STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
V JASON GLENN LEHRE, Defendant-Appellant.	No. 310260 Macomb Circuit Court LC No. 2011-002530-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V MICHAEL CHRISTOPHER GARRISON, Defendant-Appellant.	No. 310265 Macomb Circuit Court LC No. 2011-002529-FH

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

PER CURIAM.

In Docket No. 310260, defendant, Jason Glenn Lehre, appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. Because the trial court erred by denying Lehre's motion for a directed verdict, we vacate his conviction and sentence and remand for entry of a directed verdict of acquittal.

In Docket No. 310265, defendant, Michael Christopher Garrison, appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. Because Andrew Ashton's preliminary examination testimony was inadmissible hearsay and its admission violated Garrison's right of confrontation, resulting in outcome-determinative plain error, we vacate Garrison's conviction and sentence and remand for a new trial. We also direct the trial court on remand to correct Garrison's amended judgment of sentence, which erroneously indicates that the jury convicted Garrison of assault, MCL 750.81, when the jury acquitted Garrison of that charge.

I. DOCKET NO. 310260

Lehre argues that the trial court erred by denying his motion for a directed verdict. We review de novo a trial court's decision on a motion for directed verdict. *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006). We view the prosecution's evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. at 319-320.

To support a conviction of unarmed robbery, the prosecution must prove beyond a reasonable doubt that the defendant (1) used force or violence against any person present, or assaulted or put the person in fear (2) in the course of committing a larceny of any money or other property that may be the subject of a larceny. MCL 750.530; *People v Hardy*, 494 Mich 430, 446; 835 NW2d 340 (2013). "Unarmed robbery is a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property." *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

The prosecution argued that Lehre was guilty of unarmed robbery on an aiding and abetting theory. To convict on an aiding and abetting theory, the prosecution must show that: "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement." *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010) (quotation marks, citations, and brackets omitted).

The prosecution proved the first element, i.e., that "the crime charged was committed by the defendant or some other person." See *Plunkett*, 485 Mich at 61. Ashton testified[1] that Garrison punched him in the face, "snatched" his necklace from his neck, and then punched him a second time. Ashton's testimony shows that Garrison took Ashton's necklace with force by grabbing it from Ashton's neck and punching Ashton in the face. Garrison's actions and words also indicated that he had the specific intent to permanently deprive Ashton of his property. After taking the necklace, Garrison said to Ashton, "I took your s*** b****. What are you going to do about [sic]?"

The prosecution failed to prove the second element. Viewing the prosecution's evidence in the light most favorable to the prosecution, a rational trier of fact could not conclude beyond a reasonable doubt that Lehre "performed acts or gave encouragement that assisted the commission of the crime." See *Plunkett*, 485 Mich at 61. Ashton testified that during the theft, Lehre was standing between him and Garrison and was "basically" holding Garrison back. Ashton did not remember Lehre saying anything during the incident. Thus, the prosecution did not present any evidence that Lehre assisted Garrison or even encouraged him during the theft.[2]

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[1] Ashton's testimony was taken at defendants' preliminary examination and admitted at trial after the trial court determined that Ashton was an unavailable witness.

[2] Although Tony Alyass testified that he saw Lehre take Ashton's necklace and punch Ashton in the face, Alyass testified on behalf of Garrison, after the close of the prosecution's case and after Lehre moved for a directed verdict. When reviewing a motion for a directed verdict, this Court

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999); see also *People v Barrera*, 451 Mich 261, 295 n 29; 547 NW2d 280 (1996).

The evidence that Lehre possessed the necklace after the theft does not demonstrate that he gave any kind of assistance or encouragement to Garrison during the robbery. See *Plunkett*, 485 Mich at 61. Laurie Bellew testified that Lehre waved a necklace in her face in the hallway of a Quality Inn across the street from where the theft occurred. Officer Jeff Stieber found Lehre hiding in the bushes behind the hotel with the necklace in his pocket. "Possession of the fruits of a robbery plus certain other facts and circumstances permits the inference that the possessor is the thief." *People v Gordon*, 60 Mich App 412, 418; 231 NW2d 409 (1975). In this case, however, the prosecution's evidence established the thief's identity, and Ashton maintained that Garrison was the person who took his necklace and punched him. Although the evidence clearly established that Lehre received stolen property,[3] and he pleaded guilty to that charge before trial, the prosecution's evidence did not establish that Lehre aided and abetted Garrison in stealing the necklace. The prosecution's evidence did not allow a reasonable trier of fact to conclude that Lehre assisted or encouraged Garrison during the robbery where the prosecution's only evidence of Lehre's involvement was his apparent attempt to hold Garrison back.

Finally, no rational trier of fact could conclude that the third element of aiding and abetting was proven beyond a reasonable doubt. The third element requires proof that "the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement." *Plunkett*, 485 Mich at 61 (brackets omitted). As discussed above, there was no evidence that Lehre gave aid or encouragement during the robbery. There was also no evidence that Lehre intended the commission of the crime. Rather, it appears from Ashton's testimony that Lehre was trying to intervene between Garrison and Ashton.

Because the trial court erred by denying Lehre's motion for a directed verdict, we vacate Lehre's conviction and sentence and remand for entry of a directed verdict of acquittal. Accordingly, we need not address Lehre's other arguments on appeal.

II. DOCKET NO. 310265

Garrison argues that the trial court erred by admitting Ashton's preliminary examination testimony at trial because it was inadmissible hearsay and its admission violated his right of

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reviews *the prosecution's evidence* in the light most favorable to the prosecution. *Martin*, 271 Mich App at 320.

[3] To convict a defendant of receiving and concealing stolen property under MCL 750.535, the prosecution must show that (1) the property was stolen; (2) the value of the property met the statutory requirement; (3) the defendant received, possessed, or concealed the property with knowledge that the property was stolen; (4) the property was previously stolen; and (5) the defendant's actual or constructive knowledge that the property received or concealed was stolen. *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002).

confrontation. To preserve an argument that the admission of evidence violates a defendant's right of confrontation, the defendant must object on that basis at trial. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). An objection that the evidence is hearsay does not preserve the constitutional issue for appellate review. *Id*. Garrison preserved the hearsay issue by objecting on that basis in the trial court. Because Garrison did not object to the evidence on Confrontation Clause grounds, however, the confrontation issue is not preserved for our review.

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). An abuse of discretion occurs when the trial court's decision "falls outside the range of reasonable and principled outcomes." *Id.* at 723. The trial court's determination that a witness is unavailable "will not be disturbed on appeal unless a clear abuse of discretion is shown." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Generally, this Court reviews de novo the constitutional question whether a defendant was denied his constitutional right to confront the witnesses against him. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). When the defendant failed to preserve the issue, however, our review is limited to outcome-determinative plain error. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). "First, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must affect substantial rights (i.e., there must be a showing that the error was outcome determinative." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). "[R]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of guilt or innocence." *Id*.

Garrison argues that Ashton's preliminary examination testimony was inadmissible hearsay that did not fall into the MRE 804(b)(1) hearsay exception because Ashton was not an unavailable witness. Hearsay, or "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," is generally inadmissible. MRE 801(c); MRE 802. An exception to this rule exists for former testimony, "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." MRE 804(b)(1). This exception applies only when the declarant is unavailable as a witness, which MRE 804(a) defines as "situations in which the declarant—"

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
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> (3) has a lack of memory of the subject matter of the declarant's statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

In finding that Ashton was an unavailable witness for purposes of MRE 804(a), the trial court determined that MRE 804(a)(2) was applicable because the prosecutor "ha[d] made every effort to procure the witness's appearance," but the witness lived in Florida and was "unable to return." Both parties assert that MRE 804(a)(5), rather than MRE 804(a)(2), is the subsection applicable in this case. We agree that MRE 804(a)(5) is applicable and that MRE 804(a)(2) is inapplicable. Ashton did not persist in refusing to testify, nor was there a court order compelling him to testify. In fact, he was not even present at trial.

Thus, the proper inquiry is whether Ashton was unavailable under MRE 804(a)(5). For a witness to be unavailable under MRE 804(a)(5), the prosecution must show that it was unable to secure his attendance "by process or other reasonable means." The prosecution must also exercise due diligence in attempting to secure the witness's attendance at trial. MRE 804(a)(5). "The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). In most cases involving questions of due diligence, the witness's location is unknown and the prosecution's efforts to locate the witness are evaluated. See, e.g., *Bean*, 457 Mich at 689-690; *People v Dye*, 431 Mich 58, 75-78; 427 NW2d 501 (1988); *James*, 192 Mich App at 571-573. In the instant case, however, the prosecutor knew that Ashton had moved to Florida. She spoke with Ashton by telephone and presumably could have acquired his address, if she did not have it.

Thus, the issue in this case involves the prosecutor's efforts to secure Ashton's presence at trial. In *Barber v Page*, 390 US 719, 723; 88 S Ct 1318; 20 L Ed 2d 255 (1968), the prosecution knew that the witness in question was in a federal prison in Oklahoma, but made no effort to secure his attendance at trial. The Supreme Court acknowledged the general assumption that a court cannot compel the attendance of a witness located outside its jurisdiction, thus making that witness unavailable. *Id*. But, the Court also stated, "[w]hatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived [the theory] of any continuing validity in the criminal law." *Id*. The Court then discussed several options for securing the presence of witnesses who are in federal custody, but also noted that:

> For witnesses not in prison, the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings[4] provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first State to testify. [*Id*. at 723 n 4 (footnote added).]

[4] MCL 767.91 *et seq*.

In this case, the prosecutor described her efforts to contact Ashton and ensure his attendance at trial:

> I contacted his last known number. Eventually his sister contacted me, gave me his phone number.
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> We went back and forth over the weekend. He lives in Florida. There's no way he can get here. He doesn't have the money. Our office does not have the funds available to provide him with travel arrangements or travel method [sic] for him to be brought up here or to come up here.
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> * * *
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> Whether I served him personally or gave him a subpoena, no, he didn't receive one . . . I spoke with him. He wouldn't come whether he had [a] subpoena or not. He believes his mother may have gotten it because that was his last known address[.]
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> [A subpoena was mailed to the last] known address, and I cannot, I don't want to mislead the Court. I'm assuming it was mailed. I doubt that it was personally served. But Warren police is who would do it. We run the subpoenas, they pick them up from our office then they serve by way of personal service or mail, but my history with Warren police it's always mail [sic].

The trial court abused its discretion by concluding that the prosecutor's efforts met the requirements of MRE 804(a)(5) for Ashton to be considered unavailable. Under MRE 804(a)(5), a witness is unavailable if the prosecution was unable to secure his attendance "by process or other reasonable means." Every court has the power "[t]o issue process of subpoena, requiring the attendance of any witness in accordance with court rules, to testify in any matter or cause pending or triable in such courts[.]" MCL 600.1455. Here, the prosecutor was unsure whether a subpoena had been mailed to Ashton's last known address, but she knew that Ashton had not received one. The prosecutor's failure to ensure that Ashton was served with a subpoena, despite her knowledge of his location, constitutes a lack of due diligence.

The prosecution asserts that Ashton would not have appeared even if he had received a subpoena. When seeking a witness's attendance at trial, however, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Barber*, 390 US at 724 (quotation marks and citation omitted). If Ashton had been served with a subpoena, the trial court could have found him in contempt when he failed to appear at the trial. See MCR 2.506(E). It is possible that such a penalty would have prompted Ashton to find the funds to make the trip to Michigan. In addition, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (the uniform act) provides a mechanism for securing an out-of-state witness's presence at trial by court order. See MCL 767.91 *et seq.*; *Barber*, 390 US at 723 n 4; *Dye*, 431 Mich at 76-77.

The prosecution also asserts that it did not have the funds to pay for Ashton's travel arrangements to Michigan. MRE 804(a)(5) requires that the prosecution be unable to secure the witness's attendance by process *or other reasonable means* for a witness to be considered

unavailable. It appears that the lack of funds does not dispense with this requirement; locating and securing a witness's appearance for trial almost always involves the expenditure of resources. For example, in *Dye*, 431 Mich at 67-78, the prosecution spent a significant amount of time and resources attempting to locate three witnesses who were thought to be out of state. The prosecution tried personally serving the witnesses with subpoenas, obtained a forwarding address for one witness through the postal service, spoke with family members, checked all of the jails, morgues, and hospitals in Wayne, Oakland, and Macomb counties, called utility companies, contacted the local police departments and prosecutor offices in three states, and mailed the local police departments photographs of the witnesses and certificates to secure their attendance under the uniform act. *Id*. Nonetheless, our Supreme Court held that the prosecution's efforts were not enough and that the prosecution did not exercise due diligence, suggesting that the prosecution should have sent its own investigator to search for the witnesses. *Id.* at 76-78. Doing so would surely have required more funds than paying for one witness to travel to Michigan from Florida. It would have been reasonable for the prosecution's office to secure Ashton's appearance at trial by providing some compensation for his travel expenses.

Finally, it appears that the prosecutor did not speak with Ashton until the weekend before trial was to begin. A delay in making efforts to secure a witness's presence at trial is evidence of a lack of due diligence. See *Dye*, 431 Mich at 76; *James*, 192 Mich App at 571-573. For example, in *Dye*, our Supreme Court concluded that the prosecution's "belated and incomplete efforts" did not constitute due diligence where the prosecution waited until one week before trial to locate one witness, one month before trial to locate another witness, and two months before trial to locate the third witness. *Dye*, 431 Mich at 76. In *James*, 192 Mich at 571, this Court opined, "our quarrel is not so much with the amount of effort expended by the prosecution . . . but the time at which the efforts were made." In that case, the prosecution mailed the witness a subpoena three weeks before trial and assumed that he would appear. *Id.* at 571-572. This Court held that the prosecution should have contacted the witness sooner to ensure his attendance at trial. *Id*.

Therefore, the prosecution did not demonstrate that it exercised due diligence and was unable to secure Ashton's attendance "by process or other reasonable means." See MRE 804(a)(5). Thus, Ashton was not an unavailable witness under MRE 804(a), his prior testimony did not fall under the MRE 804(b)(1) hearsay exception, and the prior testimony constituted inadmissible hearsay. The trial court therefore abused its discretion by admitting Ashton's preliminary examination testimony at trial.

The admission of Ashton's prior testimony also violated Garrison's right of confrontation. The Confrontation Clause of the United States Constitution guarantees a defendant's right "to be confronted with the witnesses against him." US Const Am VI. The Michigan Constitution also guarantees a criminal defendant the right "to be confronted with the witnesses against him or her." Const 1963, art 1, § 20. This right "is aimed at truth-seeking and promoting reliability in criminal trials." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012). Accordingly, it is generally impermissible to use testimonial hearsay statements as substantive evidence. *Id.* at 697-698. One exception to this general rule allows the admission of prior testimonial statements of a witness who is unavailable to testify if the defendant had a previous opportunity to cross-examine that witness. *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006).

A witness is unavailable for purposes of the right of confrontation when the prosecution has made a good-faith effort to secure the witness's presence at trial. *Barber*, 390 US at 724-725.

> The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness. The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. [*Ohio v Roberts*, 448 US 56, 74; 100 S Ct 2531; 65 L Ed 2d 597 (1980) (quotation marks and citation omitted), abrogated on other grounds in *Crawford v Washington*, 541 US 36, 40-69; 124 S Ct 1354; 158 L Ed 2d 177 (2004); see also *Hardy v Cross*, __ US __; 132 S Ct 490, 494; 181 L Ed 2d 468 (2011).]

Our Supreme Court has acknowledged that the Michigan Rules of Evidence reflect both the constitutional right to confront one's accusers and the recognized exception that allows the admission of an unavailable witness's prior testimony. See *Bean*, 457 Mich at 682-683. In defining an unavailable witness as that term is used in MRE 804(a)(5), our Supreme Court has referenced United States Supreme Court cases that discuss the meaning of "unavailable" for purposes of the Confrontation Clause exception. See *id.* at 684; *Dye*, 431 Mich at 67. Thus, the standard for showing that a witness is unavailable with respect to the Confrontation Clause is very similar to, if not indistinguishable from, the standard for showing that a witness is unavailable under MRE 804(a)(5). See *Bean*, 457 Mich at 682-684.

For the same reasons discussed above regarding MRE 804(a)(5), the prosecution failed to show that Ashton was an unavailable witness for purposes of the Confrontation Clause. The prosecutor did not attempt to secure Ashton's presence by ensuring that he received a subpoena. The prosecutor was unsure whether a subpoena had been mailed to Ashton's last known address, but she was sure that Ashton had not received one. Although the prosecutor claimed that her office did not have the funds to pay for Ashton's travel arrangements, a good-faith effort to locate a witness and ensure his attendance at trial will necessarily require the expenditure of resources. Finally, the prosecutor did not speak with Ashton until the weekend before trial. Essentially, once the prosecutor learned that Ashton was in Florida and did not have the funds to return to Michigan, she made no further efforts to secure Ashton's attendance at trial.

The admission of Ashton's testimony constituted outcome-determinative plain error with respect to Garrison. See *Armisted*, 295 Mich App at 46. Ashton's prior testimony was the only evidence that implicated Garrison in the assault and robbery. In *Dye*, 431 Mich at 89-90, our Supreme Court stated:

> Law enforcement authorities must not be unduly burdened with a duty to locate witnesses whose testimony would merely relate to preliminary or unimportant matters. At the other extreme, however, are cases where eyewitness testimony relating to an ultimate fact such as the identity of the perpetrator of a felony must be tested *in the presence of the jury* for credibility and consistency in order to satisfy the requirements of due process." [Emphasis in original.]

In this case, Ashton's testimony related to an ultimate fact, i.e., the identity of the man who punched and robbed him. No other witness testified that he saw Garrison commit a robbery or assault. Thus, without Ashton's testimony, there was insufficient evidence to convict Garrison of unarmed robbery.

Further, there was a direct conflict in the evidence with respect to Garrison's role in the assault and robbery. While Ashton testified that Garrison punched and robbed him, Tony Alyass testified that Garrison did not punch or rob Ashton and that Garrison was trying to prevent Lehre from doing so. This conflict made Ashton's testimony identifying Garrison as the perpetrator crucial. In *Dye*, 431 Mich at 90, our Supreme Court stated that the jury's inability to view the demeanor of the absent witnesses "greatly reduced the validity and reliability of its evaluation of the witnesses' credibility." Like the jury in *Dye*, the jury in the instant case was deprived of the opportunity to view Ashton's demeanor during his testimony, making its credibility determination less reliable. Moreover, Garrison's conviction turned on that determination. Because the admission of Ashton's prior testimony constituted an abuse of discretion and violated Garrison's right of confrontation, resulting in outcome-determinative plain error, we reverse and remand for a new trial. We therefore decline to address Garrison's remaining arguments on appeal.

In Docket No. 310260, we vacate Lehre's conviction and sentence for unarmed robbery and remand for entry of a directed verdict of acquittal. In Docket No. 310265, we vacate Garrison's conviction and sentence for unarmed robbery and remand for a new trial. We also direct the trial court to correct Garrison's amended judgment of sentence, which erroneously indicates that the jury convicted Garrison of assault when it acquitted him of that charge. We do not retain jurisdiction.

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