STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYLE DEMETRIUS BAKER,

Defendant-Appellant.

UNPUBLISHED
May 10, 1996

No. 175986
LC No. 93-001012-FC

Before: Neff, P.J., and Saad and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, assault with intent to commit murder, MCL 750.83; MSA 28.278, extortion, MCL 750.213; MSA 28.410, and three counts of felony firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to life in prison without parole on the murder conviction, and to various lesser sentences on the other convictions, and he now appeals as of right. We affirm.

Defendant and Shannon Levy were both initially charged with first-degree murder, armed robbery, extortion and felony firearm; their first trial ended in a mistrial when the jury was unable to agree on a verdict. During the second trial, which was intended to be a joint trial with a separate jury for each man, Levy accepted a plea bargain and agreed to testify against defendant. Defendant was convicted and now appeals.

I.

Defendant first asserts that the trial judge erroneously denied the jury's request to replay the video testimony of five witnesses. Less then one and a half hours into its deliberations, the jury sent a note asking twelve specific questions and requesting to see the testimony of five witnesses: Shannon Levy (former co-defendant turned prosecution witness), Willie Hopkins (who had sold drugs with defendant), Barbara Pratt (the assault victim), Tim Pierce and William Gray (inmates who had heard defendant make incriminating statements). In response to the jury request, the trial judge stated:

> . . . I'm going to have to tell you that you have to rely on the record that was presented to you: The proofs, the testimony. You've each, I believe, have taken notes [sic]. Rely on your memory. Rely on your notes. Discuss the matter. Discuss these issues. These are all important issues. . .
>
> But, as it stands right now, I'm not going to replay any testimony and I'm not going to answer any of these questions.

When a jury requests that the trial court re-read testimony, both the decision to re-read it, and the extent of testimony to be re-read, if any, are left to the sound discretion of the trial judge. *People v Howe*, 392 Mich 670, 675, 221 NW2d 350 (1974). Generally, a court cannot preclude all possibility of the jury reviewing trial testimony when there exists a reasonable reason to do so. *Id.*, 392 Mich at 676-677; 221 NW2d 350. In essence, this Court must determine whether the jury's request was reasonable, and, if so, whether the trial court's failure to grant the request when viewed in the context of the entire record, was harmless error. *Id.*, 392 Mich App at 678; 221 NW2d 350.

In *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded on Milbourn[1] grounds, 437 Mich 1004; 469 NW2d 305 (1991), this Court affirmed the trial court's denial of a request for a transcript, when the jury made the request after only twenty-five minutes of deliberation. The trial court told the jurors to rely on their memory and explained that, if at a later time they were still unable to recall the information, they could request the testimony again. *Id.* This Court determined that the denial of the jury's request was an appropriate exercise of discretion.

Here, as stated above, the jury had been deliberating for less than ninety minutes on this seven-count case, when their request was made. The request was combined with a list of twelve specific questions; the request for repeated testimony appears to have been almost an afterthought. Additionally, it must have taken a good part of the ninety minutes to compose the questions which accompanied the request – thus making clear that the jury had done very little, if any, deliberating prior to requesting certain testimony. Furthermore, the judge prefaced his remarks by stating, "As it stands now . . ." indicating that the court might be willing to reconsider its ruling at a later time. Therefore, at this very early juncture of the deliberations, we find no abuse of discretion in the trial court's denial of the jury's request, especially because the judge did not prohibit the jury from asking for the testimony at a later time.

II.

Defendant next raises two issues arising out of Shannon Levy's plea bargain and subsequent testimony against defendant. At 10:32 a.m. on the second day of trial (when testimony was to begin), the prosecution announced that a plea agreement had been reached with Levy, and that other charges were being dismissed against Levy. The prosecution then sought to have Levy endorsed as a prosecution witness. Defense counsel objected, and requested an adjournment –"at the very least . . . [for] the rest of this morning" and preferably, until the following day. The trial court recessed until 2:00 p.m.

Defendant first argues that the trial court abused its discretion in permitting the prosecution to endorse Levy as a witness on the second day of trial, especially where no substantial continuance was granted. We find no abuse of discretion because (1) the particular prosecutor was apparently unaware of the plea negotiations leading up to the agreement and (2) the lower court gave defense counsel over three hours to prepare. See *People v Hana*, 447 Mich 325, 357-358; 520 NW2d 653 (1994).

Defendant next argues that the prosecutor abused his discretion and engaged in misconduct by refusing to disclose Levy's *de facto* plea bargain. (The plea agreement with Levy that was placed on the record indicated that Levy would plead to the charge of obstruction of justice, and in return the prosecutor would not recommend a sentence.) As stated above, Levy had initially faced the identical charges that defendant faced. Although all these charges were dropped when Levy's plea was accepted, the prosecutor represented that this was due to further investigation of the incident and as a result of Levy passing a lie detector test, and not as an incentive for Levy to testify against defendant. Nonetheless, defendant essentially argues that the prosecutor misrepresented the plea agreement, and that the actual agreement involved the dismissal of the charges against Levy. However, because the record contains no proof of such a contention, and because our review is limited to the record developed below, *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994), this issue is without merit.

III.

Defendant next argues that both the lower court and the prosecutor abused their discretion by preventing the jury from hearing testimony of Willie O'Day. The prosecution's theory of the case was that defendant and Levy murdered the victim and assaulted his girlfriend, because defendant and Levy thought that the victim had stolen crack cocaine that O'Day and Hopkins were selling for defendant. O'Day, who had not been charged with any crime, had testified in the first trial. O'Day's testimony at the first trial was that Levy did not stay at the apartment (as Levy had testified in the second trial), but that Levy had participated in the assault.

O'Day was an endorsed witness for the second trial, until the morning of the fifth day of trial, when the prosecution moved to excuse O'Day as a witness. Out of the jury's hearing, it was established that: (1) O'Day had admitted that his testimony at the first trial was false, (2) O'Day had made another statement to law enforcement that differed from his testimony, (3) at the request of the prosecution, O'Day had taken (and failed) a lie detector test, (4) counsel had been appointed for O'Day, and (5) O'Day had asserted his Fifth Amendment privilege. In view of the events leading up to O'Day asserting his Fifth Amendment privilege, the prosecutor stated that under the rules of professional conduct, he could not offer O'Day's testimony because he had reason to believe that it was false. Defense counsel then requested permission to use O'Day's testimony from the first trial, not for the truth of what O'Day said, but rather to cast doubt on the credibility of Levy. The trial court did not allow O'Day's testimony to be read to the jury, because the court found that the untruthful evidence was not relevant and even if it was relevant, it would be misleading to the jury.

Even if relevant, evidence may be excluded if the probative value is outweighed by the danger of unfair prejudice or misleading the jury. MRE 403; *Dunn v Nundkumar*, 186 Mich App 51, 55; 463

NW2d 435 (1990). Weighing the probative value against the prejudicial effect of certain evidence requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion of issues or misleading the jury, and whether the fact can be proved another way with few harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 472 (1976). Here, both the prosecution and defense acknowledged that O'Day's testimony and prior statements were untruthful. Presentation of such testimony could easily have confused a jury, and the potential for delay was great. The proffered purpose for O'Day's testimony (impeachment of Levy) could have been accomplished by cross-examination of Levy himself. Therefore, we see no abuse of discretion in the trial judge's decision to prevent the jury from hearing O'Day's testimony.

Defendant also characterizes the prosecutor's actions as an abuse of discretion, intimating that the state orchestrated the plea bargain with Levy and intimidated O'Day into taking the Fifth Amendment to essentially and purposefully convict defendant. However, defendant did not object below to this alleged misconduct, and therefore the allegations of prosecutorial misconduct are not preserved for review by this Court. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, ___ US ___; 115 SCt 923; 130 LEd 2d 802 (1995). Furthermore, review by this Court is limited to the record developed by the trial court. *Harkins v Dep't of Natural Reources*, 206 Mich App 317, 323; 395 NW2d 77 (1994). Because defendant offers no evidence from the record to substantiate his allegations that the prosecutor abused his discretion or engaged in prosecutorial misconduct, and because a bare statement of position without substantiating authority is insufficient to place an issue before this Court, *Collins v Director, Dep't of Corrections*, 153 Mich App 477, 479; 395 NW2d 77 (1986), we conclude that defendant failed to support his allegations of prosecutorial misconduct, abuse of discretion, or intimidation at the trial of this matter. There is no

merit to this issue.

IV.

Defendant's final argument is that the cumulative effect of various errors in this case were so prejudicial as to deny defendant a fair trial. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989). However, because we find no errors, we find no cumulative error. *People v Lyles*, 148 Mich App 583, 600; 385 NW2d 676 (1986).

Affirmed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Jane E. Markeyt

[1] People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990)