STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS NORRIS,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 233470
Genesee Circuit Court
LC No. 99-005151-FC

Before: Jansen, P.J., and Holbrook, Jr. and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316(1)(a); and two counts of first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to mandatory life in prison without parole on each of the four counts. He appeals as of right. We affirm in part, reverse in part, and remand.

Defendant was convicted of killing an elderly couple in their home. Defendant did odd jobs for the couple and admitted to taking their checkbook and car keys on July 2, 1999. The next morning, defendant claimed that he returned to their home and took their car. On July 10, 1999, the police received a dispatch to check on the welfare of the elderly couple. The police entered through a partially opened rear door and discovered the couples' bodies inside. Autopsies revealed that the couple had been dead for several days.

Defendant initially argues that the trial court erred when it allowed Carlos Wiley's prior testimony to be read to the jury.[1] Specifically, defendant claims that the prosecutor did not establish due diligence to produce Mr. Wiley at trial. We disagree. We review a trial court's determination that due diligence was established for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The trial court's factual findings that underlie its due diligence decision will not be set aside unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

An accused criminal has a federal and state constitutional right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Bean, supra* at 682. The

[1] We note that Mr. Wiley testified during defendant's first trial that resulted in a hung jury.

Michigan Supreme Court has held that this right is not violated by the use of a witness' former testimony "as substantive evidence at trial only if the prosecution . . . exercised both due diligence to produce the absent witnesses and . . . the testimony bore satisfactory indicia of reliability." *Bean, supra* at 682-683 (footnote omitted); see also MRE 804. Whether the prosecution demonstrated a diligent good faith effort to produce a witness depends on the facts and circumstances involved. *Bean, supra* at 684. The test is one of reasonableness and the fact that more stringent efforts may have produced the witness is not controlling. *Id*.

At a hearing to establish due diligence, Debra Ann Reece, who worked for the prosecutor's office, testified that she sent a subpoena to Mr. Wiley at his last known residence several weeks before trial. According to Ms. Reece, the subpoena was never returned in the mail as undeliverable. Ms. Reece acknowledged that Mr. Wiley failed to return the card enclosed with the subpoena. Nevertheless, Ms. Reece stated that when a subpoena is not returned it is assumed that the witness received it.

When Mr. Wiley failed to appeal on the day scheduled for trial, the police and Ms. Reece attempted to locate him. After several unsuccessful attempts to reach Mr. Wiley at his home telephone, the police provided Ms. Reece with Mr. Wiley's cellular phone number. Ms. Reece contacted Mr. Wiley and explained to him that he had been subpoenaed to appear at trial and that his presence was required. According to Ms. Reece, Mr. Wiley informed her that he would be unable to appear on the day requested due to his work schedule and complained that he did not want to testify again in this matter. The prosecutor subsequently made arrangements for Mr. Wiley to testify a day later. Both Ms. Reece and the police made numerous attempts to inform Mr. Wiley of this change, but he never answered his cellular phone or returned their voice messages. A bench warrant was issued for Mr. Wiley on March 9, 2001. The Flint and Detroit fugitive teams investigated the various addresses provided for Mr. Wiley but were unable to find him. Consequently, Mr. Wiley's previous testimony was taken out of order and read to the jury toward the end of defendant's trial.

The record shows that Mr. Wiley was aware of the subpoena and his responsibility to testify during the trial. Moreover, the circumstances of the case show that Mr. Wiley made an informed decision to knowingly evade the police, the prosecutor, and to shirk his duty to testify in court. After a careful review of the record, we find that reasonable, diligent good faith efforts were made to procure Mr. Wiley. See *id.* As such, the trial court did not abuse its discretion when it found Mr. Wiley unavailable and allowed the prosecution to present his previous testimony. See *id*.

Defendant next maintains that the trial court erroneously allowed defendant to make his own closing argument. We review a trial court's decision to allow a defendant to proceed in propria persona for an abuse of discretion. *People v Adkins (After Remand)*, 452 Mich 702, 721, n 16; 551 NW2d 108 (1996).

A criminal defendant's right of self-representation is guaranteed implicitly by the United States Constitution and explicitly by the Michigan Constitution and state statute. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1; *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). However, this right creates an "unavoidable tension" with a criminal defendant's constitutional right to counsel. *Adkins, supra* at 720. Thus, to invoke the right of self-representation, a defendant must first effectively waive the right to counsel. *Id*. at 720-721.

In *Anderson*, our Supreme Court held that before a trial court may grant a defendant's request to proceed in pro per it must determine whether: (1) the defendant's request for self-representation was unequivocal; (2) the defendant's request was made knowingly, intelligently, and voluntarily; and (3) the court would be unduly burdened or disrupted. *Anderson, supra* at 367-368. To ensure that the defendant's choice is made knowingly and intelligently, the trial court must advise the defendant of the dangers and disadvantages of self-representation. *Id.* at 368. MCR 6.005(D) furthers this goal by requiring the trial court to advise the defendant of the charges, the maximum penalty upon conviction, and the risks associated with self-representation. The court rule also requires the trial court to offer the defendant an opportunity to consult with counsel. MCR 6.005(D).

A trial court must substantially comply with these requirements before granting a defendant's request to proceed in propria persona. *Adkins, supra* at 726. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins, supra* at 726-727. A trial court's method of inquiring into and satisfying the *Anderson* and MCR 6.005(D) requirements is within its discretion, as long as the substantive requirements and concepts are covered. *Adkins, supra* at 725.

In this case, defendant was represented by two attorneys until he expressed a desire to present his own closing argument. The trial court inquired about defendant's reasoning and how he wanted his closing argument presented. On several occasions, the trial court explained the risks involved and asked defendant if he understood that he was giving up the opportunity to have a skilled attorney present his case. The trial court also told defendant that "[t]here's a lot at stake here; in essence, your life's at stake." Defendant stated that he understood the risks but wanted to represent himself. The trial court then informed defendant that it would allow him to present his own closing argument as long as he did so in a dignified way and confined his argument to the evidence presented in the case. The trial court also required defense counsel to remain available for consultation during defendant's closing argument.

At the conclusion of this colloquy, the prosecutor verbalized the requirements of MCR 6.005(D) and *Anderson, supra*. The prosecutor specifically noted that defendant was charged with murder in the first degree and faced life in prison if convicted. When the trial court asked defendant if he understood what the prosecutor said, defendant replied in the affirmative. Defendant also stated that he consulted with his attorneys in making his decision. On this record, we find that the trial court substantially complied with the waiver procedures and did not abuse its discretion. See *Adkins, supra* at 731.

Defendant also asserts that his convictions for first-degree premeditated murder and first-degree felony murder violated his state and federal constitutional rights against double jeopardy. We agree. A double jeopardy claim presents a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

A criminal defendant may not be placed twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). This protection against double jeopardy attaches to successive prosecutions or multiple

punishments for the same offense. *People v Green*, 196 Mich App 593, 594-595; 493 NW2d 478 (1992).

In the instant case, defendant was convicted of two counts of first-degree premeditated murder and two counts of felony murder for the deaths of an elderly couple. As noted in *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998), "dual convictions [for first-degree premeditated murder and first-degree felony murder] arising from the death of a single victim violate double jeopardy." To protect the defendant's right against double jeopardy, *Bigelow*, *supra* at 221-222, concluded that the lower court must amend the defendant's judgment of conviction and sentence to reflect a single conviction and a single sentence for a crime supported by two separate theories. Because there were two victims in this case, we instruct the trial court to amend defendant's judgment of sentence to reflect that his convictions and sentences are for two counts of first-degree murder supported by two theories: premeditated murder and felony murder. See *id*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper