STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN KEITH MAHON,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 180494
LC No. 93-049109-FC

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet*, JJ.

PER CURIAM.

Defendant was charged with open murder, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was convicted, following a jury trial, of voluntary manslaughter, MCL 750.321; MSA 28.553, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm MCL 750.227b; MSA 28.424(2). Defendant then pleaded guilty to habitual offender, second offense, 769.10; MSA 28.1082. The court sentenced defendant to concurrent sentences of 13 to 22-1/2 years' imprisonment for voluntary manslaughter and ten to fifteen years for assault with intent to do great bodily harm, to be served consecutive to a two-year term for felony-firearm. He appeals as of right. We reverse.

Defendant argues that the trial court erred in finding that the prosecutor exercised due diligence in attempting to procure the testimony of two witnesses at trial. These witnesses, Kristine Kelly and her brother Dan Brabbs, were intimately involved in the events leading to the shooting death of the victim. We agree.

The prosecution must make a diligent and good-faith effort to produce known potential trial witnesses. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). We will not disturb a trial court's finding of due diligence absent an abuse of discretion. *Id.* The determination of whether the prosecution exercised due diligence is a factual question, and we will not reverse its findings unless

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

they are clearly erroneous. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). "The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

On the first day of defendant's trial, the prosecution revealed that it learned earlier that morning that no acknowledgments of receipt of subpoenas sent to Kelly and Brabbs were received by the prosecutor's office. The prosecutor's office assumed that these witnesses had been served. However, another trial witness, Brian McCoy, told the prosecution on the morning of trial that he did not believe that these witnesses were in the area, but thought that they had left the state. The prosecutors informed the court that they were working toward locating those witnesses.

Following the trial testimony of several witnesses, the court conducted a brief due diligence hearing on the second day of trial. According to McCoy, he had last seen Kelly on July 25, 1994, about a month before the trial. At that time, Kelly indicated to McCoy that she knew about the trial date, but she did not tell McCoy whether she had received a subpoena. Kelly told McCoy that Brabbs was in North Carolina. McCoy had not seen Brabbs since the Spring. Kelly told McCoy that she was going to North Carolina at the beginning of August for three months. McCoy testified that it was not until the first day of trial that the prosecution asked him about Kelly and Brabbs.

The prosecutor's office mailed subpoenas to Kelly and Brabbs to their last known addresses on June 29, 1994. No acknowledgment of receipt was returned to the prosecutor's office for either of the witnesses, and the subpoenas were not returned as undelivered. The prosecutor's office believed that this meant that the witnesses were receiving mail at the addresses and assumed that they had received the subpoenas. Approximately one week before the trial, the prosecutor's office had a conversation with McCoy and learned that Brabbs was out of the state. The prosecution learned through its efforts on the first day of trial that the witnesses were in Lumberton, North Carolina, and it had located the name of the person with whom they were staying. The telephone number of the home was unlisted, but a sheriff from the county was enlisted to help locate the witness. The sheriff went to the address, but was told that the witnesses were not there at the time, and the person at the house told the sheriff their whereabouts were unknown. The prosecutor's office learned that Kelly had not reported to work for two days, but they did not know where Kelly worked. During the second day of trial, the prosecutor's office was unable to speak directly with the sheriff they had been working with, and the witnesses had not been located.

We find that the prosecution's efforts fell short of due diligence. A subpoena may be served on a witness by mailing a copy of the subpoena and a postage-paid card acknowledging service, but if the card is not returned, then the subpoena must be personally served or sent through registered or certified mail, return receipt requested, and delivery restricted to the addressee. MCR 2.506(G)(2) and MCR 2.105(A). The prosecutor's office failed to properly serve Kelly and Brabbs. The trial court's finding that it was not improper for the prosecutor's office to assume that the witnesses had received their subpoenas was clearly erroneous. The prosecution was required to achieve service of the subpoenas by other methods when it did not receive the acknowledgment of service cards, MCR 2.506(G)(2) and

MCR 2.105(A), and the assumption of service was inappropriate. *See People v James (After Remand)*, 192 Mich App 568, 572; 481 NW2d 715 (1992).

Based on this erroneous assumption, the prosecutor took no further actions to locate or to produce these witnesses until the day of trial even though the prosecutor's office knew one week prior to the beginning of trial that Brabbs was out of the state. We believe that the failure of the prosecutor's office to act on this information prior to commencement of trial negates a finding that it exercised due diligence. The trial court abused its discretion in concluding otherwise, and defendant's conviction must be reversed.

Next, defendant argues that the trial court erred in admitting Brabbs' preliminary examination testimony as substantive evidence at trial. We review the admission of evidence for an abuse of discretion. *People v Phillips*, 217 Mich App 489, 497; ___ NW2d ___ (1996). Former testimony of a witness who is unavailable at trial may be admitted. MRE 804(b)(1). However, in the absence of due diligence in procuring a witness' testimony at trial, the witness does not satisfy the requirements for unavailability under the Michigan Rules of Evidence. MRE 804(a)(5). Because the prosecution failed to show due diligence in procuring Brabbs' testimony at trial, the trial court abused its discretion in admitting his preliminary examination testimony.

Finally, defendant argues that his sentences are disproportionate and the trial court abused its discretion in sentencing him. In light of the fact that we have found reversible error and remand for new trial on defendant's other arguments, we decline to address defendant's challenge to his sentences.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet