STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER WAFER, a/k/a
CHRISTOPHER EDWARD WAFER,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 190153
Recorder's Court
LC No. 95-001637 FC

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797; and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fifteen to thirty years in prison for the armed robbery conviction, and two years in prison for the felony-firearm conviction, the two sentences to run consecutively. We affirm.

Defendant's first argument on appeal is that the trial judge pierced the veil of judicial impartiality and denied defendant a fair trial by making critical comments about defense counsel and questioning witnesses. We disagree. A trial court's comments and conduct pierce the veil of judicial impartiality and require reversal when they are "of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975); see also *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Pursuant to MCL 768.29; MSA 28.1052,

> [i]t shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

In the case at bar, defendant complains that the judge interrupted his attorney during cross-examination of various prosecution witnesses. A review of the judge's comments in context indicates

that she was merely trying to keep the trial moving in an expeditious manner by limiting counsel's questions to material issues and by preventing counsel from unnecessarily repeating questions that had already been asked. Defendant further complains that the judge herself questioned witnesses. It is apparent from the record that the judge was merely attempting to clarify witnesses' testimony. Defendant also contends that the judge made discourteous remarks in front of the jury that denigrated defense counsel. Although it is never proper for a judge to make belittling observations at defense counsel, such comments do not require reversal unless they deprive the defendant of a fair trial by unduly influencing the jury. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). Our review of the record indicates that to the extent any of the judge's comments demonstrated a lack of courtesy or patience, they were sufficiently rare and isolated that they were not of the "magnitude necessary for reversal on the ground that the trial court pierced the veil of judicial impartiality." *People v Turner*, 41 Mich App 744, 746; 201 NW2d 115 (1972). We conclude that the judge's comments and questions, taken either individually or cumulatively, were not so egregious as to deprive defendant of his right to a fair and impartial trial.

Defendant's second argument on appeal is that the trial court erred in refusing to allow defendant to present evidence to support his theory that a key prosecution witness was involved in the robbery. We disagree. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Baker*, 157 Mich App 613, 616; 403 NW2d 479 (1986). During defense counsel's cross-examination of an executive of the restaurant that defendant was charged with robbing, counsel sought to question the witness concerning security procedures that the manager on duty at the restaurant during the robbery should have followed, and concerning other robberies in which the manager had been present. Defendant's theory was that the manager, a key prosecution witness, was in fact involved in the robbery and had intentionally misidentified defendant. The trial court refused to permit the line of questioning because it was not material and because it had already been established that proper security procedures were not followed.

Only relevant evidence is admissible. MRE 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*." MRE 403 (emphasis supplied).

Defendant's proffered line of questioning was not relevant because there was no substantiating evidence that the manager was involved in the robbery. *People v Holliday*, 144 Mich App 560, 572-574; 376 NW2d 154 (1985). In addition, much of the testimony elicited from the proposed questioning would have been cumulative to other testimony establishing that the manager did not follow proper procedures and that he had been present during several robberies before. MRE 403. While this is a close question, we conclude that the trial court did not abuse its discretion in limiting defense counsel's cross-examination.

Defendant's third argument on appeal is that the trial court erred in admitting evidence that defendant had been discharged from the restaurant he was accused of robbing for violation of company

cash policies and had been charged with embezzlement. We disagree. The admission of

evidence of prior acts is reviewed for an abuse of discretion. *People v Humble*, 108 Mich App 777, 778; 310 NW2d 878 (1981). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith", but may be admissible for "other purposes", including "proof of motive." MRE 404(b). In the case at bar, the evidence was admitted for the "proper purpose", *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993); modfied 445 Mich 1205; 520 NW2d 338 (1994), of establishing defendant's motive. "[E]vidence of motive is relevant and admissible even if the crime is one of general intent." *People v Noble*, 152 Mich App 319, 327; 393 NW2d 619 (1986). Further, defendant has failed to establish that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. For these reasons, the evidence was properly admitted under *VanderVliet*, *supra*.

Defendant's fourth argument on appeal is that the trial court erred in ruling that the prosecution had used due diligence in attempting to produce an endorsed res gestae witness for trial. We disagree. We review the trial court's determination of due diligence for clear error. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). Although the prosecutor is not required to produce and endorse all res gestae witnesses under the current statute, MCL 767.40a; MSA 28.980(1), the prosecutor is required to produce endorsed witnesses. *Wolford, supra*, pp 483-484; *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). This duty to produce an endorsed witness may be relieved if the prosecutor shows that the witness could not be produced despite the exercise of due diligence. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). In order to exercise due diligence, a prosecutor is required to do everything reasonable, not everything possible, in order to locate and produce an endorsed res gestae witness. *Id.* Here, the prosecutor twice asked other res gestae witnesses where the missing witness might be, and obtained possible addresses after serving a subpoena on the witness' former employer. An investigator went to three possible addresses, and was informed that the witness had no permanent address. Two different relatives accepted subpoenas on the witness' behalf, and agreed to pass the message on to the witness to call the investigator or the prosecutor. This Court has upheld determinations of due diligence in cases where similar efforts were made. See *People v Stewart*, 126 Mich App 374, 376; 337 NW2d 68 (1983) [finding of due diligence was not error where the prosecutor and a police officer had "contacted the missing witness's grandparents and left their phone numbers in case (the witness) contacted his grandparents" and where "[o]ther leads were investigated, and the aid of other res gestae witnesses was sought"], and *People v Stanford*, 68 Mich App 168, 173; 242 NW2d 56 (1976) [determination of due diligence was not error requiring reversal where police "had left a subpoena with the witness's sister, who had said that she would deliver it to the witness" and where "[t]he aid of the witness's family was enlisted, but to no avail"]. As in *Stanford*, "[a]lthough we might have required a greater effort by police, we cannot find their actions to have been so lacking that the trial court's approval (requires reversal)." *Id*.

Defendant's fifth argument on appeal is that the trial court erred by failing to fashion an appropriate remedy for the prosecution's failure to provide the defense two witness statements in a timely manner. Defendant has not preserved this issue for appeal because he did not object to the court's handling of this issue or request any additional remedies. Nor has defendant made a showing of manifest injustice. Defendant contends that the quality of his counsel's cross-examination of one of the

witnesses whose statement was not provided in a timely manner suffered. However, we do not believe that any such prejudice resulted in manifest injustice because any disadvantage was remedied by the trial court's granting defense counsel a recess of approximately two hours to review the statements, after which counsel indicated that he was ready to proceed.

Defendant's sixth argument on appeal is that at the time of sentencing, the trial court improperly scored five points under offense variable (OV) 13, which provides for a score of five points when there is "serious psychological injury to victim or victim's family necessitating professional treatment." Michigan Sentencing Guidelines, 2nd Edition 1988, p 100. The Supreme Court has recently held that "application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). In our opinion, in light of *Mitchell*, defendant has failed to state a cognizable claim for relief.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Roman S. Gribbs