STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 312506 Wayne Circuit Court
LEON DELBERT CONNER, Defendant-Appellant.	LC No. 11-005612-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant Leon Delbert Conner appeals of right his jury convictions of carjacking, MCL 750.529a, robbery, MCL 750.530, and unlawfully driving away an automobile, MCL 750.413. The trial court sentenced Conner as a fourth habitual offender, MCL 769.12, to serve 18 to 40 years in prison for his carjacking conviction, to serve 10 to 40 years in prison for his robbery conviction, and to serve 3 to 40 years in prison for his unlawfully driving away an automobile conviction. Because we conclude there were no errors warranting relief, we affirm.

I. DOUBLE JEOPARDY

Conner first argues that this Court must dismiss his convictions because the convictions violate his constitutional right against being placed twice in jeopardy for the same offenses. This Court reviews de novo questions of constitutional law, such as a challenge premised on the double jeopardy clause. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

This is the second time that a jury has found Conner guilty of these offenses. After the jury found Conner guilty in his first trial, the trial judge discovered that the jury had been mistakenly provided with Conner's criminal record and a list of the maximum sentences for each of the charges against him. The trial judge called the parties back to the court room and explained the error. At that point, Conner's trial lawyer moved for a new trial and the trial court granted the motion.

The Michigan and United States constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. These guarantees are substantially identical and should be construed similarly. *People v Davis*, 472 Mich 156, 160-161; 695 NW2d 45 (2005). The guarantees against double jeopardy serve to preclude repeated

attempts to convict a criminal defendant, which includes protections against both successive prosecutions and multiple punishments for the same offense. *Nutt*, 469 Mich at 574.

On appeal, Conner argues that he cannot be retried because the trial court's decision to declare a mistrial after his first conviction was not manifestly necessary. But the "manifest necessity" doctrine applies to a trial court's decision to sua sponte declare a mistrial—it does not apply when a defendant requests or consents to a mistrial. *United States v Dintz*, 424 US 600, 606-608; 96 S Ct 1075; 47 L Ed 2d 267 (1976). Here, the trial court identified a potential error in the proceedings leading to Conner's conviction after the first trial. On the basis of the error, Conner's trial lawyer requested a new trial and the trial court granted that request. As the United States Supreme Court explained, under facts such as these, the prosecutor may retry the defendant without violating double jeopardy: "the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v Nelson*, 488 US 33, 38; 109 S Ct 285; 102 L Ed 2d 265 (1988). Accordingly, Conner's second trial did not violate his constitutional rights.

II. INEFFECTIVE ASSISTANCE

Conner next argues that his trial lawyer from his first trial was ineffective. Specifically, he contends that his lawyer should not have requested a new trial after the trial judge informed him of the errors; instead, he maintains, his lawyer should have requested that the convictions be dismissed "on the basis of double jeopardy." In order to establish this claim of error, Conner must show that his trial lawyer's decision to request a new trial instead of a dismissal fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for the error, the outcome would have been different. *People v Giolgio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864.

Conner cannot show that his lawyer's decision fell below an objective standard of reasonableness under prevailing professional norms. Conner had only been tried once by the time the error was discovered after the first trial; as such, double jeopardy did not apply to that trial. See *Nutt*, 469 Mich at 574 ("[Double jeopardy] protects against a second prosecution for the same offense after prosecution . . . ."). Moreover, where a defendant requests a new trial or consents to a new trial, the prosecutor may retry the defendant. *Lockhart*, 488 US at 38. Because double jeopardy did not apply to Conner's situation at the time of the alleged error or after the start of the new trial, his trial lawyer cannot be faulted for failing to request a dismissal on that basis. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) (stating that ineffective assistance cannot be predicated on the failure to make a meritless motion). Because Conner has not raised any other grounds that might warrant an outright dismissal of the charges from the first trial (such as insufficient evidence), he has failed to establish that his trial lawyer's decision fell below an objective standard of reasonableness. *Gioglio*, 296 Mich App at 22.

III. UNAVAILABLE WITNESS

Finally, Conner argues that the trial court abused its discretion when it allowed the prosecutor to read the testimony by a prior witness into the record. Specifically, he contends that the trial court erred when it determined that the witness was unavailable. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013).

A defendant has the right to confront witnesses against him. *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). "[T]he Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Id.* at 453. While hearsay is generally inadmissible, MRE 802, the Michigan Rules of Evidence permit the admission of former testimony when—in relevant part—the declarant is unavailable as a witness. MRE 804(b)(1).

A witness is unavailable when he or she is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." MRE 804(a)(4); see *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). In a criminal case, the prosecutor must also show that he or she used due diligence to try and procure the witness' attendance. MRE 804(a)(5). Whether the prosecution showed due diligence is a question of whether a reasonable, good-faith effort was made in attempting to procure the witness, not "whether more stringent efforts would have produced [her]." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Further, situations that are not explicitly mentioned by MRE 804(a) but are "of the same character as the other situations outlined in the subrule" can constitute unavailability. *People v Meredith*, 459 Mich 62, 65; 586 NW2d 538 (1998).

At trial, the prosecutor noted that one of the complaining witnesses called the day before and said she would be absent. The prosecutor stated that the witness, who lived in Ohio, was fighting her own cancer, attending to a very ill patient, and assisting her daughter, who had recently been diagnosed with leukemia. The trial court accepted these statements and concluded that the witness was unavailable.

The record shows that the witness had been diagnosed with cancer prior to trial and was undergoing chemotherapy. It is reasonable to believe that traveling from Canton, Ohio to Detroit, Michigan to undergo a second round of testimony and cross-examination would be detrimental to her health. A witness who was in the process of chemotherapy and other cancer treatments is exactly what was contemplated by MRE 804(a)(4). Additionally, the prosecution served the witness with a subpoena in Ohio. A victim advocate working with the prosecutor had also been in contact with the witness and arranged for a hotel room in Detroit. And the prosecution could not have taken additional steps to secure the witness given the short notice. Under these circumstances the trial court could properly conclude that the witness was unavailable under MRE 804(a)(4) and (a)(5). Consequently, it did not abuse its discretion when it admitted this testimony.

There were no errors warranting relief.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly