

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XAVIER ZACHARIAH BENDER,

Defendant-Appellant.

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UNPUBLISHED

August 17, 2006

No. 260594

Allegan Circuit Court

LC No. 04-013795-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for felony firearm, to be served before his concurrent sentences of 30 to 120 months' imprisonment for his carrying a concealed weapon and felon in possession convictions, and thirty-six to ninety-six months' imprisonment for his assault with a dangerous weapon conviction. His convictions arose from an incident in which he pointed and shot a gun at the victim after defendant, the victim, and two witnesses had left a party. We affirm.

Defendant first argues the introduction of the victim's preliminary examination testimony at trial violated his Sixth Amendment right of confrontation. A defendant has the right to be confronted with all witnesses against him. US Const, Am VI; Const 1963, art I, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Sixth Amendment prohibits testimonial statements by a witness who does not appear at trial unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59. It is undisputed that the victim's preliminary examination testimony was a testimonial statement. Thus, if he was unavailable and defendant had a prior opportunity to cross-examine him, the testimony was properly admitted.

Defendant first asserts the prosecutor failed to establish the victim was "unavailable." A witness is unavailable if he "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). We will not disturb a trial court's finding that due diligence was used in attempting to locate a witness absent a clear abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion

occurs when an unprejudiced person considering the facts before the court, would find no justification for the ruling. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

The test for due diligence is one of reasonableness, “i.e., whether diligent good-faith efforts were made to procure the testimony.” *Bean, supra*. Here, a state trooper twice visited the addresses provided to him by the prosecutor. He attempted to locate additional addresses through the Holland Police Department, the Secretary of State’s Office, and the other two witnesses. The telephone number provided by the victim’s former probation officer was called three times. In addition, one of the witnesses told the trooper that the victim refused to be served. Thus, the victim obviously knew that the prosecutor was trying to find him. Although defendant argues further steps should have been taken to procure the victim, the test is not whether more stringent efforts would have procured the witness. *Id.* Under these circumstances, we cannot conclude that the trial court abused its discretion in finding due diligence.

Second, defendant asserts he did not have a meaningful opportunity to probe the victim’s truthfulness at the preliminary examination. Generally, a trial court’s decision to admit evidence is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). However, preliminary questions of law are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The preliminary examination testimony of an unavailable witness is admissible at trial if the party against whom the testimony is offered had an opportunity and a similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 70 n 14; 586 NW2d 538 (1998). Whether a defendant had a similar motive to develop the witness’s testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

The prosecution elicited the victim’s testimony at the preliminary examination to establish that defendant pointed and shot a gun at him. The prosecution introduced the preliminary examination testimony at trial for the same purpose. Accordingly, defendant had the opportunity to cross-examine the victim at the preliminary examination for the same reason, to disprove his guilt and attack the victim’s credibility. The record does not indicate that defense counsel’s cross-examination at the preliminary hearing was limited. Defendant had a full opportunity to explore the issues. Hence, defendant’s Sixth Amendment right of confrontation was not violated by the introduction of the victim’s preliminary examination testimony at trial.

Defendant next argues the trial court denied him an impartial jury and his right to due process when it contravened a stipulation between the parties that the jury, in regard to the felon in possession of a firearm charge, would only be told that defendant committed a prior specified felony. Defendant asserts the evidence relating to the uncharged robbery was unfairly prejudicial pursuant to MRE 403. When reading the information during voir dire, the trial court informed the jury that defendant had a prior armed robbery conviction. However, defendant waived any challenge to the manner in which jury voir dire was conducted when he failed to object and then expressed satisfaction with the chosen jury. *People v Ho*, 231 Mich App 178, 183, 185; 585 NW2d 357 (1998). Accordingly, defendant’s waiver extinguished any error that may have occurred. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Subsequently, the trial court admitted testimony regarding an uncharged robbery that occurred the same day as the charges at issue in this case. Defendant challenged the testimony at

trial on the basis that it was not relevant, but defendant argues on appeal that the probative value of the testimony was substantially outweighed by unfair prejudice. An objection on one ground is insufficient to preserve an appellate attack on a different ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The jury heard testimony that a stolen wallet was found in one witness' purse. The witness did not explain how the wallet got into her purse, except that maybe either defendant or the other witness placed it there after she left the car. In addition, the jury heard testimony that the victim and defendant were arguing in the car because the victim had refused to take part in a “discrepancy” between defendant and another person at the party. No further explanation of the discrepancy was given, except that the victim and defendant had been arguing about money before the shooting. Allowing the detective to testify about the uncharged robbery of the wallet gave the jury a full presentation of the events that led up to the shooting and defendant's arrest. It provided an explanation for the presence of the wallet in the witness' purse, and it explained the “discrepancy” that the victim and defendant were arguing about before the shooting. There is no support in the record that the evidence was given undue or preemptive weight by the jury or that its use by the prosecutor was inequitable. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Therefore, we do not find clear error.

Finally, defendant argues he was denied effective assistance of counsel because his trial counsel slept through significant portions of his trial. We disagree. Because defendant did not request a new trial or a *Ginther*<sup>1</sup> hearing, our review of defendant's claim is limited to the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim for ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that counsel's representation denied him a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To support his claim, defendant attached to his appellate brief an affidavit in which he averred that counsel slept through significant portions of his trial and failed to challenge inadmissible evidence. A thorough review of the record does not support defendant's claim. The record contains no indication that counsel slept through any portion of defendant's trial, much less slept at any time when meritorious objections should have been made. In addition, although defendant averred in his affidavit that a person viewing the videotape of his trial would see counsel sleeping, the videotape was not provided. Hence, defendant has failed to establish the factual predicate of his claim. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). Thus, we conclude that defendant was not denied the effective assistance of counsel.

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Donald S. Owens