STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATINA JONES,

Defendant-Appellant.

UNPUBLISHED
May 6, 1997

No. 189333
Recorder's Court
LC No. 94-013905

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERREL MCGEE,

Defendant-Appellant.

No. 189334
Recorder's Court
LC No. 94-013905

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

These cases arise out of a consolidated bench trial. In Docket No. 189333, defendant Jones appeals as of right her convictions for conspiracy to commit kidnapping, MCL 750.349; MSA 28.581, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), obstructing justice, MCL 750.505; MSA 28.773, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In Docket No. 189334, defendant McGee appeals as of right his convictions for conspiracy to commit kidnapping, MCL 750.349; MSA 28.581, assault with intent to commit murder, MCL 750.83; MSA 28.278, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and obstructing justice, MCL 750.505; MSA 28.773. We affirm.

Docket No. 189333

Defendant Jones' sole issue on appeal is that the trial court abused its discretion in admitting the preliminary examination testimony of a prosecution witness who could not be located for trial. Specifically, defendant Jones asserts that the prosecution did not use due diligence to procure the witness' attendance. The decision to admit evidence, including prior recorded testimony, is within the trial court's discretion and will be reviewed for an abuse of discretion. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

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 offered had an opportunity to cross-examine the witness at that time. MRE 804(b)(1). The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5). The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to procure the testimony, not whether more stringent efforts would have produced it. A finding of due diligence is a finding of fact that this Court reviews for clear error. *Briseno, supra*.

In the present case, the trial court took testimony from Officer Riccinto regarding his attempts to locate Marian McGee. Riccinto stated that he went to McGee's last known address and discovered that McGee had moved and left no forwarding address. Riccinto talked to the neighbors, but no one knew where she was. Riccinto then checked Detroit Receiving Hospital, the county morgue, and the eighth floor of police headquarters. He also ran McGee's name through the LEIN system for a last known address and any outstanding warrants. These efforts were unsuccessful. Riccinto next contacted the Michigan Department of Social Services and was told that checks were being sent to a Joan Mason. Riccinto spoke with Joan Mason, who turned out to be McGee's mother. Mason told Riccinto that she had not seen McGee and did not know where she was. Lastly, Riccinto checked, unsuccessfully, to see whether McGee had any utility, gas, or phone bills in her name. Considering the above, the trial court's finding that the prosecution exercised due diligence in attempting to locate McGee was not clearly erroneous. Accordingly, the trial court did not abuse its discretion in admitting McGee's preliminary examination testimony.

Docket No. 189334

Defendant McGee first argues that he was denied a fair trial when the prosecutor asked him on cross-examination whether he told police that he had an alibi defense. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Upon review of the record, we find no miscarriage of justice. The prosecutor attempted to impeach defendant McGee's exculpatory story by cross-examining him as to whether he had ever informed police about his alibi defense. However, any error was harmless because defendant McGee was tried before a judge rather than a jury. A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Defendant McGee next maintains that he was denied a fair trial when the prosecutor's cross-examination of him resulted in the admission of several damaging hearsay statements made by his codefendants. However, defendant failed to preserve this issue for appellate review by objecting to the admission of these statements below. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, we will review the issue only to the extent that a substantial right of defendant's was affected. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

We first note that defense counsel initiated the questioning as to the out-of-court statements. Defendant therefore cannot now complain that they were inadmissible hearsay. See *Barclay*, *supra*. In any case, the statements were admissible. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In the instant case, the statements were admissible for the purpose of showing that defendant McGee was present when they were made, not for their truth.

Furthermore, the statements were admissible to show their effect on defendant McGee. See *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987). By establishing that defendant was present when these statements were made, the prosecutor was trying to show why defendant later left with defendant Jones and Alphonso Mason, that is, to prevent the victim from testifying in the carjacking case. Accordingly, we find that the introduction of the statements did not constitute error requiring reversal.

Defendant McGee's final claim is that the trial court erred in admitting his oral statement at trial without first determining whether it was voluntary. The trial court found that a *Walker*[1] hearing was unnecessary because defendant McGee contested the fact of the statement rather than its voluntariness. This is a question of law which we review de novo on appeal. *People v Nance*, 214 Mich App 257, 258; 542 NW2d 358 (1995).

Defendant relies on *People v Neal*, 182 Mich App 368; 451 NW2d 639 (1990), in support of his claim of error. In *Neal*, this Court held that the trial judge erred in refusing to decide the voluntariness issue before admitting the defendant's statement at trial. *Id*. at 371-372. The defendant signed a written statement, then moved to suppress it, arguing that his signature had been involuntarily given. *Id*. at 371. This Court held that where a defendant claims that he involuntarily signed a statement and that the statement was fabricated by police, the trial court must hold a *Walker* hearing prior to introduction of the statement at trial. *Id*. at 372.

Thus, under *Neal*, the trial court should have held a *Walker* hearing. However, we find that the error does not require reversal because defendant was afforded the equivalent of a *Walker* hearing during the bench trial, as defense counsel was permitted to conduct voir dire of Officer Riccinto on the issue of voluntariness and maintained that defendant denied making the statement. Moreover, we find that the right to a ruling regarding voluntariness was waived by counsel's agreement with the trial court's statement that since defendant denied making the statement, there was no issue of voluntariness.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White

I concur in result only.

/s/ Maureen Pulte Reilly

[1] *People v Walker (On Remand)*, 374 Mich 331; 132 NW2d 87 (1965).