STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SELEAN EVANS,

Defendant-Appellant.

UNPUBLISHED
March 14, 1997

No. 191779
Recorder's Court
LC No. 94-010974

Before: Wahls, P.J., and Gage and W.J. Nykamp, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and sentenced to fifteen to thirty years' imprisonment. She appeals as of right. We affirm.

I

At trial, the prosecutor was unable to produce an endorsed witness, Michelle Styrk. A hearing was held at which a police officer described his efforts to locate the witness. The trial court ruled that the prosecution had exercised due diligence in its attempts to produce Styrk and allowed the prosecution to use her preliminary examination testimony at trial.

Defendant argues that her constitutional right to confrontation was violated by the admission of this testimony and challenges the trial court's due diligence determination. We find that the court's ruling was proper.

Former testimony of an unavailable witness is admissible in a later proceeding if the party against whom the testimony is being offered had an opportunity and similar motive to cross-examine the witness in the earlier proceeding. MRE 804(b)(1); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5); *Id.* However, the admission of such testimony violates a criminal defendant's constitutional right of confrontation where

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

the witness's absence from trial stems from the prosecution's lack of good faith effort or failure to exercise due diligence in attempting to secure the witness's presence. *People v Pullins*, 145 Mich App 414, 419; 378 NW2d 502 (1985). Because a trial court's determination on due diligence is a factual matter, this Court will not set aside the trial court's findings absent clear error. MCR 2.613(C); *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

In the present case, the prosecution's efforts included contacting the witness's father and sister, who believed that the witness had moved to Florida with her husband. The prosecution contacted relatives of the witness in Florida, who also could not help, and provided warrant information to at least two Florida police departments. The trial court concluded that the prosecution had demonstrated due diligence in attempting to locate the witness and, because the witness was unavailable for trial, her preliminary examination testimony was admissible. Although defendant offers other options the court and prosecutor could have employed to assure the witness's presence, the authorities were not required to exhaust all avenues for locating the witness but had a duty only to exercise a reasonable, good faith effort to locate her. *Briseno, supra* at 16.

We find that the trial court's ruling that the prosecution exercised due diligence in attempting to locate the witness was not clearly erroneous, and defendant's confrontation rights were not violated.

II

Defendant next challenges the legality of her arrest, arguing that the police did not have probable cause to arrest her. We disagree.

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. MCL 764.15; MSA 28.874; *Id.*

Two days after the robbery, defendant telephoned the police station and indicated that she wished to discuss the crime. Police officers "picked up" defendant. While in the police car, defendant admitted that she was present at the robbery, but she claimed that another individual committed the crime and told the officers where he could be found. Defendant was eventually taken to the police station where, after being read her *Miranda*[1] rights, she gave a more detailed statement in which she again denied responsibility for the crime.

Although these facts are undisputed, it is not precisely clear whether defendant was under arrest before she arrived at the police station. However, we need not decide if the arrest occurred in the police car or later at the police station, because the police had probable cause to arrest defendant before she telephoned the police station. By that time, one witness had told police that defendant was seen with the victim in his blue pickup on the night of the robbery. Another witness had told police that defendant had implicated herself in the crime. Thus, the police had evidence sufficient to establish probable cause for defendant's arrest before they had any contact with defendant, and her arrest was legal whether it occurred in the police car or at the station.

Defendant further contends that her statements to police officers in the car and at the station were inadmissible as the fruit of an illegal arrest. Because we find that her arrest was not illegal, we reject defendant's argument. Moreover, there is no indication that defendant's statements in the police car were anything other than voluntary, and she was read her *Miranda* rights before her statements at the police station.

III

Next, defendant challenges the jury instructions on the prosecutor's burden of proof, the definition of reasonable doubt, and aiding and abetting. Defendant's case went to the jury on a charge of first-degree felony murder, MCL 750.316; MSA 28.548, with lesser included offense instructions on second-degree murder, MCL 750.317; MSA 28.549, and armed robbery. The jury convicted defendant of the latter offense.

Because defendant failed to object to the instructions at trial, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). No manifest injustice will result if we decline to review this issue. The trial court instructed the jury on the essential elements of the charged offense and the lesser included offenses and clearly stated to the jury that the prosecution's burden was to prove each element beyond a reasonable doubt. The aiding and abetting concept was adequately explained with respect to all charges. These instructions fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991).

IV

Defendant next argues that the trial court abused its discretion when it allowed testimony to be reread to the jury without determining whether the testimony was necessary for the jury to reach a verdict or was unfairly prejudicial to defendant, allowed the jury to determine how much of that testimony it wanted to hear, and did not require the jury to hear the cross-examination testimony. We disagree.

We review a trial court's determination on whether testimony will be reread to a deliberating jury and on the amount of such testimony that will be reread for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). Where a jury requests that only part of a witness's testimony be reread, the court is not obliged to reread that witness's entire testimony. Furthermore, where the testimony on direct and cross-examination is not in direct conflict, a trial court does not abuse its discretion in refusing to reread the cross-examination testimony. *People v Wilson*, 111 Mich App 770, 776; 315 NW2d 423 (1981).

We find that the trial court did not abuse its discretion in honoring the jury's request for the witness's direct testimony to be reread.

V

Next, defendant contends that the trial court erroneously admitted her written custodial statement into evidence because it was inadmissible hearsay. This argument has no merit. As the admission of a party offered into evidence against her, the statement was not hearsay and was admissible. MRE 801(d)(2).

VI

Finally, defendant argues that she was denied the effective assistance of counsel when her attorney failed to request jury instructions on larceny from a person and failed to object to any of the other errors which allegedly occurred at trial. We disagree.

In order to succeed on an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688.

With respect to her attorney's failure to request instructions on larceny from a person, defendant's argument fails because she cannot establish that this decision was not sound trial strategy. Failure to request lesser offense instructions can be sound trial strategy, especially where the defense presented at trial was that the defendant was not involved in the crime. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986).

In the present case, defendant maintained that she was present when the crime was committed but did not know that her companion was armed or that a robbery would occur. In light of defendant's contention that she was not involved in the crime, defense counsel's failure to request instructions on larceny from a person could be considered sound trial strategy. *Id.* Defendant was not, therefore, deprived of effective assistance of counsel by her counsel's failure to request jury instructions on larceny from the person.

Defendant's argument that she was denied effective assistance of counsel because of her counsel's failure to object to other trial errors is without merit. We have discussed these alleged errors above and found that no errors requiring reversal occurred. Defendant was not, therefore, prejudiced by her counsel's failure to object.

Affirmed.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).