STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2014
v	No. 312794 Wayne Circuit Court
DYCARIOUS DEMONTE ROBINSON, Defendant-Appellant.	LC No. 12-003556-FC

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony-murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and carjacking, MCL 750.529a(1). He was sentenced to mandatory life imprisonment for felony-murder and 14 years and 3 months to 25 years for armed robbery and carjacking. We affirm.

I. FACTUAL BACKGROUND

The victim was shot and killed outside a home on Fordham Street in Detroit. One eyewitness—who was murdered before trial—testified[1] that the victim was driving down the street when Demetrius "Meech" Randall flagged him down. Randall and defendant then entered the SUV with the victim. The witness heard a gunshot, and then saw defendant and Randall exit the SUV. A van pulled up, and Randall and another man dragged the victim out of the SUV. Randall took the victim's keys and wallet and then drove off in the victim's car, with the van following behind. The victim was left on the street bleeding heavily from his right side. A couple of hours later, Randall reappeared and asked the witness to hold onto a gun, which the witness did for a few hours before returning it to Randall.

Another eyewitness—who disappeared and could not be located before trial—was in an upstairs apartment across the street when she heard a noise that sounded like a pop.[2] Thinking someone had hit her car, she ran to the window and saw that there was commotion around a SUV

[1] This witness's preliminary examination testimony was read into the record at trial.

[2] This witness's preliminary examination testimony was read into the record at trial.

truck in the street. She witnessed three or four black men fighting with a white man, the victim, inside of the SUV. The victim was being pulled from the SUV, and the witness noticed that he looked hurt and was bleeding from his right side. The perpetrators then got into the victim's car and drove away, with a van following. The victim was left in the street, attempting to walk, and trying to scream for help. The witness called 911 and later identified defendant, Randall, and Deshawn Jenkins as perpetrators, although she could not identify what role each man played in the murder. Randall's mother testified that defendant confessed that he shot the victim.

The victim died from his gunshot wounds. The jury found defendant guilty of felony-murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and carjacking, MCL 750.529a(1).[3] Defendant was sentenced to mandatory life imprisonment for felony-murder and 14 years and 3 months to 25 years for armed robbery and carjacking. Defendant now appeals.

II. CONFRONTATION CLAUSE

A. STANDARD OF REVIEW

Defendant first argues that his rights under the Confrontation Clause were violated when the trial court admitted testimony from the witness who disappeared before trial based on its finding that the prosecution engaged in due diligence to find her. We review Confrontation Cause issues de novo. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). "We review a trial court's determination of due diligence . . . for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). Similarly, we review decisions "whether to admit evidence" for an "abuse of 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. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

B. ANALYSIS

"The Confrontation Clause provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *People v Taylor*, 482 Mich 368, 375; 759 NW2d 361 (2008), quoting US Const, Am VI; see also Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 524-525; 802 NW2d 552 (2011). The Confrontation Clause prohibits the admission of prior testimony from a witness absent at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine her. *People v Dinardo*, 290 Mich App 280, 288; 801 NW2d 73 (2010); *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006); see also *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

In the context of "transcribed testimony of a witness at the preliminary examination, MRE 804(b)(1)," that witness is "unavailable in the sense explained in MRE 804(a)(5)[.]"

[3] The jury found Jenkins not guilty of these same charges. Demetrius "Meech" Randall pleaded guilty to second-degree murder and was sentenced to 18 to 27 years in prison.

People v Bean, 457 Mich 677, 683; 580 NW2d 390 (1998). MRE 804(a)(5), in turn, states that unavailability occurs when the desired witness "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." In other words:

> The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. 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. [*Bean*, 457 Mich at 684.]

As this Court recognized in *Eccles*, 260 Mich App at 391, "due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness[.]"

In the instant case, defendant contends that the prosecution failed to demonstrate due diligence in locating the missing witness. However, the police officer in charge of the investigation made repeated attempts to locate the witness. He maintained contact with the witness until approximately two weeks before trial, when the witness called and informed him that the other eyewitness had been murdered, and that she was concerned about testifying. The officer told her that he would look into the matter and call her back.

The officer called the witness's cellular telephone several times after that conversation, but she did not answer. He had two addresses for her: one at the apartment from which she witnessed the murder in Detroit, Michigan, and the other in Warren, Michigan. The officer went to the Detroit address and spoke with residents in the area who considered themselves her "cousins." The officer left his business card at this address. He also enlisted the assistance of the Detroit Fugitive Apprehension Team (DFAT), the Ninth Precinct, and the headquarter surveillance unit, who assisted in searching for the witness around the area. The officer also ran a LEIN check searching for warrants and checked with the Secretary of State to see if the witness had changed her address. He also checked with the morgue in Wayne County and hospitals in Detroit.

Defendant, however, contends that the bulk of the officer's efforts took place in and around the Detroit address, and that the search effort in Warren was inadequate. That argument is meritless. First, the officer's attempts through the Secretary of State would have revealed where the witness lived even if not in Detroit. Second, the officer's discussions with the witness's "cousins" were an attempt to locate her no matter where she resided. Moreover, the officer visited the Warren address and left his contact information.

Defendant also alleges that the officer should have begun his search earlier. Yet, at the due diligence hearing, defendant stated: "I don't really think that timeliness is an issue." As this Court has recognized, "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006) (quotation marks and citation omitted). Moreover, defendant's argument assumes that the officer knew the witness would fail to appear the first day of trial. While defendant posits that the officer knew

the witness was reluctant to testify after learning about the murder, the officer testified that the witness had been hesitant from the beginning, but had still showed at the preliminary examination. Further, the officer did engage in repeated attempts to contact the witness after she called and informed him about the other witness's murder.[4]

The police used reasonable efforts to locate the missing witness. The trial court's ruling that the officer's actions—repeatedly calling the witness, checking for her at both addresses, leaving his contact information, talking with her "cousins," checking with the Secretary of State, and enlisting the help of other departments—constituted "everything reasonable" was not an abuse of discretion. *Bean*, 457 Mich at 684; *Eccles*, 260 Mich App at 391; *Yost*, 278 Mich App at 353.

III. SEVERANCE

A. STANDARD OF REVIEW

Defendant next posits that he was deprived of a fair trial when the trial court refused to sever his trial from that of Jenkins. "Generally, a trial court's ultimate ruling on a motion to sever is reviewed for an abuse of discretion." *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009) (quotation marks and citation omitted). "Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

As defendant concedes, the issues of Jenkins's statement to the police and irreconcilable defenses were not argued below, and are therefore unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

B. ANALYSIS

Pursuant to MCR 6.121(C), "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."[5] In order to satisfy this mandate, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be mutually exclusive or irreconcilable." *Hana*, 447 Mich at 349 (quotation marks omitted). Further, "incidental

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[4] While defendant relies heavily on the facts of *Bean*, *supra*, and *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), such fact specific arguments are unpersuasive, as the officer in this case engaged in a different course of action. As the Court in *Bean*, 457 Mich at 684, held: "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."

[5] While MCR 6.121(D) grants the trial court discretion to sever the trials, the rule defendant invokes in his discussion section of his brief is MCR 6.121(C), not MCR 6.121(D).

spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* (quotation marks, citation, and brackets omitted). As the Michigan Supreme Court has set forth:

> It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-defendants are, to some extent, forced to defend against their co-defendant as well as the government. This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that both cannot be believed. Consequently, we hold that a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant. [*Id.* at 349-350, quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801, 803 (1984).]

In the instant case, defendant contends that the trial court erred in declining to sever the trials because there were mutually antagonistic defenses presented to the jury, and defendant effectively faced two prosecutions. This argument is meritless. Defendant has failed to identify any mutually exclusive defenses. Instead, he merely highlights instances where evidence was potentially favorable to Jenkins but unfavorable to defendant. As the Michigan Supreme Court has recognized, "to some extent" a defendant always is "forced to defend against [his] co-defendant as well as the government" in joint trials. *Hana*, 447 Mich at 349. This common occurrence does not provide a basis for finding that there are defenses so antagonistic that both cannot be believed. *Id.*

Defendant, however, asserts that "this single jury essentially had an either or proposition: to choose between [the missing witness's] identification of Mr. Randall and Mr. Jenkins as the principles or [the murdered witness's] identification of Mr. Randall and Mr. Robinson as the principles and his exoneration of Mr. Jenkins." Yet, that argument is misleading, as both witnesses identified defendant as a perpetrator.[6] At defendant's preliminary examination, the murdered witness identified defendant, but not Jenkins. Thus, the jury's verdict pertaining to Jenkins was not a reflection of a choice between Jenkins or defendant, but merely a recognition that only one of the eyewitnesses identified Jenkins.

Defendant further contends that the trial should have been severed because it resulted in a violation of his rights under the Confrontation Clause. First, he posits that the Confrontation Clause was violated through the admission of testimony from Jenkins's preliminary examination. Defendant relies on *People v Morgan*, 50 Mich App 288; 213 NW2d 276 (1973) rev'd on other

[6] At defendant's preliminary examination, the missing witness testified that defendant was a perpetrator. At Jenkins's preliminary examination, the missing witness testified that Randall, Jenkins, and Randall's cousin were perpetrators. Randall's mother testified that defendant was Randall's cousin.

grounds 400 Mich 527 (1977), to support his argument. In that case, three defendants were each convicted of two counts of kidnapping and two counts of felonious assault, and testimony from the preliminary examination of two defendants was admitted against the third. *Id.* at 290-291. This Court found, *inter alia*, that because the third defendant "was not present at the preliminary examination [of the other two], he was denied the right of confrontation and the testimony was not admissible against him." *Id.* at 291.

Yet, defendant's reliance on *Morgan* is misplaced for several reasons. As it is a Michigan Court of Appeals case from 1973, it is not binding. MCR 7.215(J). Furthermore, unlike the defendant in *Morgan*, defendant in the instant case did have the opportunity to cross-examine the eyewitnesses at his own preliminary examination. Thus, this is not a case where defendant was denied the opportunity to cross-examine the witnesses, as was *Morgan*.

Second, defendant contends that a joint trial led to a violation of his rights under the Confrontation Clause through the admission of Jenkins's statements to the police.[7] While somewhat convoluted, it appears that defendant is arguing he was denied the right to confront Jenkins, who did not testify at trial. Yet, the Confrontation Clause only guarantees defendant the right "to be confronted with the witnesses against him.'" *Taylor*, 482 Mich at 375. The statement Jenkins made to the police officer did not implicate defendant, but instead identified an unknown third-party who was involved in Jenkins's drug dealings. Thus, Jenkins was not a witness against defendant, and defendant's argument based on the Confrontation Clause is meritless. See, e.g., *Richardson v Marsh*, 481 US 200, 211; 107 S Ct 1702; 95 L Ed 2d 176 (1987) ("the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.").

Therefore, defendant has not demonstrated any error in the trial court's decision not to sever the trials under MCR 6.121(C).

IV. CONCLUSION

Defendant has not established that his rights under the Confrontation Clause were violated, nor that he was entitled to a separate trial. We affirm.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[7] The disputed testimony involves Jenkins answer when asked whether he and a man named Terry were selling drugs during an unrelated incident. According to the police officer testifying, Jenkins responded: "No. We were robbing customers that was [sic] coming to buy dope. I would pretend like I was selling dope and when the customers would come up, I would rob them. I wouldn't say robbing, they would give me the money, I would take off running."