STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK L. YEARGIN,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 172114
LC No. 93-125152

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227(b)(1); MSA 28.424(2). He was subsequently sentenced to 25 to 60 years' imprisonment for the murder conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arose out of the shooting death of James Powell. In January 1993, several youngsters were playing basketball in the driveway of one of their homes when defendant drove up near the driveway in his car. The victim and another came out of the house and approached defendant, who was still in the vehicle. After words were spoken between the victim and defendant, defendant drove away. Approximately ten minutes later, defendant, accompanied by two young children, approached the driveway area again and while seated in his car fired shots in Powell's direction killing him.

Defendant first argues that the trial court erred in finding that the prosecution exercised due diligence in securing the presence of res gestae witness Eldrick Harris. We will disturb this finding only if it is clearly erroneous. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). The prosecution is required to exercise due diligence in producing a res gestae witness. *Id.* The test we

* Circuit judge, sitting on the Court of Appeals by assignment.

employ is whether good faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *Id*.

At trial, Officer Robert York testified that he made trips to five different addresses in Detroit and contacted the Wayne County Probation department to find Harris. He also spoke with witness Keisha Williams regarding Harris' whereabouts; she revealed another potential address that the officer investigated. Moreover, York stated that he contacted both the Oakland and Wayne County Jails and that efforts to find Harris occurred as recently as three weeks before trial. This testimony indicates that the prosecution made reasonable efforts to produce Harris. The fact that York did not contact the Michigan Department of Corrections or hospitals, or utilize the police LEIN system, does not render the actual efforts unreasonable. Since the police were not required to increase their efforts to locate Harris, the trial court's finding of due diligence was not clearly erroneous.

Next, defendant argues that the prosecutor violated the res gestae statute, MCL 767.40a; MSA 28.980(1), because he knew of the existence of a second child in defendant's vehicle at the time of the murder, but failed to call him to testify at trial. We disagree. We note that the purpose of the listing requirement of the res gestate statute is to notify the defendant of the witness' existence and res gestae status. *People v Lawton*, 196 Mich App 341, 347; 492 NW2d 810 (1992). Thus, where the defendant has knowledge of the existence of a res gestae witness and fails to move for endorsement of that witness until after the completion of the prosecution's case, he waives his right to endorsement and production. *People v Nixten*, 160 Mich App 203, 208; 408 NW2d 77 (1987).

Our review of the record reveals that defendant knew of the child's existence and res gestae status. Thus, notification in this regard was not required. Defendant and his counsel were present at the preliminary examination during the direct examination of witness Isaac Rowe, who referred to the child in question by name. Since defendant did not object to or move for the child's endorsement until well after the prosecutor closed his case, he has waived any right to endorsement or production.

We next address whether the trial court erred in admitting the preliminary examination testimony of witness Isaac Rowe. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Former testimony of a witness is admissible in a later proceeding where the witness is unavailable to testify and the party against whom the testimony is being offered had an opportunity to cross-examine the witness. MRE 804(b)(1). *Briseno, supra* at 14. Unavailability includes situations in which the declarant has a lack of memory of the subject matter of his statement. MRE 804(a)(3).

When called to testify at trial, Rowe could not remember any details regarding the crime or his previous preliminary examination testimony. Thus, he was deemed unavailable. Furthermore, the record reveals that counsel vigorously cross-examined Rowe at the preliminary examination and that he had a similar motive in doing so. As to defendant's contention that the court erred in taking the witness' statement that he could not remember "at face value," we note that the trial court is not required to

assess whether the witness in all actuality cannot remember. See generally *People v Thomas*, 61 Mich App 717, 719; 233 NW2d 158 (1975). Therefore, the trial court did not err in admitting this evidence.

Regarding defendant's argument that his right to effectively cross-examine Rowe was impeded by the prosecution's failure to produce Officer Raymond Sain's narrative of a previous interview with Rowe, we find it to be without merit. The record does not reveal that such a narrative existed.

Defendant argues that an inculpatory statement made to a police officer in Kentucky was improperly admitted. The prosecutor may not introduce the defendant's custodial statement unless she demonstrates that, prior to any questioning, the defendant was informed of his *Miranda*[1] rights, waived those rights and voluntarily made a statement. *People v Wright*, 441 Mich 140, 146-147; 490 NW2d 351 (1992). We review the totality of the circumstances to determine whether the statement was freely given. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The fact that the defendant did not request to speak with counsel or that he did not refuse to speak with an investigating officer during an interview, are factors which may be considered in reviewing waiver and the voluntariness of the defendant's subsequent statement. *People v Haywood*, 209 Mich App 217, 226-227; 530 NW2d 497 (1995).

Officer Brandon testified that he read defendant his *Miranda* rights verbatim from a regularly used document. Defendant appeared coherent and responsive to the officer's recitation of these rights and otherwise appeared to understand them. Defendant did not appear intoxicated or otherwise coerced. Furthermore, the questioning took place within minutes of arrival at the station and at no time did defendant ask to speak to counsel or refuse to be questioned. We think that the totality of the circumstances reveals that defendant voluntarily waived his *Miranda* rights and freely responded to the officer's question regarding the location of the gun. Thus, his statement was properly admitted.

Defendant's next argues that an inculpatory letter written by defendant was improperly admitted. As with all evidentiary decisions, whether a document has been properly authenticated is a matter within the trial court's sound discretion and we review such decisions for an abuse of discretion. *People v Hurt*, 211 Mich App 345, 350; 536 NW2d 227 (1995). A condition precedent to admission of an item into evidence is authentication by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901(a); *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Authentication can take the form of witness testimony. MRE 901(b).

Although unfamiliar with defendant's handwriting, DeShawn Johnson testified that defendant's return address was on the envelope of the letter containing the inculpatory statement. The letter, which was written to DeShawn, referred to Tiffany Johnson and the recent birth of Tiffany's baby. Tiffany was DeShawn's sister and defendant's girlfriend. DeShawn also stated that the letter responded in part to a poem contained in a letter written by him to defendant. Since DeShawn was the addressee of a letter that contained defendant's return address and because he was able to testify to facts indicating

that this letter was written by defendant, it was sufficiently authenticated under MRE 901. Therefore, the trial court did abuse its discretion in admitting it.

Finally, defendant claims that the trial court improperly admitted testimony regarding another's identification of defendant at a photo lineup. However, defendant did not object at trial to this testimony. Because our review of the record does not reveal that a substantial right of defendant has been affected, we need not address the issue. MRE 103(a).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 76 L Ed 2d 694 (1966).