STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 246999 Wayne Circuit Court
LYNN CHESTER STRAYHORN, Defendant-Appellant.	LC No. 01-013443-01

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arise from allegations that on September 28, 2001, he and an accomplice robbed and fatally shot the victim. Defendant gave a statement to the police admitting his involvement in the crimes but he testified at trial and denied any wrongdoing.

On appeal, defendant first argues that the trial court abused its discretion by denying his motion for a mistrial after a police officer indicated during cross examination that a witness made certain statements during a polygraph. We disagree. This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted).

Defendant did not timely object to the challenged testimony. Rather, following the completion of the officer's testimony, defense counsel objected to the witness twice using the term polygraph, and providing "unresponsive" answers. Defense counsel requested a curative instruction. On the following day, defense counsel moved for a mistrial, which the trial court denied after noting that the references to a polygraph were solicited by defense counsel, stated neutrally in response to questions regarding to whom the witness made certain statements, and did not rise to a level warranting a mistrial.

Generally, reference to a polygraph examination at a defendant's criminal trial is not permitted. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000); *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). But the introduction of such evidence does not always warrant reversal. *Nash*, *supra* at 98. This Court has identified a number of factors that should be considered in determining whether reversal is required:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id*. (citations omitted).]

Reviewing the facts in light of these factors, there was no error requiring reversal. Although defendant did not timely object, the trial court gave a cautionary instruction, directing the jury to "disregard any testimony that you heard that had anything to do with a polygraph." Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, the reference to the polygraph appeared to be an attempt to identify to whom the witness made certain statements and was not responsive to defense counsel's questions, which required affirmative or negative responses. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Additionally, as noted by the trial court, the witness' references to the polygraph examiner/operator were neutral, i.e., they were not made in the context of attempting to bolster the witnesses' credibility, or to undermine defendant's credibility. Also, the testimony was not elicited during the prosecutor's examination of the officer, but during defense counsel's cross-examination. Moreover, no polygraph examination results were admitted. In sum, defendant has not shown prejudice warranting a mistrial and, thus, the trial court did not abuse its discretion by denying defendant's motion.

Next, we reject defendant's claim that the prosecutor contravened a trial court ruling when he questioned a police officer about defendant's request for counsel after the court precluded such questioning. Defense counsel first elicited the testimony now complained of during cross-examination. In fact, the record indicates that the prosecutor prudently conducted his direct examination of the officer, and was careful not to frame his questions in a way that would elicit the objectionable testimony. Once defense counsel elicited the testimony, the prosecutor's subsequent questioning on the matter was not improper. A party may not claim error when it contributes to the alleged error by plan or negligence. *Griffin*, *supra* at 46. Moreover, because the alleged error was directly attributable to the affirmative conduct of defense counsel, defendant has waived this claim. See, e.g., *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001) and *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Accordingly, reversal is not warranted on this basis.

Next, defendant argues that the trial court abused its discretion by determining that the prosecution exercised due diligence in attempting to locate Linton Richey and Derrick Strayhorn, and that the admission of their preliminary examination testimony at trial under MRE 804(b)(1)

violated his rights guaranteed by the Confrontation Clause of the federal and state constitutions.[1] We disagree. This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

MRE 804(b)(1) governs the admission of former testimony if a witness is unavailable for trial. MRE 804(a)(5) defines "unavailable" to include a situation where the witness "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The focus is on whether diligent, good-faith efforts were made to procure the testimony and not on whether more stringent efforts would have produced it. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). This Court reviews a trial court's determination that due diligence was established for an abuse of discretion, *id*., and the findings of fact that underlie that decision for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Here, the trial court did not abuse its discretion in determining that the prosecution exercised due diligence in its attempts to produce the witnesses at trial. After an unsuccessful attempt to personally serve the witnesses at their respective homes weeks before trial, a police officer went to their high school and talked to teachers and the principal. The officer learned that neither witness had attended school for nearly a year. The detective contacted possible places of employment and called multiple cell phone numbers received from various individuals. The detective also contacted various area agencies, including the Department of Corrections, local morgues, jails, local utility companies, the postal service, Herman Kiefer, and the Family Independence Agency. The Michigan Street Enforcement Team was also involved in searching for the individuals. The prosecution is "not required to exhaust all avenues for locating [witnesses], but ha[s] a duty only to exercise a reasonable, good-faith effort in locating [them]." *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995). Defendant identifies no other steps the prosecution could have taken in an effort to locate the witnesses.

Further, the preliminary examination provided defendant with an opportunity for cross-examination under a similar motive. MRE 804(b)(1). Both witnesses' prior testimony was chiefly offered to prove defendant's identity as one of the perpetrators of the crimes. During cross-examination, defense counsel attacked the witnesses' credibility, and elicited that Richey was granted limited immunity with respect to his possession of stolen property. He also elicited Strayhorn's claim that the police coerced him into implicating defendant, and that he was intoxicated on the night of the incident. Defendant does not claim that the district court curtailed defense counsel's efforts to cross-examine the witnesses at the preliminary examination, and he offers no examples of additional questions that he was not able to pursue because of either witnesses' absence at trial. In sum, the trial court did not abuse its discretion by concluding that the witnesses' preliminary examination testimony was admissible at trial.

[1] US Const, Am VI; Const 1963, art 1, § 20.

Next, defendant contends that, because there was evidence that Richey and Strayhorn were his accomplices and the case was "closely drawn," the trial court erred by failing to sua sponte give cautionary instructions regarding accomplice testimony. Defendant failed to request the instructions below, therefore, this unpreserved claim is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant maintains that the failure to give a cautionary accomplice instruction was plain error under *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974). In *McCoy*, our Supreme Court held that it has been "deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." *Id*. at 237, 240. A case is considered "closely drawn" if a determination of the defendant's guilt essentially comes down to a credibility contest between the defendant and his accomplice. *People v Perry*, 218 Mich App 520, 529; 554 NW2d 362 (1996).

Initially, contrary to what defendant argues, this case was not "closely drawn." Apart from the testimony of Richey and Strayhorn, the prosecutor presented defendant's own confession of his participation in the crimes. Additionally, the evidence did not show that Strayhorn and Richey, the alleged accomplices, actually participated in the crimes. More significantly, the cautionary accomplice instructions were logically inconsistent with the defense that defendant neither committed the charged crimes, nor was involved in any way. Indeed, defendant cannot have accomplices to crimes that he purportedly did not commit. Accordingly, because CJI2d 5.5 and CJI2d 5.6 were inapplicable, defendant has failed to demonstrate plain error. Therefore, reversal is not warranted on this basis. Further, defendant's claim that his counsel was ineffective for failing to request these instructions is without merit.

Defendant also argues that he is entitled to a new trial because defense counsel failed to move to suppress his confession. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*.

Here, there was no basis for defense counsel to move to suppress defendant's confession where the record does not support defendant's claim that he was denied counsel, or that his confession was otherwise involuntary and coerced. See *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Defendant, as well as the officers who took his statement, testified at trial regarding the statements. During the initial questioning, defendant requested counsel. It is undisputed that,

when defendant requested counsel, the interview ceased and was not resumed until defendant requested to speak with an officer. Besides his general claims, defendant has not offered any corroborating evidence that he was induced into making a statement by the denial of counsel. Also, it is undisputed that defendant was advised of his *Miranda* rights before he was questioned, indicated that he understood those rights, and signed a written waiver of his rights.

Furthermore, viewing the totality of the circumstances, defendant's statements were voluntarily given. Although defendant was arrested several hours before giving his statement, there is no indication that he was coerced into confessing to a crime he did not commit because of improper delay, or anything that occurred during that time. In fact, defendant admitted that, after his father pleaded with him to cooperate, he decided to speak to the police. Also, there is no indication that defendant was abused, ill, intoxicated, or deprived of sleep, food, or drink. Although defendant claimed that at one point an officer grabbed him by the neck and pushed him back into a chair, he testified that there was no "hitting or anything like that." Defendant claimed that an officer "snatched" the telephone while he was attempting to talk to his father, but he also testified that he had several telephone conversations with his father. Finally, there is no indication that defendant had any learning disabilities, psychological problems, or was otherwise unaware and not acting of his own free will. Indeed, the record indicates that defendant completed one year of college, and had previous experience with the police and the criminal process. In sum, given these facts, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. See *Effinger, supra*. He is not entitled to a new trial on this basis.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood