STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RAYMOND ZIEGLER,

Defendant-Appellant.

UNPUBLISHED
September 2, 1997

No. 186414
Oakland Circuit Court
LC No. 93-129070-FH

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). Following his conviction, defendant pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. The trial court sentenced defendant to consecutive terms of two years' imprisonment for the felony-firearm conviction, and four to eight years' imprisonment for the habitual offender, third offense conviction. Defendant now appeals as of right. We affirm.

Michigan State Trooper Phillip Vannette was scouting the Novi and Walled Lake area on October 28, 1993, for defendant who was wanted for a felony warrant. While returning to the police station, Vannette spotted defendant at a local gas station. Vannette pulled into the gas station and parked his patrol car behind defendant's vehicle. Once defendant noticed that Vannette was approaching him, defendant ran toward the back of the building in an effort to escape. Vannette chased defendant and a struggle ensued. With the assistance of two citizens, defendant was apprehended and Vannette was able to handcuff defendant and walk him back to the patrol car.

While Vannette was attempting to call radio dispatch to request backup, defendant reached across Vannette, unlatched his holster, and grabbed his pistol from the waistband. Defendant proceeded to point the gun at Vannette's stomach until Vannette was able to dislodge the gun from defendant's hand and throw it to the ground. Moments later, Michigan State Troopers Mark Thompson and Kurt Fonger arrived at the scene in response to a dispatch call. They were instructed to transport defendant to the police station and place him in a holding cell. As defendant and the officers

were entering the patrol car, both Thompson and Fonger testified that they heard defendant say, "I could have killed him if I wanted to." In addition, after they arrived at the station and placed defendant in a holding cell, the officers further heard defendant say, "Do you know how easy it would be to kill a cop, get a high powered rifle, go to a doughnut shop."

At trial, the prosecution was unable to locate Trooper Fonger to testify so the trial court permitted his testimony, preserved at a *Walker* hearing, to be read to the jury. On appeal, defendant first argues that the trial court erroneously concluded that the prosecution had exercised due diligence in locating Trooper Fonger to testify at trial, and admitting his testimony from a *Walker* hearing into evidence, pursuant to MRE 804(b)(1). We disagree.

A finding by the trial court of due diligence is a finding of fact that this Court will not set aside absent a showing of clear error. *People v Briseno*, 211 Mich App 11, 15; 535 NW2d 559 (1995); *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). The trial court has discretion to admit or exclude evidence and we review its ruling for an abuse of discretion. *Briseno, supra* at 15; *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). "An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court relied in making its decision, would conclude that there was no justification for the ruling." *Briseno, supra*; *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Where a declarant is determined to be unavailable at trial, the former testimony of the witness will be allowed to be read into evidence as a hearsay exception. MRE 804(1); 804(b)(1). "Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time." *Briseno, supra* at 14; MRE 804(b)(1). A declarant is deemed unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his presence. *Briseno, supra* at 14; MRE 804(a)(5). The party who seeks to admit declarant's former testimony must demonstrate that it made a "reasonable, good faith effort to secure the declarant's presence at trial." *Id.* The determination of whether the prosecution made a diligent, good faith effort to produce a witness depends on the facts and circumstances of the case. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). The prosecutor must pursue all specific leads, if any, as to where the witness may be; however, if there are no leads, the prosecutor is required to investigate known persons who might reasonably be expected to have information leading to the whereabouts of the witness. *People v McIntosh*, 389 Mich 82, 86; 204 NW2d 135 (1973).

In a due diligence hearing before the court, Michigan State Trooper Trevor Radke testified the he "made several phone calls to [Fonger's] residence, left messages on his telephone answering machine, drove by the residence on one occasion, and mailed one letter to the residence." In addition, when asked about Fonger's possible whereabouts, Radke responded that he and Fonger had spoken about Fonger's post-retirement plans and Fonger indicated that he intended to travel extensively both in and out of the country. Specifically, Radke testified that he believed Fonger was traveling in Spain at the time of the trial.

The trial court initially deferred its ruling on the due diligence issue to allow for further inquiry to determine whether Fonger was still traveling and, if so, when he planned to return. Two days later, Radke again testified that he made additional efforts to locate Fonger by visiting his residence and leaving another message on his answering machine. Radke also attempted to contact Fonger's son; however, the son could not be located at his residence, and was believed to be vacationing up north. Thus, the trial court found due diligence in the prosecution's efforts to locate Trooper Fonger, and allowed the admission of Fonger's prior testimony. The trial court concluded that there had been sufficient opportunity for defendant to cross-examine Fonger at the *Walker* hearing. We are satisfied that reasonable, good-faith efforts were made in attempting to locate Trooper Fonger both prior to trial, and during trial. In light of Radke's testimony that Fonger indicated that he would be traveling out of the country, it was reasonable for the trial court to infer that Fonger's absence at trial was explained by his plans to travel.

Defendant further argues that his due process rights were violated by his inability to cross-examine Fonger at trial, and because the jury was denied the opportunity to assess the witness' credibility and demeanor in person. We find that defendant had a sufficient opportunity to cross-examine Fonger at the *Walker* hearing. The same facts were being contested and defendant had the same motive for examining Fonger and for eliciting information from him. Therefore, the trial court did not clearly err in determining that the prosecution had exercised due diligence; Fonger's testimony from the *Walker* hearing was properly read to the jury.

Defendant's second argument on appeal pertains to voir dire. Specifically, defendant argues that the trial court abused its discretion in denying defendant's challenge for cause to excuse a potential juror. Defendant argues that as a result of the trial court's erroneous decision, he was required to excuse the juror by use of a peremptory challenge. Defendant contends that, consequently, he was forced to exhaust his five peremptory challenges and was unable to subsequently excuse another juror.

We review a trial court's decision to deny a challenge for cause for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989); *Jalaba v Borovoy*, 206 Mich App 17, 23; 520 NW2d 349 (1994). A trial court has broad discretion in the manner selected to conduct voir dire and obtain an impartial jury. *People v Tyburski*, 445 Mich 606, 623; 518 NW2d 441 (1994); *People v Sawyer*, 215 Mich App 183, 187; 545 NW2d 6 (1996). In reviewing a trial court's conduct during voir dire, this Court must determine whether the trial court conducted a voir dire "sufficiently probing . . . to uncover potential juror bias." *Tyburski, supra* at 609; *Sawyer, supra*.

During voir dire, defense counsel informed the jury pool that he intended to raise the defense of diminished capacity and that the defense of post traumatic stress syndrome would be established by psychiatrists and experts. When the potential jurors were questioned as to whether they had any reason to believe these defenses were invalid, one juror admitted that she was doubtful of the validity of these syndromes. Nevertheless, after further inquiry by defense counsel and the court, the juror stated she would try to listen to all of the witnesses and make a decision based on the law, as instructed.

Defense counsel subsequently informed the jury pool that defendant intended to take the stand in his own defense, but he had a past criminal record. When questioned as to whether this would cause any of the potential jurors to disbelieve defendant, or afford his testimony less credence, solely because of his prior record, the same juror indicated that although she may be inclined to give the police officer's testimony more weight, she would try to be fair after hearing all of the evidence. She stated that she would make an honest judgment, regardless of her prejudices.

Defense counsel then made a challenge for cause to excuse this juror. The trial court denied the request concluding that the potential juror could be fair and impartial. Defense counsel subsequently excused the juror by peremptory challenge and exhausted all five of his peremptory challenges. In determining whether the trial court erroneously failed to disqualify a juror for cause, the Michigan Supreme Court set forth several factors to consider in such claims. *Poet*, *supra* at 236. The Court held:

> [A] trial court commits error requiring reversal when the record reveals that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party had exhausted all peremptory challenges, (3) the party demonstrated a desire to excuse another subsequently summoned juror, and (4) the juror whom the party wishes later to excuse was objectionable. [*Id.* at 231.]

See also *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995).

In our judgment, the trial court did not abuse its discretion in determining that the potential juror was willing to fairly and impartially consider the evidence as it was presented. A court is not required to dismiss a juror for cause where the court believes the juror's commitment to be fair and objective. *Lee, supra* at 249. The trial court is in the best position to evaluate the demeanor and credibility of the potential jurors and conclude whether a juror could render a fair and impartial verdict. *Id.*

Further, although defendant alleges that the trial court improperly denied the challenge for cause, and he was, therefore, forced to exhaust all of his peremptory challenges, defendant failed to identify a specific, additional juror that he would have used his fifth peremptory challenge to excuse had he not had to use it on the juror in question. Therefore, we find that the trial court did not abuse its discretion in deciding not to strike the juror for cause.

Affirmed.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman