

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 23, 2013

v

ANTHONY LAMAR WILLIAMS,
Defendant-Appellant.

No. 310441
Wayne Circuit Court
LC No. 12-000747-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of voluntary manslaughter, MCL 750.321, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, larceny from a person, MCL 750.357, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 12 to 30 years for the voluntary manslaughter conviction, 5 to 10 years for the felon-in-possession conviction, and 5 to 20 years for the larceny conviction. He was also sentenced to a consecutive term of two years in prison for the felony-firearm conviction. We affirm.

Defendant shot and killed Cortez McCollum in the city of Detroit. Defendant does not dispute this fact. He claims that he acted in self-defense. Shayvonna Smith was the only known eyewitness. When she failed to appear at the preliminary examination, the prosecution obtained a material witness detainer in order to produce her at the rescheduled examination.

Defendant argues that, under the circumstances, the prosecution's efforts to produce Smith as a witness at trial fell short of due diligence. Therefore, defendant argues, Smith's prior testimony was improperly introduced at trial.

A trial court's determination of due diligence is reviewed for an abuse of discretion, *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004), as is its decision to admit or exclude evidence, *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). An abuse of discretion occurs when the trial court reaches a decision that falls outside the range of principled outcomes. *Id.*

For a witness's former testimony to be admitted into evidence under MRE 804, the prosecution must first show that it exercised due diligence in trying to produce the unavailable

witness at trial. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

When there are no leads as to a witness's whereabouts, the prosecutor should inquire of known persons who might reasonably be expected to have information that would be helpful in locating the witness. *Conner*, 182 Mich App at 681; see also *People v McIntosh*, 389 Mich 82, 87; 204 NW2d 135 (1973). In the present case, the police had less than 24 hours to locate Smith from the time it was discovered that she was missing. Still, the prosecutor and police were required to exercise due diligence in attempting to locate Smith at that time, and there were some basic, additional steps that they could and should have taken. For instance, the police should have asked Smith's mother some additional questions when they spoke with her that night, especially regarding Smith's likely whereabouts and the places where Smith spends time on a regular basis. In addition, the police should have inquired concerning the names of any people with whom Smith spends time, Smith's employment, any relatives Smith had in the area, and the last time Smith's mother had seen Smith. Such information would have been reasonably likely to produce leads regarding Smith's whereabouts. The police also should have contacted Smith's neighbors and asked for any relevant information they might have. Instead, the police and prosecutor made only cursory efforts to find Smith, similar to those that our Supreme Court found inadequate in *People v Bean*, 457 Mich 677, 689-690; 580 NW2d 390 (1998).

Given the record before us, we conclude that the prosecution failed to show due diligence with respect to its efforts to produce Smith at trial. See *id.* Under MRE 804, due diligence *must* be shown before a witness's prior testimony can be admitted in a criminal case. Therefore, the trial court erred by admitting Smith's previous testimony under MRE 804.

However, such an error "is not grounds 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." *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). Defendant's theory at trial was that he had acted in self-defense. Smith testified at the preliminary examination that the victim had initiated a physical fight with defendant by striking defendant with a glass bottle. According to Smith, it was only after being struck that defendant drew a gun and shot the victim. Smith's testimony supported defendant's theory of the case by tending to show that the victim was the aggressor. In fact, it was Smith's preliminary examination testimony that allowed defendant to argue self-defense because Smith was the only eyewitness to the actual shooting. In other words, if the error made any difference in the outcome of the trial, the difference was to defendant's benefit. Therefore, while the trial court's admission of Smith's prior testimony constituted error, it did not result in a miscarriage of justice and does not warrant reversal. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly