STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 328003 Muskegon Circuit Court
JESHKAIF DOMINIQUE BASS, Defendant-Appellant.	LC No. 14-065579-FC

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 27 to 49 years' imprisonment for the assault with intent to murder conviction, 1 to 20 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm convictions. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from an altercation between defendant and the victim, Steven Bailey. Defendant produced a handgun during an argument and shot Bailey non-fatally. Numerous witnesses testified to having witnessed the altercation. Two witnesses testified to seeing defendant fire the gun.

On the morning of the second day of trial, Juror Two indicated to the court clerk that he had had a "change of heart." The trial court spoke to the juror outside the presence of the rest of the jury. The juror stated that he was a member of the Jehovah's Witness faith and that he had religious or moral concerns about sitting in judgment over defendant. The prosecution asked that the juror be excused. Defense counsel expressed some concerns about a mistrial if another juror were to be excused later in the trial, but ultimately stated, "[b]eyond that I would leave it to the Court's discretion." The trial court excused the juror and the trial continued with 12 jurors (thus, with no alternate jurors remaining). On that same day, the trial court received information regarding another juror experiencing emotional issues. According to Aron McConaughy, a deputy with the Muskegon County Sheriff's Department, he heard someone crying in the parking

lot during the trial's lunch break. McConaughy testified that, upon further inspection, he realized that it was a juror. McConaughy stated that when he asked the juror what was wrong, she explained that her husband had died eight months before and that she was feeling "emotionally distraught." McConaughy testified that the juror indicated that she did not want to discuss the issue with him further and that she had not approached him directly to talk. The trial court did not call the juror into the courtroom to inquire about this incident and proceeded with the trial.

At trial, the prosecution moved to introduce the preliminary examination testimony of Lameke Strickland,[1] the victim's sister, who had testified at the preliminary examination hearing that she had seen defendant fire the gun. The prosecution argued that Strickland was an unavailable witness whose prior testimony was admissible under MRE 804(b)(1). In support of its argument that it had used due diligence in attempting to procure Strickland to testify at trial, the prosecution offered the testimony of two police officers, John Holtz of the Muskegon County Sheriff's Department and Steven Winston of the Muskegon Heights Police Department. Holtz testified that he had attempted without success to serve Strickland with a subpoena by attempting to locate her at her last known address, by searching various databases and visiting the other addresses associated with her name, and by speaking with several members of her family. Holtz testified that he had performed all of his searches using the surname "Bailey," and did not search using the surname "Strickland," because that name was not on the subpoena.

Winston testified that he checked a database for Strickland using both of the surnames. Winston also contacted Strickland's mother, who told him that Strickland was out of town and would not be back for several weeks, although she would not reveal where Strickland was. The trial court found that the prosecution had shown due diligence, found Strickland unavailable, and allowed her preliminary examination testimony to be read for the jury.

Defendant was convicted as described above. This appeal followed.

II. DISMISSAL OF JUROR

Defendant first argues on appeal that the trial court deprived defendant of his constitutional right to a trial by an impartial jury when it dismissed Juror Two. We disagree. In the first instance, this issue has been waived. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). A defendant's right to challenge a trial court's decision to excuse a juror from deliberations may be waived. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). When defense counsel leaves a decision to the trial court's discretion, the challenge has been waived. *People v Sardy*, 313 Mich App 679, 719; ___ NW2d ___ (2015). Here, when discussing whether to dismiss the juror, defense counsel expressed concern that a mistrial could result if any other jurors experienced issues, but then agreed to leave the decision whether to dismiss the juror "to

[1] The record indicates that Strickland went by the name "Lameke Bailey," but that her legal name was "Lameke Strickland."

the Court's discretion." Accordingly, defendant has waived the issue now raised and there is no claim of error for this Court to review. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Further, even if the argument were not waived, defendant has not demonstrated plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, (1999). Trial courts have discretion to excuse jurors "[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors." MCL 768.18. Although a trial court may not dismiss jurors arbitrarily or without factual justification, *People v Van Camp*, 356 Mich 593, 605; 97 NW2d 726 (1959), it has "broad discretion" to reduce the number of empaneled jurors to 12. *Harvey*, 167 Mich App at 745. Here, the record supports that the trial court provided a factual justification for its decision to dismiss the juror, and did not dismiss the juror arbitrarily or based on the trial court's personal inclinations. *Van Camp*, 356 Mich at 605. The trial court acted within its discretion in dismissing the juror, and defendant has not established that the trial court's dismissal of the juror violated his right to an impartial jury. See, e.g., *People v Mahone*, 294 Mich App 208, 217; 816 NW2d 436 (2011). And in the end, defendant was tried by a jury of twelve. Although defendant argues that the dismissal of Juror Two impacted the trial court's decision not to inquire further into the circumstances of the other juror, nothing in the record indicates that the other juror could not be fair and impartial just because she was observed crying over a lost spouse while on her lunch break. Mere speculation as to a different outcome is not sufficient to show prejudice. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

III. ADMISSION OF STRICKLAND'S TESTIMONY

Defendant next argues that the trial court abused its discretion by finding Strickland to be unavailable and by admitting her testimony from the preliminary examination hearing. He also argues that the admission of Strickland's preliminary examination testimony violated his right to confront the witness. We disagree. We review for an abuse of discretion a trial court's decision to admit evidence. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We review de novo a claim that the admission of evidence violated the defendant's right of confrontation. *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible at trial unless it meets the requirements of an exception set forth in the Michigan Rules of Evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). In general, former testimony is not excluded by the hearsay rule where the declarant is unavailable. MRE 804(b)(1). A witness is unavailable when 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). Thus, the test for whether a witness is unavailable is whether the prosecution has shown that it used due diligence in its attempt to locate the witness for trial. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "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*.

The trial court did not abuse its discretion when it found that Strickland was unavailable for trial. *Unger*, 278 Mich App at 216. Initially, when attempting to locate Strickland, Holtz checked several databases using "Bailey" only. However, the record supports that both names were ultimately checked in a database before trial. The record also supports that two police officers attempted to locate Strickland by checking various addresses associated with her and by speaking with her family members. Ultimately, neither police officer was able to locate Strickland for trial. "Due diligence is the attempt to do everything reasonable, not everything possible," to secure the presence of a witness at trial. *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983). The record supports that the prosecution used diligent, good-faith efforts to procure Strickland's presence at trial. Accordingly, the trial court did not abuse its discretion in finding Strickland unavailable pursuant to MRE 804(a)(5).

The trial court also did not abuse its discretion when it found Strickland's testimony admissible under MRE 804(b)(1). *Unger*, 278 Mich App at 216. Under MRE 804(b)(1), former testimony "given as a witness at another hearing of the same or a different proceeding," is admissible at trial "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." To be admissible, the testimony must have been made "at another hearing." MRE 804(b)(1); *People v Farquharson*, 274 Mich App 268, 272; 731 NW2d 797 (2007). Also, the party against whom the testimony is offered must have had an opportunity and similar motive to develop the testimony. *Id.* at 275. "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *Id*.

Here, Strickland's testimony came from defendant's preliminary examination hearing, and therefore her testimony was made "at another hearing" as required by MRE 804(b)(1). At both the preliminary examination and at trial, the prosecution sought to show that defendant had shot the victim, and defendant's counsel was motivated to prove that defendant was not the shooter. Defense counsel had an opportunity to cross-examine Strickland at the preliminary examination hearing. Defense counsel questioned Strickland about her ability to view the shooting, her memory of the events, her relationship with the victim, and her actions after the shooting. Because the same issues were involved at the preliminary examination and at trial, defendant had an opportunity and similar motive to develop the testimony. *Farquharson*, 274 Mich App at 275. Accordingly, the trial court did not abuse its discretion in admitting Strickland's testimony under MRE 804(b)(1). *Unger*, 278 Mich App at 216.

Defendant has also failed to establish that the use of Strickland's preliminary examination testimony violated his rights under the Confrontation Clause; US Const, Am VI; Const 1963, art 1, § 10. "The admission of testimony under MRE 804(b)(1) often raises issues concerning a defendant's right to confront witnesses against him." *Farquharson*, 274 Mich App at 277. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). "Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). Because Strickland was unavailable under MRE 804(a)(5) and

was subject to cross-examination at defendant's preliminary examination hearing, defendant's right of confrontation was not violated. *Id*.; *Jackson*, 483 Mich at 277.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Mark T. Boonstra