STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 309425 Wayne Circuit Court
MICHAEL PAUL ST. CLAIR, Defendant-Appellant.	LC No. 11-009114-FH

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of aggravated stalking, MCL 750.411i. We remand for proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from defendant's nonconsensual contact with his wife, Rita Duby, from whom he was separated, on and after July 9, 2011, in violation of a personal protection order. On July 9, 2011 at about 10:16 p.m., Duby received a telephone call from Ashley Luthe. Luthe used vulgar language during the call and Duby heard defendant laughing in the background. Although at the time of the call Duby did not know Luthe, she later learned that Luthe was dating defendant.

Duby testified that between July 9, 2011 and August 1, 2011, Luthe, on her own initiative, made additional harassing phone calls to her. She further testified that defendant tried to contact her several more times in July and that after the July 9 call, she reported to the police that defendant was still harassing her.

The parties stipulated that the July 9 call originated from a phone number that belonged to Luthe. Duby testified that she did not "know phone numbers by heart" but that she could recognize the number from which Luthe called by the time and length of the call as listed on the phone records.

The prosecution questioned Duby on direct examination:

> [PROSECUTOR]: [W]as there a valid court order indicating that the defendant was to have no contact with you?

DUBY: Yes.

[PROSECUTOR]: And how do you know that?

DUBY: Because he went to jail for —

[PROSECUTOR]: No —

DUBY: How did I know he got a court order?

Then defense counsel objected and the trial court sustained the objection:

> [DEFENSE COUNSEL]: I'm going to object. We stipulate there was a court order, your Honor. I'm going to object to the relevance of this line of questioning.
>
> THE COURT: Okay. And, of course, I'll ask the jury to disregard the remark about him going to jail. It's been stipulated that there was a valid court order which the defendant knew was in effect.
>
> * * *
>
> THE COURT: You knew the person?
>
> DUBY: I didn't until she started contacting me and having the same things happen to her that he was doing to me.
>
> * * *
>
> [PROSECUTOR]: What about the subsequent phone calls? What was the nature of those calls?
>
> DUBY: Them [sic] were — she wanted to discuss with me things that he threatened to do.
>
> [DEFENSE COUNSEL]: Hearsay your Honor.
>
> THE COURT: Excuse me, ma'am. If an attorney objects, you have to stop talking.
>
> What's the nature of the objection, Counsel?
>
> [DEFENSE COUNSEL]: The objection is hearsay. She's saying what someone else told to her. That person is not in court here.
>
> THE COURT: I'm going to sustain that objection, Counsel.
>
> [PROSECUTOR]: Judge, I'm not offering it for the truth of this conversation. I'm offering it because there is conversation between the two people and —

THE COURT: Well, the Court is not going to allow you to get into it. That's it.

On cross-examination, Duby testified:

[DEFENSE COUNSEL]: So you didn't talk to her on the ninth, at 12:51 on the 9th, like you said in your statement? That's a wrong time, right?

DUBY: She called me and she texted me right here. It says July 9th at 12:51, she texted me. And she texted me that she was sorry, that he made her do it. So that's where I got July 9th at 12:51. She had called me prior to that, it was ten to 11:00, with a different phone number. It's right here on my phone.

* * *

[DEFENSE COUNSEL]: That was the first time Ashley ever called you, right?

DUBY: Right. Ashley called me and he was laughing in the background and she called me all kinds of stuff. Then she called the next day and told me that Mike just got out of jail because I didn't know-

THE COURT: Wait, wait, ma'am, ma'am. Strike the.

DUBY: I don't know —

THE COURT: Ma'am, ma'am, I'm talking now. Only answer the question that he asked.

DUBY: I have.

THE COURT: Well, when you go about the next day, he asked you about what happened that night. So you were volunteering. So only answer what he asks you.

On re-direct examination, Duby testified:

[PROSECUTOR:]. You testified on cross-examination that Ashley texted you on your phone and said she was sorry she did it?

THE COURT: Counsel, Counsel, Counsel?

[DEFENSE COUNSEL]: Yes. This is what he brought out.

THE COURT: No, that's what she volunteered and that's what the court struck so I'm striking it.

On re-cross examination, Duby testified:

[DEFENSE COUNSEL]: Did you ever go back to the police department telling them he's still harassing you and calling you?

DUBY: Yes, I did. We've been to court several times over it.

[DEFENSE COUNSEL]: You were in court?

DUBY. I have 72 calls from him.

After the prosecution closed its proofs, defense counsel moved for directed verdict. The trial court denied that motion. Defendant then testified on his own behalf. He testified that he did not ask Luthe to call Duby. He also testified that on the morning of July 9, Luthe left his house before noon. After she left, he found that she had taken $150 from a box on his dresser. Although defendant called the police regarding this incident, he did not press charges. Defendant testified that he had not seen Luthe from July 9 at noon until the date of trial.

Before defense counsel rested, he noted that Luthe had not been produced as a witness at trial and that she was a prosecution witness and had been on defendant's witness list. Because Luthe was not available to testify, defendant requested a jury instruction that the jury could draw an inference that her testimony would have been favorable to defendant. Plaintiff responded that Luthe was a prosecution witness, and that efforts had been made by the officer in charge of the case to produce Luthe at trial. The trial court requested case law. When court reconvened, without hearing any argument from counsel or taking any testimony, the court ruled:

> The Court has had an opportunity to look at the cases, also had an opportunity to review something else and I have — I'm reversing my decision. I will take the People at its word that the officer [did] due diligence, did attempt to locate the witness and the adverse instruction is given when the People have not exercised due diligence. I think in this case they did. So I will not give the instruction.

The jury subsequently found defendant guilty of aggravated stalking. This appeal followed.

II. MISTRIAL

Defendant first argues the trial court should have declared a mistrial because of certain bad acts testimony by Duby. We disagree. As defendant failed to request a mistrial below, we review his claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-768; 597 NW2d 130 (1999).

Generally, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness could give unresponsive testimony or the prosecution conspired with or encouraged a witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, while Duby repeatedly provided unresponsive testimony, she did so during questioning by not only the prosecutor but also defense counsel and even the trial court. There is no evidence or indication that the prosecutor knew that Duby would provide unresponsive or inadmissible testimony. The court gave curative

instructions to the jury to disregard the testimony and admonished Duby several times. Instructions by the court are presumed to cure most errors. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Moreover, none of the challenged testimony, even taken cumulatively, amounted to plain error that denied defendant his substantial right to a fair trial. During her testimony, Duby stated several times that defendant had been in jail, but the trial court instructed the jury to disregard the reference or had the reference stricken each time that she did. Defendant asserts that Duby's unsolicited responses resulted in prior bad acts testimony being admitted against defendant without a ruling of the trial court in accordance with MRE 403 and created the danger of unfair prejudice. However, the record does not support this argument, especially in light of the trial court's curative instructions.

Defendant also challenges Duby's testimony that Luthe told Duby that "he" was doing the same things to her, that she said she was sorry and that defendant made her call Duby, and that Luthe wanted to discuss what "he" threatened to do. Defendant did not object to the statement that the same things were happening to Luthe, and Duby was not permitted to elaborate on the statement. With regard to the testimony regarding Luthe being sorry and that defendant instructed her to call Duby, some of that testimony was volunteered by Duby during cross-examination by defendant and was not challenged. When the prosecutor attempted to follow up on that testimony, the trial court found that the initial testimony was volunteered by Duby and struck the testimony. Defendant also challenges the alleged threats that Duby testified Luthe mentioned in her telephone call. The trial court found that what Luthe allegedly said to Duby was hearsay and instructed the jury to base its decision only on the evidence admitted. Lastly, defendant claims error because of Duby's statement that she received 72 phone calls from defendant. The testimony regarding the 72 calls occurred during questioning by defense counsel. Because defendant invited the alleged error, he may not seek its review on appeal. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). Further, defendant was charged with aggravated stalking, which required the prosecution to establish two or more willful and nonconsensual contacts with Duby. MCL 750.411i. To support the charge, the prosecution had to demonstrate contact beyond the phone call from Luthe.

Finally, defendant argues that to the extent that this Court finds that defendant's trial counsel waived this issue, it can be addressed through a claim of ineffective assistance of counsel. However, defendant makes no arguments and offers no legal support regarding ineffective assistance of counsel. As this Court has repeatedly held, a party cannot rely upon the appellate court to make his arguments and find authority to support them. See, e.g., *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). We therefore decline to consider this issue.

III. SUFFICIENCY OF THE EVIDENCE/GREAT WEIGHT OF THE EVIDENCE

Next, defendant argues that the prosecution failed to prove the elements of the charged offense, that his motion for a directed verdict should have been granted, and that there was insufficient evidence to support the jury's verdict. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the

evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

To prove a charge of aggravated stalking, the prosecution must establish the crime of stalking, MCL 750.411h(1)(d), with the presence of an aggravated circumstance, MCL 750.411i(2). Stalking is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). The nonconsensual conduct can include contact by telephone. MCL 750.411i(1)(f). To establish aggravated stalking, the prosecution must show one of the following:

> (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.
>
> (b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.
>
> (c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.
>
> (d) The individual has been previously convicted of a violation of this section or section 411b. [MCL 750.411i(2).]

Defendant argues that Duby testified that she was harassed by the telephone call from Luthe, not defendant, and never indicated how she was harassed. According to defendant, there were not two or more willful, separate, and noncontinuous acts of unconsented contact since the case involved only one phone call and did not demonstrate any willfulness on defendant's part. Lastly, there was no proof that the call would cause a reasonable person to suffer emotional

distress or feel terrorized, frightened, intimidated, threatened, harassed, or molested and actually caused Duby to feel this way.

Plaintiff established the elements of the charge of aggravated stalking. Duby testified that she felt harassed by defendant and that the contact made by and on behalf of defendant was unconsented, "lewd," "obscene," "vulgar," and "rude." Based upon her testimony on the issue, a reasonable person could suffer emotional distress and feel terrorized, frightened, intimidated, threatened, harassed, or molested by such unconsented contact. Further, the contact was not just a single incident. Duby testified that she contacted the police when she received the phone call from Luthe in which she heard defendant laughing in the background, and then returned to the police to report that defendant continued to harass her several more times. It was reasonable for the jury to find that defendant committed the offense of aggravated stalking. Finally, Duby testified that she did not know Luthe before receiving the telephone call from her on July 9, 2011, and that she heard defendant laughing in the background during the call. Based upon that testimony, it was reasonable for a jury to infer that defendant gave Duby's phone number to Luthe, and directed her to call Duby. Defendant stipulated that, at the time of the July 9 call, a personal protection order prohibiting contact with Duby was in effect and that defendant was aware of the order. A reasonable jury could thus conclude that defendant's participation in the telephone call constituted a violation of the personal protection order. "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *Carines*, 460 Mich at 757.

Additionally, the verdict was not against the great weight of the evidence. A new trial may be granted where "the evidence preponderates heavily against the verdict and a miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642 (quotation marks and citation omitted). Defendant did not timely move the trial court for a new trial; thus we review defendant's claim for plain error. *People v Horn*, 279 Mich App 31, 41; 755 NW2d 212 (2008). Although defendant attacks Duby's credibility, none of the "exceptional circumstances" under which a trial court may grant a new trial based on the incredibility of a witness are present here. *Lemmon*, 456 Mich at 643-644. Further, although defendant points out his own testimony conflicts with Duby's, such a conflict is not sufficient ground for the grant of a new trial. *Id*. at 647.

IV. MISSING WITNESS INSTRUCTION

Finally, defendant argues that the trial court erred in finding that the prosecution exercised due diligence to ensure Luthe's appearance at trial. Luthe was the prosecution's endorsed witness and was also on defendant's witness list. This Court reviews a trial court's determination of due diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 388-389: 677 NW2d 76 (2004). Absent clear error, a finding regarding due diligence in producing a witness is a factual finding that will not be set aside on appeal. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A finding is considered clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003).

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to

> produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the witness's testimony would have been unfavorable to the prosecution's case. [*Eccles*, 260 Mich App at 388 (citations omitted); see also *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003) (A missing witness instruction "may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused.")]

"The test is one of reasonableness and depends upon the facts 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." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The requirement of due diligence is "a substantial requirement" that must be satisfied by "a diligent effort to *find* the witnesses." *People v Dye*, 431 Mich 58, 66, 77; 427 NW2d 501 (1988) (emphasis in original).

Prior to the commencement of trial, the prosecution sought an adjournment, so that the officer in charge could continue to try to locate Luthe. The officer did not testify regarding his efforts to locate Luthe, but the prosecutor made the following statements at that time regarding the absence of Luthe:

> [PROSECUTOR]: Your Honor, before we bring the jury in, I have a witness that I have endorsed, an Ashley Marie Luthe, and I have an Officer Lazar here and Officer Lazar could probably represent to the Court that he made attempts to personally serve Ms. Luthe and that [sic] spoke to her on Friday and she indicated that she would need him to personally receive a subpoena and she never showed up and that he made efforts to go to her last-known address and he's been trying to contact her and trying to get her here but he has not been able to locate her.

The trial court denied the requested adjournment.

After Luthe failed to appear at trial, defense counsel requested a missing witness instruction. The prosecutor responded that Luthe was not a defense witness, that she would not testify favorably for defendant, and that defendant did not request assistance from the prosecution in securing her appearance.

After reviewing requested case law, the trial court ruled, without further argument or testimony, as follows:

> The Court has had an opportunity to look at the cases, also had an opportunity to review something else and I have — I'm reversing my decision. I will take the People at its word that the officer [did] due diligence, did attempt to locate the witness and the adverse instruction is given when the People have not exercised due diligence. I think in this case they did. So I will not give the instruction.

Although the trial court found that the prosecutor, through its officer in charge, exercised due diligence in attempting to produce Luthe at trial, the trial court did not state on the record what efforts the officer had made or its basis for concluding that due diligence was exercised. Nor did the trial court indicate what it had reviewed that had caused it to change its mind on this issue; the trial court instead merely indicated that it had had an opportunity to review unspecified caselaw, and that it had also had "an opportunity to review something else," without indicating what that "something else" might have been. Officer Lazar never testified regarding his efforts to locate Luthe; instead the trial court merely stated that it would "take the People at its word that the officer [performed] due diligence, did attempt to locate the witness . . . ."

The prosecution's earlier equivocal statement that Lazar could "probably" testify as to his efforts to locate Luthe also does not suffice to satisfy the requirement that the prosecution exercise due diligence in locating an endorsed witness. Here, without a record by the trial court, this Court cannot determine with a definite and firm conviction whether an error has been made. The trial court should have conducted a due diligence hearing on this issue. *Eccles*, 260 Mich App at 389. For example, in *Eccles* the trial court conducted a due diligence hearing where the officer in charge testified as to his efforts to locate the witness, and was subject to cross-examination. *Id.*; see also *Bean*, 457 Mich at 393-394. The trial court's failure to take these proofs and make factual findings renders this Court unable to review the trial court's finding that the prosecution exercised due diligence.

Without determining whether the prosecutor exercised the required due diligence, this Court also cannot determine whether the trial court abused its discretion in declining to provide a missing witness instruction. *Eccles*, 260 Mich App at 388-389. The prosecution argues that defendant has not demonstrated that Luthe's testimony would be helpful to his defense. However, Luthe may have provided testimony favorable to defendant had she appeared at trial. Although she gave her version of events to the police, she could have provided different or conflicting information under cross-examination by the defense. Further, defendant's testimony that Luthe took money from his home raised a question regarding whether Luthe had a bias against him or an incentive to lie. Lastly, had Luthe testified, the jury would have had the opportunity to assess her credibility with regard to the July 9 call. We are not prepared, based on the record before us, to definitively conclude that Luthe's testimony could not have been helpful to defendant.

We therefore remand this matter for a due diligence hearing to establish a record amenable to this Court's review. On remand, the trial court should take testimony from prosecution witnesses concerning efforts to locate Luthe, and allow defendant to cross-examine those witnesses. *Id.*; see also *Bean*, 457 Mich at 393-394. The trial court should make findings of fact on the record in support of its conclusion.

Remanded for proceedings consistent with this opinion. We retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering