# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 13, 2006 |
| v | No. 260065<br>Genesee Circuit Court |
| TROY GRANT HALSTEAD,<br><br>Defendant-Appellant. | LC No. 04-014477-FC |

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and was sentenced to 375 to 600 months' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from his participation in the brutal killing of Heath Tripp. In the early morning hours of September 16, 2003, after a night of drinking and partying, Kevin Werth, Brian Hunt, and defendant became involved in an altercation with Tripp, whom they had known for approximately one month. According to codefendant Werth,[1] defendant struck Tripp, who was extremely intoxicated, and knocked him to the ground. While Tripp was on the ground, defendant continued to assault him. Tripp did not fight back, and when defendant asked Hunt to help knock out Tripp, Hunt joined in the physical assault. Werth admitted that he also began hitting and kicking Tripp. At some point, defendant instructed Hunt and Werth to put Tripp into his own car. Defendant indicated that they were going to "get rid" of Tripp. Werth believed that they were going to drive Tripp to his girlfriend's house and leave him there. However, defendant drove to the Flint River and told Werth and Hunt to pull Tripp out of the car. Tripp, who was in the back seat, did not struggle. Defendant subsequently gave Werth a box cutter and told him to cut Tripp. Werth was scared and felt bad but, based on past experience, he believed that he had to follow defendant's instructions. Werth was afraid of the consequences if he chose to ignore them. Werth cut Tripp's neck in a superficial manner. Defendant subsequently carried Tripp into the Flint River and began drowning him. For the first time, Tripp started to struggle. Defendant, however, never removed his hands from Tripp until he went limp. Tripp's body was

[1] Werth pleaded guilty to second-degree murder, MCL 750.317, for his participation in Tripp's death.

found on September 19, 2003. The cause of death was determined to be drowning with complicating blunt and sharp force trauma.

After the murder, defendant made statements to several people, implicating himself in the crime. Defendant's former girlfriend, Jennifer Winn, testified that in the early morning of September 16, 2003, defendant, Werth, and Hunt came to her house. The men were scared. Winn heard defendant instruct Werth to take his shoes and get rid of Tripp's car. When Hunt and Werth left, defendant confessed killing Tripp to Winn in some detail. Leatha Mann, another past girlfriend, testified that she picked defendant up from Winn's house in September 2003. Defendant told Leatha that he killed someone on the previous night. Leatha testified that, based on defendant's statements, she believed that defendant, Werth, and Hunt had murdered Tripp, who Leatha did not know. Leatha's brother, Charles Mann, was defendant's friend. He testified that defendant confessed that he, Werth, and Hunt beat up Tripp, threw him in his car, and took him to the river. Defendant also admitted that he held Tripp under the water in the river after Werth slit Tripp's throat. Defendant told Charles that Tripp was a "cocky asshole" and "deserved it." The following day, Charles informed the police. Charles's girlfriend was with him when defendant made his inculpatory statements. She testified that she heard defendant say that "they" beat the hell out of someone, that Werth slit the person's throat, and that "they" threw the person in the river.

On appeal, defendant argues that the trial court improperly limited the parties and their attorneys with respect to information listed in the jury questionnaires. We disagree.

Before trial, the trial court issued an order, stating that "[n]o personal information from the jury questionnaires will be *recorded* by counsel or taken from the jury board room." The jury questionnaires would not be allowed in the courtroom during voir dire. On October 25, 2004, the issue of jury questionnaires was raised and discussed before the court after defense counsel objected to the order. The trial court noted that MCR 2.510 allowed the parties and their attorneys to examine the questionnaires, and it indicated that it was willing to permit that. It was also willing to allow the parties and counsel to record in writing any information they desired from the questionnaires, subject to a few exceptions. Specifically, the parties could not record the home or work addresses of potential jurors or the number of their children. There was concern about defendant, a neo-Nazi, receiving specific information. During his discussion with the trial court, defense counsel suggested that, rather than requiring the parties to take notes from the jury questionnaires, the court should redact the objectionable information from the questionnaires and allow the parties to have the redacted questionnaires in the courtroom. Apparently, the trial court followed this suggestion. The record reveals that, during voir dire, defense counsel was provided with jury questionnaires in the courtroom. The questionnaires included the names of jurors, but information about their addresses, work locations, and number of children was deleted. All other information remained on the questionnaires. During jury selection, the jurors were referred to by number.

Decisions concerning the conduct of voir dire are reviewed for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). We find no abuse of discretion in the trial court's handling of jury selection in this case. "[T]he practice of impaneling an 'anonymous jury' is an extreme measure, in which 'certain biographical information about potential jurors' is withheld, even from the parties." *Id.* at 523, quoting *United States v Branch*, 91 F3d 699, 723 (CA 5, 1996).

> An "anonymous jury" is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public. The withholding of information from parties was first used in federal courts, primarily as a protection against dangerous individuals. Use of this procedure in state courts began in the past decade. The courts have recognized that the use of an "anonymous jury" may promote the safety of prospective jurors, but at a potential expense to two interests of the defendant: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence. In order to successfully challenge the use of an "anonymous jury," the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised. [*Id.* at 522-523 (citations omitted).]

In this case, defendant argues only that his ability to examine the venire was compromised. We disagree. Defendant and his counsel had access to, and was allowed to review and evaluate, all of the information from the jury questionnaires. While defendant was not allowed to make a record of the jurors' specific home and work addresses or the number of their children, nothing in the record indicates that any information was actually withheld. Thus, the jurors were not anonymous to the parties. Moreover, the record does not support defendant's claim that his ability to effectively examine the venire was compromised in any way. In fact, defendant argues only that it would have been helpful to know the particular cities in which each juror lived because jurors in some cities are more liberal than jurors in other cities. Defendant's claim in this regard is unsupported by statistics or other authority. More importantly, defense counsel had the opportunity to review the information regarding the cities in which the potential jurors lived. If he had any concerns in this regard, he could have used peremptory challenges to remove jurors based on their city of residence. Defendant has not demonstrated that his ability to effectively examine the venire was compromised by the trial court's restriction.

Defendant next argues that the trial court erred when it ruled that the prosecutor was not required to produce Hunt, a res gestae witness. This issue was preserved by defendant's objection to the prosecutor's motion to strike Hunt from its witness list.

When a prosecutor endorses a witness under MCL 767.40a(3), he is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of the witness for trial. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). "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, and not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A prosecutor may delete a witness she intends to call for trial at any time upon leave of the court and for good cause shown. MCL 767.40a(4). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The decision to permit a prosecutor to delete a witness upon a finding of good cause is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

Pursuant to MCL 767.40(a)(3), the prosecutor identified Hunt as a witness who would be produced at trial. However, Hunt disappeared before trial and could not be located. Detective Sergeant Alan Edwards of the Flint Police Department testified at trial that he tried to locate Hunt. He checked Hunt's last known address, checked the county jail, and checked hospitals. He also knocked on doors throughout Hunt's known neighborhood, called Hunt's cell phone number repeatedly, hoping for an answer or call back, and distributed Hunt's picture to narcotics officers and patrol officers. Sergeant Edwards also talked to Hunt's mother and told her to try and contact Hunt. Hunt's mother informed Sergeant Edwards that she never saw Hunt anymore. While trying to find Hunt, Sergeant Edwards learned that Hunt had been arrested on a drunk driving offense on October 9 or 10, 2003. After Hunt was released, however, he failed to appear in court as required. The record revealed that the officer who arrested Hunt for drunk driving did not know about Hunt's involvement in this case. No warrant was ever issued for Hunt's arrest in conjunction with Tripp's killing. On this record, we agree that due diligence was exercised in trying to locate Hunt, and the trial court properly found that the prosecutor showed good cause to strike Hunt from the witness list.

Defendant also argues that the trial court erred by not holding a separate due diligence hearing. This argument is not preserved because defendant never requested a due diligence hearing or objected to the lack of a hearing. Upon review of the record, we find no plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trial court heard testimony regarding the police department's efforts to locate Hunt. Additionally, it entertained lengthy arguments on the issue. Under the circumstances, defendant cannot demonstrate that, if a due diligence hearing had been held, the outcome of his trial would have been different. *Id.*

Finally, defendant argues that the trial court erred in allowing a statement made by Jerrie Chadwell to be introduced through Charles Mann. Defendant argues that the statement was admitted as impeachment evidence without a proper foundation and that it violated his right of confrontation. At the time of trial, defendant objected to the statement only on the ground that it was hearsay and constituted improper impeachment. Thus, that aspect of defendant's argument is preserved for appeal. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Whether a rule of evidence precludes admissibility, however, is an issue of law that is reviewed de novo. *Id.* Moreover, a preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id.* at 495-496.[2] The necessary inquiry focuses on the type of error and its effect in light of the weight and strength of the untainted evidence. *Id.* at 495.

In this case, the prosecutor sought to admit Chadwell's prior statements to impeach her credibility about what occurred at her home before Tripp's death. Chadwell testified at trial that defendant, Werth, Hunt, and Tripp partied at her house on September 15, 2003, that there were no arguments, that Tripp left on his own after defendant passed out on the couch and Hunt went

[2] Evidentiary errors fall into a category of nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

to bed, and that defendant thereafter spent the night at her house. Charles Mann testified, however, that Chadwell told him that she had to scrub a bloodstain out of her front yard, that "they" beat Tripp up and left with him in his car, that Werth and Hunt later returned, that she washed their bloody clothes, and that defendant did not return to her home that night.

"Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted." *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). See also *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997). MRE 613 governs the use of inconsistent out-of-court statements for impeachment purposes. MRE 613(b) provides that extrinsic evidence of a prior inconsistent statement of a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same . . . ." In this case, the prosecutor sought to use extrinsic evidence of Chadwell's prior inconsistent statements to Charles Mann to impeach her credibility, but the prosecution never afforded Chadwell an opportunity to explain or deny the alleged statements made to Charles Mann. Thus, the trial court abused its discretion in allowing the impeachment evidence.

However, we conclude that the error was harmless. *Lukity, supra.* The evidence at trial revealed that Chadwell was defendant's sexual partner, and Hunt was her son. Moreover, Chadwell's testimony about the evening of Tripp's death was contrary to the testimony of numerous other witnesses including Werth, Winn, Leatha Mann, Charles Mann, and Charles's girlfriend. Thus, Chadwell's credibility regarding the events preceding the killing was questionable even without the tainted evidence. Further, the evidence against defendant was overwhelming, and the trial court provided a limiting instruction regarding the use of prior inconsistent statements. Therefore, we cannot conclude that reversal is required based on this evidentiary error. *Lukity, supra.*

We also conclude that there was no violation of the Confrontation Clause such that reversal is required. This issue is not preserved because defendant failed to object to the challenged evidence on this ground. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). We review unpreserved constitutional issues for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764.

The right of confrontation insures that a witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), citing *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (Brickley, J). The admission of a declarant's out-of-court statements at trial does not violate the Confrontation Clause as long as the declarant testifies as a witness and is subject to full and effective cross-examination. *People v Malone*, 445 Mich 369, 382-385; 518 NW2d 418 (1994), citing *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 489 (1970). See also *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999) (stating that, when witnesses are present at trial and can be cross-examined about their statements, they are available for cross-examination within the meaning of the Confrontation Clause).

At the preliminary examination, Charles Mann testified that Chadwell had talked to him about Tripp's murder. Defense counsel knew that Charles Mann was an endorsed witness and would be produced at trial. When Chadwell testified at trial, defense counsel had the opportunity

to fully cross-examine her about her alleged statements to Charles Mann. Although defendant chose not to cross-examine Chadwell on this issue, the opportunity was afforded to him. *Id.* at 283 n 4. Thus, there was no Confrontation Clause violation, and we find no plain error requiring reversal. *Carines*, *supra.*

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray