STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2005
v	No. 257026 Wayne Circuit Court
KEITH ELROY SMITH, Defendant-Appellant.	LC No. 04-003429-01

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to concurrent prison terms of mandatory life for the first-degree premeditated murder conviction and three to five years for the felon in possession of a firearm conviction, and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

I.

Defendant contends that the admission of witness Richard Gentry's preliminary examination testimony at trial under MRE 804(b)(1) violated defendant's Sixth Amendment right of confrontation. We disagree.[2]

[1] The prosecutor initially charged defendant with first-degree premeditated murder, felony murder, MCL 750.316, felon in possession of a firearm, and felony-firearm. The trial court granted defendant's motion for a directed verdict on the alternate felony-murder count and the jury convicted defendant of the remaining charges.

[2] We review a trial court's finding regarding the issue of due diligence for an abuse of discretion, *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). To the extent that a trial

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The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, it is undisputed that Gentry's preliminary examination testimony was testimonial.[3] Thus, his prior testimony could only be properly admitted against defendant if Gentry was unavailable and defendant had the prior opportunity to cross-examine him.

A witness is "unavailable" if he 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." MRE 804(a)(5). The due diligence factor requires that the prosecutor "made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).[4] The test is "one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* at 684.

Defendant specifically asserts that the prosecutor failed to meet its due diligence obligation because its attempts to locate Gentry were "tardy and incomplete." To support his argument, defendant relies on *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), and *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), but the cases are clearly distinguishable.

In *Dye*, though the prosecutor knew that the witnesses (1) were difficult to locate for the first trial, (2) left the state after the first trial and, (3) had incentives to go into hiding, the prosecutor made no effort to locate them, other than single visits to their homes. In light of those facts, our Supreme Court found a lack of due diligence in securing the witnesses at retrial. *Dye*, *supra* at 67-73, 76-78.

Here, the prosecutor knew of no potential difficulty in producing Gentry at trial or that Gentry had an incentive to go into hiding. Rather, the record shows that Gentry intended to appear in court until the day before trial. When, on the second day of trial, the prosecutor and the police realized that Gentry might not arrive, they immediately conducted exhaustive searches to locate him. Investigator Dale Collins testified that he visited Gentry's residence on Garland. Also, after receiving information that Gentry might reside at the YMCA on Shoemaker and Harper, Investigator Collins sent Officer Mark Amos and his crew, at approximately 10:00 a.m. that day, to look for Gentry in the YMCA area, as well as the area of Bewick, Garland, and Hurlbut Streets. Investigator Collins also spoke with Gentry's sister, who indicated that she did not know his whereabouts.

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court's rulings implicate a defendant's right to confrontation, our review is de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

[3] See *Crawford*, *supra* at 52 (ex parte testimony at a preliminary hearing is testimonial).

[4] The good-faith effort standard is identical to the due diligence standard. See *Bean*, *supra* at 682-683 n 11.

The next day, Investigator Collins testified that Officer Amos and his crew made several more attempts to locate Gentry in the area of YMCA, Shoemaker, Hurlbut and Bewick, but were unable to find him. The officers were told that no one had seen Gentry for a few days. According to Investigator Collins, Sheila Sellers contacted him that morning and told him that she received a phone call from Gentry who said that he did not know if he was coming to court. Sellers told Investigator Collins that, at approximately 3:30 a.m. that morning, she went to a drug house at which Gentry was present, but that Gentry jumped out of a window and fled. Investigator Collins also testified that he contacted various local agencies, including the Wayne County Jail and Morgue, and the Detroit Police Headquarters, but none of these facilities had a record of Gentry. Thus, unlike *Dye*, officers made substantial efforts to locate Gentry and there is no indication in the record that the prosecutor and the police failed to trace the leads or that any other measures could have led to the production of Gentry.

This case is also distinguishable from *James, supra*, in which this Court found that the prosecutor's efforts were tardy because it had no contacts with the witness over three and one-half years between the time of the preliminary examination and the time of trial. Here, less than three months elapsed between the preliminary examination and the trial. Accordingly, defendant's reliance on *Dye* and *James* is misplaced. Also, contrary to defendant's contention, it is not necessary that the authorities exhaust *all* possible avenues to locate a witness. Rather, the prosecutor must only exercise a reasonable, good faith effort to obtain the presence of a witness. *People v Briseno,* 211 Mich App 11, 16; 535 NW2d 559 (1995). Because the record clearly supports the trial court's finding that the prosecutor exercised due diligence in attempting to obtain Gentry, we find no abuse of discretion and hold that Gentry was properly considered "unavailable" under MRE 804(a)(5).

We also hold that defendant had the prior opportunity to cross-examine Gentry. *Crawford, supra* at 54. The preliminary examination testimony of a witness is admissible at trial if the witness is unavailable and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998), citing MRE 804(b)(1). Whether a defendant had a similar motive to develop the testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

Here, the prosecutor elicited Gentry's preliminary examination testimony to establish defendant's guilt and the prosecutor introduced the testimony at trial for the same purpose. Similarly, defendant's trial counsel cross-examined Gentry at the preliminary examination in an effort to show inconsistencies between his testimony and other evidence and to prove that defendant did not commit the crimes for which he was charged. Therefore, we hold that defendant had the opportunity to cross-examine Gentry at the preliminary examination under a similar motive. *Meredith, supra* at 66-67. Because Gentry was unavailable, as required by the Confrontation Clause, and defendant had the prior opportunity to develop his testimony through cross-examination, we conclude that Gentry's preliminary examination testimony was properly admitted MRE 804(b)(1) and that defendant's right to confrontation was not violated. *Crawford, supra* at 54.

II.

Defendant also maintains that the trial court erred by refusing to give the cautionary accomplice instructions, CJI2d 5.5 and CJI2d 5.6, with regard to the testimony of Gentry whom defendant claims is a disputed accomplice. We disagree.

"The decision whether to give a cautionary accomplice instructions falls within the trial court's sound discretion." *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). Here, defendant requested the disputed accomplice instruction, CJI2d 5.5, and thus, properly preserved the issue regarding CJI2d 5.5. MCL 768.29; MCR 2.516(C); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Accordingly, we review the trial court's decision to refuse defendant's request for the disputed accomplice instruction, CJI2d 5.5, for an abuse of discretion. *Young*, *supra* at 135. However, defendant neither requested the cautionary instruction on accomplice testimony, CJI2d 5.6, nor objected to the court's failure to give one. Thus, our review of the unpreserved issue regarding the accomplice testimony instruction, CJI2d 5.6, is limited for plain error affecting defendant's substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

Generally, if a defendant requests a cautionary instruction regarding an accomplice's testimony, a trial court is required to give the instruction. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). However, a trial court is not required to give requested instructions that are not supported by the evidence or the facts of the case. *Id*. Here, the trial court properly refused to read the instruction because no evidence showed that Gentry was an accomplice "who knowingly and willingly helped or cooperated with someone else in committing a crime." *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. Though Gentry was with the victim in his van at the time of the shooting, nothing in the record indicates that Gentry knew that defendant planned to shoot the victim. Gentry did not encourage defendant, but instead fled for his life when he saw defendant fire the first shot into the van. Gentry heard the second shot as he ran to his house, and he immediately told his neighbor to call for help. The record simply does not reveal that Gentry participated in the victim's murder. In the absence of evidence that Gentry acted as defendant's accomplice, we hold that the trial court did not abuse its discretion in refusing to read the disputed accomplice instruction regarding Gentry. *Ho*, *supra* at 189.

We also hold that there was no plain error in the trial court's failure to give the accomplice testimony instruction, CJI2d 5.6.[5] Defendant, relies on *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), and argues that the court's failure to give the accomplice testimony instruction is error requiring reversal. However, our Supreme Court, in *Young*, *supra*, recently overruled *McCoy*, *supra*, explaining:

> In *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), this Court invented a new rule regarding cautionary instructions on accomplice testimony. That rule provided that the trial court's failure to give a cautionary instruction

[5] The standard jury instruction regarding accomplice testimony, CJI2d 5.6, advises the jury to exercise caution when considering the testimony of an accomplice, and provides more detail with respect to the considerations for evaluating accomplice testimony.

> upon a defense request requires reversal of a conviction. Moreover, reversal may be required even in the absence of a defense request if the issue of guilt is "closely drawn." We reject the *McCoy* rule because it has no basis in Michigan law. Indeed, it contravenes long-standing authorities according discretion to trial courts in deciding whether to provide a cautionary instruction on accomplice testimony. Moreover, the *McCoy* rule is inconsistent with MCL 768.29, which provides that the failure to instruct on a point of law is not a ground for setting aside a verdict unless the instruction is requested by the accused, and MCR 2.516(C), which states that a party may assign as error the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict. [*Young, supra* at 132.]

In *Young*, our Supreme Court held that a cautionary accomplice instruction was not clearly or obviously required upon its findings that:

> [I]t is not clear that Martin and Lawrence were accomplices in any event. Moreover, the prosecution presented evidence of guilt beyond the testimony of the alleged accomplices, including testimony from other witnesses and physical evidence that defendant was at the murder scene. Further, counsel thoroughly cross-examined Martin and Lawrence and challenged their testimony during closing argument, thereby exposing their potential credibility problems to the jury. The court also instructed the jury to consider any bias, prejudice, or personal interest that a witness might have. For these reasons, defendant has not demonstrated a plain error that affected his substantial rights.

Similarly, we hold that defendant was not entitled to the cautionary accomplice instruction. As discussed, *supra*, no evidence indicates that Gentry was defendant's accomplice. See *Young, supra* at 143. Also, apart from Gentry's preliminary examination testimony, ample evidence implicated defendant in the murder. *Id*. All other eyewitnesses consistently testified that the victim was sitting in the driver's seat in his van when defendant removed a silver handgun from his pocket and fired two shots into the van. The undisputed evidence also shows that after the shootings, defendant entered the van and drove away.

Moreover, Gentry's potential credibility problems were plainly presented to the jury and his motivation to lie was thoroughly explored by defense counsel. *Id.* at 143-144; See also *People v Reed*, 453 Mich 685, 693; 556 NW2d 858 (1996). The record shows that, during closing argument, defense counsel highlighted Gentry's initial status as a suspect, his absence from trial and his motivation for falsely testifying and implicating defendant at the preliminary examination. Defense counsel also discussed the inconsistencies between Gentry's prior testimony and the testimony of other witnesses. Furthermore, the trial court instructed the jury to consider whether a witness has "any bias, prejudice, or personal interest in how the case is decided" when assessing credibility. See *Young, supra* at 144. Moreover, defendant's defense was that the prosecutor failed to prove beyond a reasonable doubt that defendant committed the charged crimes: Defendant cannot have accomplices to crimes that he purportedly did not commit, and thus, neither CJI2d 5.5 nor CJI2d 5.6 was applicable. Accordingly, we hold that defendant failed to demonstrate that any error occurred and he is not entitled to relief. *Carines, supra* at 761, 764-767.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell