STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD WALTERS,

Defendant-Appellant.

UNPUBLISHED
March 1, 2002

No. 226315
Wayne Circuit Court
LC No. 99-006443

Before: Whitbeck, C.J., and Markey and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with the intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to six years and eight months to ten years' imprisonment for the conviction. We affirm.

Defendant argues that because the lower court refused to exclude evidence regarding the death of the victim's unborn baby, or grant a mistrial when the evidence came out, the lower court abused its discretion. We disagree. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion exists if the trial court's denial of the motion deprives the defendant of a fair and impartial trial. *Id*. Additionally, the decision to admit evidence is within the discretion of the trial court, and we will not disturb it on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

At the beginning of the trial, defendant moved in limine to exclude any testimony about the death of the baby. Defendant stated that the testimony was irrelevant because his charge for assault of a pregnant person resulting in the miscarriage or stillbirth of the child had already been dismissed and was not at issue in the case. Defendant argued further that evidence of the baby's death would be more prejudicial than probative and would deny defendant a fair trial. The lower court ruled that although it would allow testimony that the child was born prematurely in the emergency room, there could be no testimony about what happened to the child.

During Dr. Loechner's testimony, he stated that he was present when the child was born, and that the baby was born without a pulse and was not breathing. The testimony went no

further about the condition of the child, and no testimony revealed that the baby ultimately died. Defendant objected several times during this testimony and eventually moved for a mistrial arguing that Dr. Loechner's testimony went beyond what the court had previously ruled admissible. Defendant also argued that the evidence that was revealed was more prejudicial than probative and denied defendant his right to a fair trial and the lower court should have granted a mistrial. The court ruled that the fact that the baby had to be delivered by emergency caesarian section and the condition of the prematurely born child were relevant to the severity of injuries Jenkins suffered because she was almost full-term when she was assaulted. Furthermore, it was never revealed that the baby died in accordance with the court's ruling on defendant's motion in limine at the beginning of the trial.

Defendant now argues that the evidence elicited was more prejudicial than probative and denied defendant his right to a fair trial; consequently, the lower court should have granted a mistrial. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Further, defendant "takes his victim as he finds [her]." *People v Brown*, 197 Mich App 448, 451; 495 NW2d 812 (1992). In this case, Jenkins was seven months pregnant when she was assaulted. Additionally,

> [r]es gestae are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.
>
> No inflexible rule has ever been and probably never can be adopted as to what is a part of the res gestae. It must be determined largely in each case by the peculiar facts and circumstances incident thereto; but it may be stated as a fixed rule that, included in the res gestae are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect. [*People v Lytal*, 119 Mich App 562, 572; 326 NW2d 559 (1982), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978), quoting *People v Kayne*, 268 Mich 186, 191-192; 255 NW 758 (1934) (emphasis deleted).]

The evidence that after Jenkins was assaulted and fell out a second story window, she suffered several cuts and had free flowing blood in her abdomen causing her to deliver her child prematurely by an emergency caesarian section was part of the res gestae of the crime. *Lytal, supra* at 571-572. This evidence went to the severity of Jenkins' injuries and was relevant to prove intent that was at issue because it is an essential element of the charged offense, assault with intent to murder. MCL 750.83.

Assessing probative value against prejudicial effect requires a balancing of factors, including how directly the evidence tends to prove the fact in support of which it is offered and the importance of the fact sought to be proved. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified 450 Mich 1212 (1995), quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). The evidence that the child was born was probative because the evidence directly tended to prove the severity of Jenkins' injuries and defendant's intent, an essential element of the crime

charged. *Oliphant, supra* at 490. Because the fact of the baby's death was not offered into evidence, there was no chance of the jury giving that fact undue weight; therefore, unfair prejudice did not exist. *Mills, supra* at 75-76. As this is the case, the court did not abuse its discretion when it allowed the testimony because an unprejudiced person, considering the facts on which the trial court acted, would say there was a justification or excuse for the ruling. *Snider*, *supra* at 419.

A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Because the evidence was properly admitted, there was no irregularity that prejudiced defendant's rights and impaired his ability to receive a fair trial. *Stewart (On Remand), supra* at 43; *Haywood, supra* at 228. Therefore, the trial court did not abuse its discretion by denying defendant's motion for mistrial. *Wolverton, supra* at 75.

Defendant next argues that his motion for directed verdict should have been granted by the lower court because the only evidence linking defendant to the crime was his statement that he was not sure what he did because he was high on crack and intoxicated the day of the incident. Further, defendant asserts that any other evidence presented by the prosecutor was hearsay and inadmissible. We disagree.

At the close of the prosecutor's case, a defendant may move for a directed verdict. Due process requires that the trial court direct a verdict of acquittal if the evidence is not sufficient to support a conviction. MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). The court must consider the evidence presented by the prosecutor up to the point defendant brought the motion in the light most favorable to the prosecution when ruling on a motion for a directed verdict. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997), quoting *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The court must decide if a rational trier of fact could find that the prosecutor proved the essential elements of the charged crime beyond a reasonable doubt. *Id.*

The charged crime in this case was assault with intent to murder, MCL 750.83. In order to prove assault with intent to commit murder, the prosecution must establish (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The prosecution may prove intent to kill by inference from any facts in evidence. *McRunels, supra* at 181. Because of the difficulty of establishing an actor's state of mind, minimal circumstantial evidence is satisfactory. *Id*. Further, evidence of injury is admissible to show defendant's intent to kill. *Mills, supra* at 71.

Witnesses saw Jenkins with a man in the second story window of Jenkins' and defendant's home. In fact, a witness saw a man with his arm around Jenkins' neck in an arm lock, while Jenkins had blood covering her back, and was screaming for help. After she fell out of the window, several witnesses observed Jenkins in a panicked and extremely frightened state, and heard her repeatedly state that she needed help because "he" was going to come back and kill her, and that he tried to kill her. They also saw her attempt to move toward the church to get

away because she thought "he" was coming back to get her, and she needed help. At trial, a witness testified that Jenkins said that "Gerald" was the "he" who had injured her in the house. Because Jenkins had just fallen out of a second story window after being stabbed and was in a panicked state in fear for her life, Jenkins' statements were excited utterances and excepted from the hearsay rule under MRE 803(2).

Further, in defendant's statement, he admitted to fighting and wrestling with Jenkins, acting in a rage, hitting her "upside" the head, and possibly stabbing her and striking her in the stomach while he knew she was seven months pregnant. He also stated that he had followed her up the stairs. Defendant also admitted that he had cut himself when he grabbed the knife from Jenkins and on the broken window while watching Jenkins fall out the window. Defendant also stated that he was intoxicated on drugs and alcohol when the incident occurred and argues this fact on appeal. However, the defense of intoxication is only proper if the facts of the case would allow the jury to conclude that defendant's intoxication was so great that he was unable to form the necessary intent. *Mills, supra* at 82. The only evidence that defendant was drunk or high was from his own statement and testimony that he had consumed crack cocaine and vodka that day. Defendant did not offer any evidence to show that his intoxication was so great that he was unable to form the necessary intent, and therefore, defendant's intoxication argument is without merit. *Id*. at 82-83.

Evidence regarding the severity of Jenkins' injuries came from Dr. Loechner's testimony that Jenkins' suffered a very large through and through cut on her cheek, extending from her ear diagonal along her left cheek to just before the opening of her mouth. There was also a three-centimeter laceration in her left chest that was oozing blood. These two major cuts were large and deep enough to cause significant bleeding, and could have been caused by a kitchen knife. There were also multiple small cuts over her protruding abdomen, presumably from glass shards. Additionally, Jenkins had free blood in her abdomen and had to deliver her child by emergency caesarian section. It was Dr. Loechner's expert opinion that if Jenkins had not received medical attention, she would have died from her injuries.

The testimony regarding the severity of Jenkins' injuries supports an inference that defendant intended to kill her. *Mills, supra* at 71. Moreover, there was evidence that Jenkins was afraid for her life: she stated in front of several witnesses that he had tried to kill her, that he was coming to get her, and that she needed help. Additionally, defendant admitted in his statement that he had fought with Jenkins, had hit her, and possibly had stabbed her. When viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential element of intent was proven beyond a reasonable doubt. *Vincent, supra* at 121.

Lastly, defendant argues that the trial court improperly ruled that the prosecution showed due diligence in attempting to locate Jenkins and, because this is the case, he was denied his right to a fair trial and is entitled to a new trial. This Court reviews a trial court's determination whether the prosecution has made a diligent good-faith effort in locating a witness for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion exists "when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998). The trial court's factual finding underlying its due diligence decision will not be reversed unless clearly erroneous. *People v Lawton*, 196 Mich

App 341, 348; 492 NW2d 810 (1992). A factual finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986).

Under MCL 767.40a, "the prosecutor no longer has a duty to produce res gestae witnesses." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The statute states that the prosecutor has an ongoing duty to advise the defense of all res gestae witnesses that it intends to produce at trial. *Id*. The prosecutor's inability to locate a witness that is listed on the prosecution's witness list may be stricken from the witness list for good cause if the prosecution displays its exercise of due diligence to locate the witness. *Id*. In the instant case, the prosecution listed Jenkins on its witness list; however, it was unable to locate her, so it could not produce her for trial. The court held a due diligence hearing and concluded that the prosecution exercised due diligence in its search for Jenkins, and therefore, the prosecution was excused from producing Jenkins. On appeal, defendant argues that the prosecution did not illustrate due diligence in attempting to locate Jenkins, and because he was not allowed to confront his accuser, he was denied his right to a fair trial.

"Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses . . . ." *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988), quoting *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983). Whether the prosecution demonstrated a good-faith, diligent effort depends on the facts and circumstances of each case. *Bean*, *supra* at 684. The test is one of reasonableness, and the focus is whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Id*.

The facts and circumstances in the search in the instant case exhibited that the prosecution demonstrated a good-faith, diligent effort to locate Jenkins. *Bean*, *supra* at 684. Wolff personally checked five former residences on multiple occasions and attempted to speak to residents to procure information about Jenkins. He visited her known family and her pastor's home. He visited, and then followed up, at her church and shelters. He checked the utilities, a hospital, jails, and morgues. He checked with several government agencies, looked for an employment record, a forwarding address, and even attempted to plan a strategy to serve Jenkins when she went to pick up her SSI check with the Social Security Commission.

Defendant, however, argues that Wolff did not check any hospitals other than Detroit Receiving Hospital, did not go to Tride Stone Baptist Church on a Sunday when services are held, and did not check any substance abuse centers. However, the test is one of reasonableness, and the focus is whether diligent, good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Id.* We find that there is overwhelming evidence in the record that the prosecution exercised due diligence in its search for Jenkins. Therefore, the trial court's finding that the prosecution had exercised due diligence was not clearly erroneous, and defendant was not denied a fair trial. *Lawton*, *supra* at 348.

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly