interview tape or not, defendant had a similar motive to cross-examine the victim: to damage his credibility. Because both of these requirements are satisfied and the court rule requires no further investigation into whether the victim's prior testimony bears satisfactory indicia of reliability, defendant's argument is without merit. Accordingly, the trial court did not abuse its discretion in permitting the prosecution to admit the victim's preliminary examination testimony in light of his unavailability.

III

Defendant argues that the trial court misinterpreted his request for dismissal of the charges at the first trial as a request for or consent to a mistrial and that therefore the declaration of a mistrial barred his retrial where the mistrial was not prompted by manifest necessity. Defendant argues that even assuming that he consented to the mistrial, that consent did not waive the protection of the double jeopardy clause because the consent was prompted by the prosecution's intentional misconduct, to wit, the withholding of the interview tape. We disagree.

A trial court's determination of a double jeopardy issue is a question of law that is reviewed de novo on appeal. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). However, in determining a prosecutor's intent, the trial court relies on the objective facts and circumstances of the case, and its findings will not be disturbed on appeal unless clearly erroneous. *People v Dawson*, 431 Mich 234, 254, 257-258; 427 NW2d 886 (1988).

After a mistrial has been declared in a case, retrial is permissible in only two circumstances: (1) where there is manifest necessity for the mistrial; and (2) where the defendant consented to the mistrial, and the consent was not prompted by the prosecutor's intentional misconduct. *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997). If mistrial is granted because of either the prosecutor's or the trial court's error due to reasons that were innocent or beyond their control, retrial is not barred by double jeopardy protections. *Dawson, supra* at 236, 252; *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999).

Although defendant in this case initially requested the trial court to dismiss the charges upon finding that he had been deprived of the interview tape and subsequently debated the wisdom of having the trial court declare a mistrial, defendant clearly acquiesced, i.e., consented to, the trial court's subsequent declaration of a mistrial. Consent to a mistrial exists if the defendant either expressly consents to a mistrial or consents to the discontinuance of the trial. *Tracey, supra* at 329. "[T]he relevant issue is whether a defendant consented to the discontinuance of the trial, rather than whether he formally consented to the declaration of a mistrial." *Id.* In the context of clear evidence demonstrating that the defendant elected to forgo his right to continue the trial by unequivocally consenting to its discontinuation, the prohibition against double jeopardy does not bar retrial. *Id.*

The trial court in this case specifically stated to defendant that it was granting "your motion for a mistrial" and to the jury that it had "just now granted a Defense motion for a mistrial." Not only did defense counsel answer in the negative when the trial court inquired about any objections from the

parties, defense counsel did so after discussing the ramifications with defendant and after stating on the record that the trial court's characterization of their colloquy was accurate and complete.

Therefore, the pertinent question becomes whether defendant's consent to the declaration of a mistrial was prompted by the prosecutor's intentional misconduct. As the prosecutor points out, defendant cannot now argue that the prosecutor intentionally withheld the interview tape from defendant during discovery where defendant claimed otherwise below. See *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Accordingly, retrial was permissible because defendant consented to the mistrial and conceded that the prosecutor had not committed any intentional misconduct that would have prompted his consent.

IV

Defendant argues that the trial court erred in not instructing the jury on the defense of accident in accordance with CJI2d 7.3a where that instruction was intended to negate a specific intent crime such as assault with intent to commit great bodily harm.

Our review of the record reveals that defendant requested that the trial court instruct the jury on accident in accordance with CJI2d 7.2. The trial court declined because that instruction was part of the murder instruction, not the assault instruction. Defendant opined that perhaps the instruction could be tailored but did not pursue this request on the record. Therefore, we find that defendant did not preserve his objection to the trial court's instructions. Because no manifest injustice will result, we decline to review the merits of his argument. See MCL 768.29; MSA 28.1052, *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Defendant also argues that in instructing the jury on assault with intent to murder, the court essentially instructed the jury that it could only consider lesser included offenses if it concluded that the shooting was done under circumstances that would justify a finding of voluntary manslaughter, had death occurred. Again, we have found no objection made on the record on this matter; therefore, we also decline to review the merits of this argument because no manifest injustice will result.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski