

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOISES ESPINOZA HERNANDEZ,

Defendant-Appellant.

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UNPUBLISHED

March 10, 2005

No. 253227

Kent Circuit Court

LC No. 03-003978-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of three counts of assault with the intent to do great bodily harm less than murder, MCL 750.84, arising out of the stabbing of three men during an altercation at a party. Defendant was sentenced to 5 to 10 years for each conviction. We affirm.

I.

Defendant first contends that he was deprived of a fair trial by the prosecutor's failure to use due diligence in obtaining the testimony of a res gestae witness,<sup>1</sup> Samuel Espinoza Hernandez.<sup>2</sup> Defendant properly preserved this issue by bringing it up in his motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). We review a trial court's determination that proper due diligence was had for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

In Michigan, the prosecution is no longer required to produce every witness who may have knowledge of the crime for which a defendant is charged. *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995). Instead, the former rule has been replaced by a notice system

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<sup>1</sup> A res gestae witness is someone who witnessed some event in the continuum of the criminal transaction and whose testimony would have aided in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Although the trial court never specifically addressed whether Hernandez was a res gestae witness, he was present at the altercation where the stabbings occurred. Therefore, he was a res gestae witness.

<sup>2</sup> Hernandez is defendant's younger brother.

whereby the prosecutor is charged with the duty of listing all known witnesses to the charged crime and listing the witnesses he or she intends to call at trial. *Id.* at 288-289; MCL 767.40a(1)-(4). Although the prosecutor is no longer required to use due diligence to obtain the testimony of every *res gestae* witness, the prosecutor must, upon written request by the defendant, supply reasonable assistance, including investigative assistance, to assist in locating and serving process on witnesses. MCL 767.40a(5). In addition, a prosecutor who endorses a witness under MCL 676.40a(3) is obliged to exercise due diligence to produce that witness at trial. *Eccles, supra* at 388. However, a prosecutor's failure to produce such a witness may be excused by demonstrating that the witness could not be produced despite the exercise of due diligence. *Id.*

In the present case, the prosecutor listed Hernandez on the list of witnesses to be called; therefore, contrary to plaintiff's contention on appeal, the prosecution had a duty to exercise due diligence in obtaining his testimony. At trial the prosecutor presented testimony by detective Smith concerning the efforts he made to locate Hernandez. Although defendant's trial counsel did not expressly object on grounds of due diligence, at the close of Smith's testimony, defendant's trial counsel expressed concern that Smith had not contacted the adjacent counties to see if Hernandez was in one of their jails. Defendant's trial counsel stated that, "if the detective can state tomorrow morning that he's done so and he's not in custody in any of those counties, I'll be satisfied and we can move on." The next morning, Smith testified that he checked to see if Hernandez was being detained in any of those counties and determined that he was not. After this testimony defendant's trial counsel stated, "I guess they certainly have demonstrated due diligence." Defendant's trial counsel's express approval of the efforts made by Smith in attempting to locate the witness waived any claim of error based on due diligence. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.") (citation omitted). Consequently, there is no error to review.

## II.

Defendant next contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court permitted Hernandez's preliminary examination testimony to be read into the record after the prosecutor was unable to procure his presence at trial. We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law *de novo*. *People v Shepherd*, 263 Mich App 665, 667; 689 NW2d 721 (2004). The admission of testimonial hearsay evidence in violation of the Confrontation Clause is constitutional error warranting reversal unless the beneficiary of the evidence is able to prove, and we determine, beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction.<sup>3</sup> *Id.* at 672.

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<sup>3</sup> Defendant contends that a violation of the Confrontation Clause is structural error mandating reversal. This is incorrect. See *People v Shepherd*, 263 Mich App 665, 671-672; 689 NW2d 721 (2004) (listing the types of structural errors and noting that a violation of the Confrontation Clause is not structural error).

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1359; 158 L Ed 2d 177 (2004); *Shepherd*, *supra* at 668-673. A witness is a person who bears testimony against the accused in the form of a formal statement to government officers. *Crawford*, *supra* at 1364. The Sixth Amendment bars 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 1365. In the present case, Hernandez's preliminary examination testimony was clearly testimonial,<sup>4</sup> and, as a result, it could only be properly admitted against defendant if Hernandez was both unavailable and defendant had the prior opportunity to cross-examine him.

A witness is considered unavailable if 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." MRE 804(a)(5). "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The good-faith effort standard is identical to the due diligence standard. See *id.* at 682-683 n 11. As already noted, defendant's trial counsel conceded that Smith had exercised proper due diligence in attempting to obtain Hernandez as a witness. However, even if defendant had not conceded this issue, we would hold that the prosecution's efforts to obtain Hernandez complied with the diligent good-faith effort requirement necessary to establish that he was unavailable.

Detective Smith testified that a subpoena was issued to compel Hernandez's attendance as a witness for the original trial date of September 22, 2003.<sup>5</sup> Smith stated that he attempted to locate Hernandez at his residence on two occasions. On the first occasion, one of Hernandez's brothers said he no longer lived there and on the second occasion, Hernandez's sister said she did not know where he lived. Smith then testified that when the trial was adjourned to the 29<sup>th</sup> he attempted to serve the new subpoena by going to the same home, to no avail. Smith said he also did a record check to see if Hernandez was in the county jail, but found that he was not there. Smith then learned that Hernandez had some bench warrants and that he was on probation. Smith testified that Hernandez' probation officer did not have a current address for him and that he (Smith) had been unable to learn where Hernandez was currently living. After this Smith made out a material witness form and had the prosecutor's office issue another bench warrant. Smith also said he checked the LEIN<sup>6</sup> system to see if Hernandez had been picked up on these warrants. As already noted, defendant's trial counsel expressed concern that Smith had not checked to see if Hernandez was being held in any of the neighboring counties' jails and, as a result of this concern, the trial court instructed Smith to check those counties during the

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<sup>4</sup> See *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1364; 158 L Ed 2d 177 (2004) (noting that ex parte testimony at a preliminary hearing is always testimonial).

<sup>5</sup> Defendant erroneously states that Smith received the subpoena on September 22 and that Smith's attempts to locate Hernandez on the "eve of the trial" constituted a failure to exercise due diligence.

<sup>6</sup> LEIN stands for Law Enforcement Information Network.

overnight break. The next morning Smith verified that Hernandez was not being held in any of the neighboring counties' jails.

Due diligence requires the investigating officer to do everything reasonable, not everything possible, to obtain the presence of the witness. *People v Cumming*, 171 Mich App 577, 585; 430 NW2d 790 (1988). In *Bean*, our Supreme Court granted the defendant a new trial because the investigating officers in that case did not exercise due diligence in attempting to locate the witness. *Bean, supra* at 684-685. The Court noted that the officers never visited the home of the witness' grandmother, with whom the witness said he was living, and never attempted to follow-up leads on the witness' mother's whereabouts. *Id.* at 689. Likewise, the officers never checked jails, hospitals, and morgues, or contacted the utility companies or government agencies. *Id.* Prior to Smith's attempts to serve Hernandez with a subpoena, the prosecution had no reason to believe that Hernandez would be difficult to locate. As a result, unlike the case in *Bean*, Smith had very little information upon which to conduct an investigation and virtually no leads as to his whereabouts. Despite this, Smith made several attempts to locate Hernandez. He visited Hernandez' home and contacted two of Hernandez' relatives, who were of no assistance in locating Hernandez. Smith also contacted Hernandez' probation officer and filled out a material witness warrant for him. Finally, Smith checked the LEIN system to see if Hernandez was being held in jail. Under these circumstances, we would find that Smith exercised due diligence in attempting to locate Hernandez.

Having determined that Hernandez was properly considered unavailable, we must now determine whether defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 1365. Our Supreme Court has held that the preliminary examination testimony of a witness is admissible at trial where the witness is unavailable and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998).<sup>7</sup> Whether a defendant had a similar motive to develop the 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).

Defendant contends that preliminary examinations have a more "relaxed ambiance" and, at a preliminary examination, defense attorneys are motivated more by an interest in discovery than by a desire to test the reliability of the witnesses' testimony. We disagree. Hernandez' preliminary examination testimony was originally elicited by the prosecution to establish defendant's guilt and was introduced in the actual trial for the same purpose. Likewise,

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<sup>7</sup> The *Meredith* Court also noted that the Confrontation Clause required a showing that the "testimony bears satisfactory indicia of reliability." *People v Meredith*, 459 Mich 62, 68; 586 NW2d 538 (1998), quoting *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). However, *Crawford* clarified that the Confrontation Clause's ultimate "goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but rather that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford, supra* at 1370. Consequently, the Confrontation Clause does not require further indicia of reliability beyond the prior opportunity of cross-examination.

defendant's trial counsel, who was the same at both the preliminary examination and trial, cross-examined Hernandez at the preliminary examination in an effort to prove that defendant did not commit the crimes for which he was charged. Consequently, defendant had an opportunity to cross-examine Hernandez and his motive in doing so was the same. Because Hernandez was unavailable as required by the Confrontation Clause and defendant had the prior opportunity to develop his testimony through cross-examination, Hernandez' preliminary examination testimony was properly admissible.

### III.

Finally, defendant argues that the trial court erred when it ordered defendant to pay restitution to one of the stabbing victims without making factual findings regarding the amount of the restitution. Defendant's argument is without merit.

We review a trial court's order of restitution for an abuse of discretion. *People v Guajardo*, 213 Mich App 198, 202; 539 NW2d 570 (1995). A trial court is required to order a defendant convicted of a crime to make full restitution to his or her victims. MCL 769.1a(2); MCL 780.766(2). This restitution includes an amount equal to the reasonably determined cost of medical and related professional services. MCL 769.1a(4)(a); MCL 780.766(4)(a). At the sentencing hearing, the trial court ordered defendant to pay \$1,000 to one of the stabbing victims to reimburse that victim for his medical deductible. Defendant did not object to the amount of the restitution and did not request an evidentiary hearing. A trial court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution, but rather it is incumbent on defendant to make a proper objection. *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997). This failure constituted a waiver of his right to an evidentiary hearing and "he cannot now argue that he was denied due process." *Id.* at 276. Furthermore, at the hearing on defendant's motion for a new trial, the trial court indicated that the amount of restitution awarded was based on a figure in the presentence investigation report and such an amount is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information. *Id.* at 276-277 n 17. Not only has defendant failed to challenge this amount, he has not even provided this Court with a copy of the presentence investigation report. Consequently, there is no error to review.

Affirmed.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Jessica R. Cooper