

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 13, 2014

v

CHRISTOPHER ALEXANDER BUCCANNION,

Defendant-Appellant.

No. 314380
Oakland Circuit Court
LC No. 2012-240731-FH

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm, MCL 750.84, for his role in a barroom fight. The prosecutor did not use due diligence to secure the presence of at least one witness at trial and therefore the court should not have permitted the prosecutor to present that witness's preliminary examination testimony. Yet, the challenged evidence related only to crimes with which defendant was neither charged nor convicted. The error was harmless and does not warrant relief.

Contrary to defendant's assertion, the trial court did not abuse its discretion in declining to sever the trials of defendant and his codefendant and nephew, Don Murphy. Defendant and Murphy did not present mutually exclusive and irreconcilable defenses and defendant was not prevented from testifying in his defense. Moreover, the trial judge did not exhibit improper partiality by advising defendant to accept a plea offer from the prosecutor. The judge advised defendant of the sentencing consequences of the charged offense and noted the minimal remaining jail time he would be required to serve if he accepted the offer. This was proper commentary. We affirm.

I. BACKGROUND

The background of this case was succinctly described in this Court's opinion affirming codefendant Murphy's convictions:

On February 13, 2012, defendant and [codefendant Murphy] physically assaulted Everett Felton inside Prue's bar in Pontiac. Apparently fueled by racial animus, the Caucasian assailants beat the African-American victim with their fists and bar stools. The incident was captured by the bar's security cameras. [The bartender also placed defendant and codefendant at the scene.]

After the assailants left, the severely injured Everett stood up and left the bar. Everett walked to a nearby relative's home. Fearing additional violence, the relatives would not let Everett enter. His cousin called his sister, Micarle Felton, advising her of Everett's injuries. Everett then walked to Huron Plaza Store and the owner administered first aid and contacted the police.

Micarle found Everett at the store and he told her about the events at the bar. Everett's friend, Tanesha Hill, also entered the store to make a purchase and learned of Everett's assault. [Defendant] then walked in, Everett identified him as one of the attackers, and Everett, Micarle and Hill chased him outside. [Defendant] yelled to [Murphy], who was sitting in a car parked outside. [Murphy] jumped out of the vehicle and retrieved a revolver. [Murphy] fired four or five shots, striking Micarle in the back, Hill in the arm, and Everett in the leg. All three were transported to the hospital for treatment.^[1] [*People v Murphy*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2014 (Docket No. 314333), pp 1-2.]

For his role in the assault at the bar, the prosecutor charged defendant with assault with intent to do great bodily harm less than murder and an alternate lesser charge of assault with a dangerous weapon (felonious assault), MCL 750.82.

II. LOCATING WITNESSES FOR THE PROCEEDINGS

Just as defendant in this appeal, Murphy challenged the trial court's decision to admit the preliminary examination testimony of missing witnesses. We adopt this Court's earlier analysis and resolution of this issue:

At defendant's and [Murphy's] joint preliminary hearing on March 15 and 19, 2012, all three victims of the February 13 events testified. Micarle was the first to take the stand and she expressed her displeasure with being forced to participate in the proceedings. An officer brought her to the courthouse to ensure her participation. She was argumentative with the defense attorneys and the court, eventually exclaiming, "I'm sorry, Your Honor, I'm just frustrated. They making [sic] me do this." Micarle identified "they" as "[t]he police" and claimed she had only learned that she would be required to testify an hour earlier. Hill did not appear on the first day of the preliminary examination and officers had to secure her presence as well. Hill was more cooperative once on the stand.

Trial was originally scheduled for July 13, 2012, but was rescheduled due to a conflict with the court's and attorneys' schedules. On September 15, the parties returned for trial, which had to be postponed again because the court was

¹ Defendant and Murphy were tried together before a single jury but with separate counsel. The jury convicted Murphy alone for charges arising out of the shootings, and also convicted him of assaulting Felton inside the bar. This Court affirmed Murphy's convictions.

conducting a jury trial in another matter that had run over. Trial was then pushed back to November 29, 2012.

At the onset of defendant's and [Murphy's] joint trial, the prosecutor noted that Everett Felton had been arrested and was in jail awaiting trial in an unrelated case. Everett would therefore be transported to the courthouse to testify. Neither Micarle Felton nor Hill was present, however. The prosecutor sought admission of the witnesses' preliminary examination testimony. The court conducted a hearing to determine whether the prosecutor had used due diligence to secure the witnesses' presence at trial. Oakland County sheriff's detective John MacDonald testified about his attempts to locate Hill and Micarle. MacDonald claimed that he made attempts to locate the female victims each time the trial was scheduled, but was never able to serve them.

MacDonald indicated that he left a subpoena for Hill at one of her prior addresses with a man who claimed Hill still lived there. The detective contacted the sheriff's department fugitive team for assistance in locating the witnesses, but the responding sergeant said the department was too busy to help. MacDonald searched the databases of several local county jail systems to determine if the witnesses had been incarcerated and "CLEMIS" to ascertain whether either had had a run in with any police agencies. He contacted local hospitals and the Oakland County medical examiner to ascertain whether the witnesses were injured or dead. He used a system called "Accurate" to trace any known addresses of Hill, Micarle, or their relatives. The phone numbers MacDonald collected from the witnesses seemed to be invalid. He left approximately 20 messages at the number provided by Micarle with no response. The number provided by Hill was out of service. At one point, the detective bumped into Hill at the courthouse and she provided a new number. That number was disconnected shortly thereafter. MacDonald did not attempt to contact the phone companies to track down the witnesses' numbers. The detective claimed he spoke to witness Everett, but he did not know the whereabouts of his sister.

The court ruled that the prosecutor had used due diligence in searching for the witnesses. Accordingly, over defense counsels' objections, the court permitted the prosecutor to read into the record the preliminary examination testimony of Micarle and Hill.

At [Murphy's] sentencing, however, his trial counsel created a record that MacDonald had not in fact conducted a diligent search before each rescheduled trial date. On November 9, 2012, 20 days before the final trial date, Hill was arrested and incarcerated at the Oakland County Jail. She remained incarcerated throughout the five-day trial. Had MacDonald made a timely search of the Oakland County jail system, he would have found this witness and she could have been presented at trial. [*Id.* at 2-3.]

III. MISSING WITNESSES

Defendant contends that the trial court abused its discretion when it determined that the prosecutor exercised due diligence in attempting to locate Hill to produce her at trial. While the prosecutor did not employ due diligence, we discern no error requiring relief. Defendant was not convicted of the shootings, only the assault inside the bar. Neither Hill nor Micarle testified regarding the assault, rendering their testimony irrelevant to the charges against defendant. Again, we adopt the analysis of this Court's opinion in Murphy's appeal:

We review for an abuse of discretion a circuit court's determination that the prosecutor exercised due diligence in obtaining the attendance of a witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Pursuant to MRE 804(a)(5), a witness is deemed "unavailable" when he or she "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." In such circumstances, the proponent of evidence may present "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). See also MCL 768.26 (permitting the admission of preliminary examination testimony at trial when the witness cannot be produced). For the prosecutor in a criminal case to present prior testimony at trial, he or she must show that the prosecution "made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* While the prosecution must follow up on specific leads, *People v McIntosh*, 389 Mich 82, 87; 204 NW2d 135 (1973), "[d]ue diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

At the due diligence hearing, the court was limited to Detective MacDonald's testimony in making its determination. Based on this testimony, the detective likely could have done more to search for the victims. Although the Feltons had family in the area, the detective spoke only to Everett and his girlfriend about Micarle's whereabouts. Despite knowing three of Hill's prior addresses, Detective MacDonald spoke to no neighbors to cultivate leads. The absence of these "more stringent efforts" did not render the detective's conduct unreasonable, however. See *Bean*, 457 Mich at 684. Had Detective MacDonald actually searched for the witnesses as he described before each rescheduled trial date, the court's conclusion that due diligence had been employed would be accurate. Yet, Detective MacDonald gave a false impression that he had undertaken the described steps to find the witnesses before each trial date, including searching the databases of local penal institutions. As Hill had been

housed in the Oakland County Jail for 20 days before the final trial date, Detective MacDonald obviously had not made a timely inquiry into her whereabouts. Accordingly, the prosecutor clearly did not use due diligence in searching for Hill and may not have used due diligence in searching for Micarle.

Absent due diligence, the preliminary examination testimony of Hill and Micarle should not have been admitted at defendant's trial. And the court should have instructed the jury that it could "infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *People v Eccles*, 260 Mich App 379, 388; 580 NW2d 390 (1998). See also CJI2d 5.12.

Yet, reversal is not required simply because an error occurred. When facing a "preserved, nonconstitutional error," relief is only required when a review of the entire record leads this Court to conclude that a "miscarriage of justice" would occur if the conviction is allowed to stand. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). "The object of this inquiry is to determine if it affirmatively appears that the error asserted undermines the reliability of the verdict." *Id.* (quotation marks and citation omitted). Reversal is warranted when the error "more probabl[y] than not . . . was outcome determinative." *Id.* at 495-496. [*Murphy* at 3-4.]

The prosecutor presented significant evidence linking defendant to the sole event with which he was charged—assaulting Everett at the bar. The bartender testified that defendant was at the bar with Murphy. Security footage showed defendant engaged in the assault. Specifically, the video showed Everett approach defendant who was sitting at the bar. Murphy followed Everett into the bar from outside. He stood nearby and listened to Everett and defendant's conversation for approximately 20 seconds. Murphy approached and punched Everett in the back of the head, knocking him to the ground. Defendant and Murphy punched Everett and then used bar stools to hit him. As defendant and Murphy walked away, Murphy turned around and kicked Everett. Defendant claimed self defense at trial but the video evidence clearly showed that Murphy started the altercation, Everett never touched either man, and yet defendant joined in beating the defenseless Everett. Whether Hill and Micarle later saw defendant with Murphy during the shooting has no impact on whether defendant participated in the assault or his reasons for doing so. Accordingly, defendant cannot show that the improper admission of the preliminary examination testimony was outcome determinative and he is not entitled to relief.

Defendant also mirrors his codefendant's challenge on confrontation grounds:

Defendant contends that because Hill was incarcerated and actually available to be brought to his trial to testify, the use of her preliminary examination testimony violated his constitutional right to confront the witnesses against him. In *Bean*, 457 Mich at 682-683, the Supreme Court explained, "the constitutional right to confront one's accusers would not be violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution had exercised both due diligence to produce the absent witnesses and that the testimony bore satisfactory indicia of reliability."

Bean acknowledged the importance of the defendant's right to question the witnesses against him despite the prosecutor's inability to locate them:

“[T]he purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial. This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors. . . . Demeanor evidence is important.” *Id.*, quoting *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988) (alterations in original).

As discussed above, the prosecutor's efforts to locate Hill did not constitute due diligence. Given the ease with which the prosecutor could have located Hill and the misleading information provided at the due diligence hearing, the prosecutor may not have exercised due diligence in searching for Micarle either. Absent due diligence, the trial court violated defendant's confrontation rights by admitting Hill's and possibly Micarle's preliminary examination testimony at trial. Nonetheless, “[a] constitutional error is harmless if ‘[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’” *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), quoting *Neder v United States*, 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999). [*Murphy* at 5.]

As these witnesses' testimonies related to the shooting at the party store, not the assault at the bar, a rational jury would have convicted defendant even without Hill's or Micarle's testimony. The error is harmless.²

IV. SEVERANCE OF TRIALS

Defendant argues that the trial court erred by refusing to sever his trial from that of *Murphy*. We review for an abuse of discretion a trial court's decision on a motion to sever. *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009), quoting *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). The trial court did not abuse its discretion in this case because severance was not necessary to prevent prejudice or to safeguard defendant's substantial rights. Severance was also not required to ensure defendant a fair trial.

“A strong policy favors joint trials in the interest of judicial economy; a defendant does not have an absolute right to a separate trial.” *People v Hoffman*, 205 Mich App 1, 20; 518

² Defendant's trial attorney recognized that neither Micarle's nor Hill's testimony could impact his client's trial. At the due diligence hearing, the trial court asked defendant if he wished to question Detective MacDonald and counsel expressly declined to do so, stating, “I'm not going to ask any questions because it doesn't pertain to witnesses that will be testifying against my client” Defendant arguably waived this issue through his counsel's statement, providing an additional reason to deny appellate relief.

NW2d 817 (1994). However, the trial court may, and in some cases must, order severance. MCR 6.121 provides for mandatory and permissive severance as follows:

(C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

(D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

MCL 768.5 further provides, "When 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly in the discretion of the court."

"[S]everance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence.'" *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). Finger pointing between codefendants does not invoke MCR 6.121(C). While "presenting antagonistic defenses has serious negative implications for the accused," the mere existence of such defenses does not mandate severance. *Hana*, 447 Mich at 347-348. Rather, to require severance "the defenses must be 'mutually exclusive' or 'irreconcilable.'" Moreover, 'incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.' The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* at 349 (citations omitted).

In his pretrial motion, defendant did not meet his burden of persuasion. "A trial court ruling on a pretrial motion must have concrete facts on which to base a ruling." *Id.* at 355. "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id.* at 346-347.

In moving for severance of his trial from that of Murphy, defendant argued that the assault at the bar and the shooting at the party store did "not stem from the same conduct or transaction, nor [did] they comprise or constitute connected acts or related schemes" as required for joinder. "Severing these Defendants," he argued, "would promote the potential for a fair trial . . . and reduce the potential that a jury could be confused or prejudiced against this Defendant due to the outrageous and excessively violent behavior alleged to have been committed by Defendant Murphy."

Defendant implied that the jury was more likely to convict him of the greater charged offense in relation to the bar fight based on Murphy's escalation of hostility during the party store shooting. Such evidence would have been admissible even if defendant was tried alone, however, as it provided a complete picture of events. "[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). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id.* at 742 (quotation and citation omitted). The shooting was connected with the events at the bar, and testimony regarding the shooting was relevant to the identification of defendant as one of the barroom attackers. The fact that information about the shooting may have portrayed defendant in a poor light demonstrates nothing more than incidental spillover prejudice, which is not sufficient to warrant reversal. *Hana*, 447 Mich at 349. Moreover, "[i]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 350.

For the first time on appeal, defendant contends that he felt coerced not to testify in his own defense because he naturally would have implicated his nephew as the individual who started the bar fight. While defendant may have felt pressure from his family to refrain from testifying, defendant remained free to testify if he wished. The joint trial did not prevent defendant from exercising his right. Further, defendant stated under oath that he was aware of his right to testify, had consulted with his attorney regarding whether to testify on multiple occasions, and freely chose not to testify. Ultimately, defendant cannot establish that he was unduly prejudiced or denied a fair trial and he is therefore not entitled to relief.

IV. TRIAL COURT BIAS

Finally, defendant argues that the trial court lost its appearance of impartiality by encouraging defendant to accept a plea offer. Before the start of trial, defense counsel made a record that the prosecutor had offered his client a significantly reduced sentence, which would require only two more months of jail time in exchange for his agreement to testify against Murphy. Defendant indicated that he "ha[d] no problem pleading guilty to a felonious assault with a year in the county," because he was "guilty of felonious assault." The court advised defendant that if he rejected the plea deal, the jury would "decide whether they think you're guilty" and it would be "a dice roll." The court queried why defendant did not want to take the deal and defendant cited "all the other stipulations to" the offer. The court then stated:

I understand everything you're saying, sir. I guess, at this late date, with an offer on the table, that, you know, you've got to be more pragmatic than principled. Sorry.

You've got to look out for yourself. And when I feel that somebody's making a mistake by turning down a deal, I tell them.

* * *

That's what I'm telling you, and I'm going to give you a minute to talk to him. And your father can stay here.

Sir, you should talk to your son. I don't know what you think about this. And you're entitled to say whatever you want, but I'm telling you, too, he's making a mistake.

After this discussion, defendant still declined the plea deal.

Because defendant did not object to the trial court's comments, the issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

A criminal defendant is entitled to a neutral and detached magistrate. A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality. In general, this Court applies the following analysis to determine whether a trial court's comments or conduct deprived the defendant of a fair trial:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Id.* at 597-598 (quotation marks and citations omitted).]

The trial court did encourage defendant to accept the plea bargain offered by the prosecutor. However, defendant has not supported his contention that this demonstrated bias. Our review of the record reveals that the trial court showed genuine concern for defendant by encouraging him to fully consider the ramifications of proceeding to trial, his likelihood of success, and the comparative benefits of the plea offer. Defendant has not "overcome [the] heavy presumption of judicial impartiality." *Id.* at 598. Moreover, these comments were made outside the presence of the jury and could not have influenced the verdict. See *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006). Accordingly, defendant has not established any error, let alone error demanding a new trial.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto