STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 21, 1997
REISSUED
December 12, 1997

v

No. 187317
LC No. 83-000839

KEITH CLARK,

Defendant-Appellant.

Before: Cavanagh, P.J., and Reilly and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and assault with intent to commit murder, MCL 750.83; MSA 28.278. Defendant was sentenced to life in prison for each conviction. We affirm.

Defendant first argues that he was denied his constitutional right to confront a witness brought against him. See US Const, Ams VI & XIV; Const 1963, art 1, § 20. Defendant claims this right was violated when the trial court improperly allowed the prosecution to introduce Ricky Wallace's testimony from defendant's first trial. Specifically, defendant argues that the prosecution's efforts to locate and produce Wallace for the second trial fell below the level of "due diligence," as required by MRE 804(a)(5). We disagree.

This issue requires application of a bifurcated standard of review. See *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Because a finding of due diligence under MRE 804(a)(5) relies on a factual determination, it will not be upset unless clearly erroneous. *Briseno, supra* at 14. Upon finding due diligence, the trial court's decision whether to admit the statement into evidence under MRE 804(b)(1) is reviewed for an abuse of discretion. *Id.* at 14; *People v James (After Remand)*, 192 Mich App 568, 572-573; 481 NW2d 715 (1992).

To establish unavailability, the proponent must establish that he has made a diligent, good faith effort to obtain the witness' presence at trial. *People v Dye*, 431 Mich 58, 66; 427 NW2d 501, cert den 488 US 985 (1988). Whether the prosecution has made such an effort depends on the particular

facts of the case. *Id*. at 67. Due diligence is a question of reasonableness and does not turn on whether the prosecution would have been able to produce the witness through the use of more stringent measures. *Briseno, supra*.

The leading Michigan case on this issue is *Dye, supra*. The Supreme Court found in *Dye* that the efforts of the prosecution to locate and produce three witnesses for a second trial (after the first trial ended in a mistrial) were less than duly diligent. *Id.* at 67-68. The Court's determination was based primarily on the prosecution's failure to promptly follow leads and its heavy reliance on out-of-state officials. The prosecution knew from the start that the three witnesses would be difficult to locate, but despite this knowledge, there were substantial periods of time during which no action was taken. *Id*. at 67-78.

The efforts undertaken in the instant case do not suffer the same failings as those in *Dye*. First, the prosecution did not have reason to suspect that Wallace would not appear at the second trial. Wallace appeared at the first trial without having to be held in protective custody, and there was no evidence that he feared prosecution for the crime. Because there was no real reason to believe that Wallace would intentionally absent himself from the second trial, the prosecution's lack of effort before trial was not unreasonable. Moreover, when Wallace did fail to appear, the police promptly pursued all leads. In addition to visiting the homes of friends and relatives, Officer Collins checked locales where Wallace had been seen before, as well as Wallace's probation and parole status, for possible information.

Because the prosecution had no reason to suspect that Wallace would not appear at the second trial, and because the record from the due diligence hearing shows that the prosecution promptly followed every lead, the trial court's finding of due diligence was not clearly erroneous. See *Briseno, supra*. Because the prosecution exercised due diligence, the court's decision to admit Wallace's testimony from the first trial was not an abuse of discretion. See *James, supra* at 572-573. Therefore, we hold that defendant's right to confrontation has not been violated. See *Dye, supra* at 65.

Defendant next contends that the trial court reversibly erred in failing to sua sponte instruct the jury that Wallace's prior inconsistent statements to the police could only be considered for impeachment purposes and not as substantive evidence of defendant's guilt. We disagree.

A trial court's failure to sua sponte give such a limiting instruction is not reversible error where there has been (1) no request for such an instruction, (2) no demonstration or likelihood of prejudice, and (3) neither the trial court nor the prosecutor suggested to the jury that the prior inconsistent statement could be used as substantive evidence. *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989). In the instant case, there is no question that defendant failed to request such an instruction and there has been no suggestion that the trial court or prosecutor suggested anything improper to the jury. Instead, defendant argues that the introduction of Wallace's prior inconsistent statement, without a limiting instruction, requires reversal because it was prejudicial to his case.

However, most of the evidence in Wallace's statement to the police was cumulative of other evidence introduced at trial. To the extent that the statement merely reiterated other evidence presented at trial, the court's failure to sua sponte give a limiting instruction did not prejudice defendant.

The only part of Wallace's statement that was strong evidence against defendant, and also not cumulative of other testimony, was Wallace's claim that defendant said he "shot that bitch," apparently referring to Earl Taylor. This evidence would tend to negate defendant's claim that the shooting was accidental. However, other evidence from the trial would also tend to show that the shooting was not accidental, including (1) Rodney Bolden's testimony that defendant asked about Taylor before heading toward the store, (2) Wallace's trial testimony that defendant wanted to "beat his ass," referring to Taylor, (3) the testimony of three witnesses inside the store that defendant approached Taylor and said, "I know you're strapped," (4) Phillip Vance's testimony that defendant held a gun in his hand when he said this, and, most importantly, (5) Basil Antoon's testimony that he saw defendant shoot Taylor while Taylor was on the floor. Because the jury could have easily concluded that the shooting was not accidental without relying on Wallace's police statement, the failure of the court to give a limiting instruction was not prejudicial. Therefore, we hold that it was not reversible error. Cf. *Hodges*, *supra* at 623-633.

Finally, defendant argues that defendant was denied a fair trial because the court failed to adequately instruct the jury on the defense of accident. We disagree. While the defense of accident was central to defendant's case, we do not believe that the trial court's instructions require reversal of defendant's conviction. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). We hold that the trial court's instructions to the jury were sufficient. Unlike *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975), where the accident defense was only referred to tangentially, the trial court specifically explained to the jury that the defendant had raised an accident defense. This alone was sufficient to direct the jury's attention to the defense. When coupled with the trial court's detailed instructions on the necessary mental element for second-degree murder and the necessity of finding defendant guilty beyond a reasonable doubt, we conclude that the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Bell*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin