STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS A. LANIER,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 182159
LC No. 94-005197

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from the shooting death of David Williams. Williams was involved in a relationship with Theawiana Evans, who is defendant's ex-girlfriend and the mother of his two children. On June 6, 1993, defendant came to Theawiana's home, where Theawiana lived with her brothers, Raymarte and Dionco, and her children. Williams was also at the home that evening. Theawiana testified at the preliminary examination that defendant came to her home and asked her if Williams was her "new man." After learning that Williams was Theawiana's boyfriend, defendant pulled a handgun and pointed it at Theawiana and told Williams to get off the couch. Williams rose and he and defendant left the house. Defendant took Williams to the back of the house, and shortly thereafter Theawiana heard a gunshot. Defendant returned to the front of the house and told Theawiana to leave with him. On the way to a hotel with Theawiana and the children, defendant told Theawiana that he shot Williams in the head.

Theawiana did not appear for trial.[1] The prosecution moved for an adjournment. The trial court denied the motion and dismissed the charges against defendant. Immediately thereafter, the police

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

interviewed seven-year-old Raymarte. Following the interview, the charges against defendant were reinstated.

Defendant first argues that the trial court erred in denying his motion to dismiss on the ground that it was a violation of his right to due process to reinstate the charges against him after the case had been dismissed without prejudice. We disagree.

Dismissal is generally not a bar to a subsequent arrest, examination, and trial for the same offense. See, e.g., *People v Laslo*, 78 Mich App 257, 260; 259 NW2d 448 (1977). There are exceptions to the general rule, such as where the prosecution "judge-shops" or where there is harassment in the re-arrest and re-examination of a defendant, either of which result in the denial of a defendant's due process rights. *People v Wynn*, 197 Mich App 509, 511; 496 NW2d 799 (1992); *People v George*, 114 Mich App 204; 318 NW2d 666 (1982). The prosecutor must act in good faith when holding a second hearing and should not subject a defendant to a second examination without good reason. *Gaffney v Missaukee Circuit Judge*, 85 Mich 138, 139; 48 NW 478 (1891). Here, the prosecution reinstated the charges after interviewing seven-year-old Raymarte. Although the prosecution was aware before the original preliminary examination of Raymarte's existence, the prosecution chose not to interview him as a witness because of his young age and because Theawiana was an eyewitness. After Theawiana's death, however, the prosecution interviewed Raymarte and, after the interview, the charges were reinstated. The prosecution had good reason to reinstate the charges, and no evidence of judge-shopping or harassment was presented. Defendant's due process rights were not violated by reinstatement of the charges.

Next defendant argues that he is entitled to a reversal of his convictions because there was evidence that Theawiana and Raymarte had been intimidated by the police and prosecutor. We disagree. Because the actual or purported threats were brought out at trial, and counsel failed to ask that the court address the issue of witness intimidation, no manifest injustice would result in upholding the verdict and in declining to remand for an evidentiary hearing. *People v Pena*, 383 Mich 402, 406; 175 NW2d 767 (1970); *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992); *People v Stacy*, 193 Mich App 19, 28-30; 484 NW2d 675 (1992).

Defendant also argues that the prosecutor improperly elicited hearsay testimony that Theawiana had changed the exculpatory version of events she told her sister, Marcella. We disagree. The asking of a question that would reflect on a witness' veracity is proper and can be used in an attempt to impeach the witness because a prosecutor may argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989).

Next, defendant contends that the trial court improperly admitted Theawiana's preliminary examination testimony into evidence. We disagree. When a witness is unavailable for trial, prior testimony may be admitted where counsel had an adequate opportunity to cross-examine the witness. MRE 804(b)(1); *People v Barclay*, 208 Mich App 670, 673-674; 528 NW2d 842 (1995); *People v Connor*, 182 Mich App 674, 683-684; 452 NW2d 877 (1990). Here, Theawiana died before trial,

and the record reveals that defense counsel had an opportunity to cross-examine her. *Barclay*, *supra* at 673-674. Consequently, the trial court did not abuse its discretion in admitting the testimony.

Defendant also maintains that he was denied his right to a fair trial and impartial jury where the jurors were concerned about the cause of Theawiana's death. We disagree. The communication from the jury was administrative in nature and thus defendant needed to object in order to preserve the issue for review. Because there was no objection, the response is presumed to be not prejudicial. *People v France*, 436 Mich 139, 143; 461 NW2d 621 (1990). Furthermore, the court's answer to the inquiry was sufficient to instruct the jury not to consider Theawiana's death when rendering its verdict. The reason surrounding her death was not part of the evidence and the trial court properly refused to answer the question and properly instructed the jury not to consider it. See, e.g., *People v Davis*, 216 Mich App 47 56-57; 549 NW2d 1 (1996).

Finally, defendant contends that he was denied his right to a fair trial when seven year old Raymarte testified without having been examined by the court as to his competency as a witness. We disagree. Absent an abuse of discretion, this Court will not reverse the trial court's decision to permit a child witness to testify. *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Here, there was no abuse of discretion where an investigation into Raymarte's competency and a determination by the lower court that he was competent to testify was made at the preliminary hearing. Such a determination need not be made in front of the jury. MCL 600.2163; MSA 27A.2163; *People v Hargrove*, 57 Mich App 378, 381 n 1; 225 NW2d 772 (1975). Furthermore, the prosecution questioned Raymarte in front of the jury on the concept of truth and extracted a promise from Raymarte to tell the truth prior to asking Raymarte any substantive questions.

Affirmed.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello

[1] Theawiana had been killed before trial. Defendant was charged in connection with her death.