

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS JEREMIAH DECOSEY,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 283051

Kent Circuit Court

LC No. 07-004732-FC

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, felonious assault, MCL 750.82, and extortion, MCL 750.213. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 10 to 20 years' imprisonment for assault with intent to do great bodily harm less than murder, 5 to 10 years' imprisonment for carrying a concealed weapon, 5 to 10 years' imprisonment for felon in possession of a firearm, 2 years' imprisonment for possession of a firearm during the commission of a felony, 4 to 8 years' imprisonment for felonious assault, and 18 to 40 years' imprisonment for extortion. The felony-firearm sentence runs consecutive to the remaining counts, which are concurrent to each other. For the reasons set forth in this opinion, we affirm, but remand to correct the Sentencing Information Report.

I. Facts

Defendant's convictions arise out of an assault that occurred at the apartment of his former girlfriend Nachica Wheeler. Defendant arrived at Nachica's apartment and physically assaulted her, pointed a gun at her head, and threatened to kill her, while demanding that she telephone her brother and convince him to come to the apartment. Nachica's brother Rico Wheeler and her cousin Taylor Wheeler witnessed portions of the incident, and all three testified at the preliminary examination. All three witnesses, however, failed to appear to testify at trial, and the prosecutor requested that the preliminary examination testimony be admitted as former testimony under the MRE 804(b)(1) hearsay exception. Defense counsel requested an adjournment to provide police with more time to locate the witnesses. However, after defense counsel agreed that the police and prosecutor had done all they could to locate the witnesses, the trial court admitted the preliminary examination testimonies of all three witnesses.

II. Analysis

A. Confrontation

Defendant claims that the prosecutor did not show due diligence in attempting to produce the witnesses for trial and, therefore, the witnesses were not “unavailable” under MCR 804(b)(1). Defendant asserts that the trial court’s admission of the preliminary examination testimony violated his right to confront the witnesses against him. Defendant failed to preserve this issue for review. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Generally, we review whether a defendant was denied his or her right to confrontation de novo, *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000), and we review a trial court’s finding of due diligence for clear error because it is a finding of fact. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A trial court’s finding is “clearly erroneous” “if the reviewing court has a definite and firm conviction that a mistake has been committed...” *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). However, unpreserved constitutional errors are reviewed for plain error affective substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

MRE 804(b) is an exception to the prohibition against the admission of hearsay statements. The rule states:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The Confrontation Clause excludes the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, the testimonial nature of the witnesses’ statements at the preliminary examination, and whether defendant had an opportunity to cross-examine the witnesses at that proceeding are not at issue. Rather, defendant claims the three witnesses were not “unavailable” because the prosecutor did not exercise due diligence in attempting to locate the witnesses. In *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968), the United States Supreme Court explained that a witness is “not ‘unavailable...’ [for confrontation clause purposes] . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Michigan evidentiary law essentially applies this same standard in the context of MRE 804(a)(5) to determine if a witness is “unavailable” for application of the rules of evidence. Under the rule, a witness is unavailable if he or she is absent after the prosecutor has shown due diligence was exercised in attempts to locate the absent witness. See *Briseno*, *supra*. This 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.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Here, with respect to Rico Wheeler, the police went to his residence, left messages at his residence, and sent officers to his residence on the morning of trial. Defense counsel agreed that there was nothing more the police could do to locate Rico, and declined the trial court's offer to hold a hearing to determine what additional efforts had been made to locate the witnesses. With respect to Taylor Wheeler, the prosecutor did not have a reason to suspect that he would fail to appear on the day of trial. The prosecutor made contact with Taylor three days before trial, and Taylor indicated that he was aware of the trial and appeared prepared to testify at that time. The prosecutor obtained contact information from Taylor himself, and left messages for him; the police were sent to his residence on the morning of the trial and defense counsel agreed there was nothing more that could be done to locate the witness. After reviewing the entire record, we conclude the trial court did not commit clear error when it found the prosecutor had exercised due diligence in attempting to locate Taylor and Rico. *Briseno, supra* at 14. On the record before us, the witnesses were unavailable. Defendant also had a prior opportunity to cross-examine the witnesses, and defendant was not denied his Confrontation Clause rights when the trial court admitted their preliminary testimony pursuant to MRE 804(b)(1). *Crawford, supra* at 42. Admission of the preliminary examination testimonies of Rico and Taylor did not amount to plain error on the record. *Carines, supra*.

With respect to Nachica, defendant waived any right to confront her because the record shows that defendant's own wrongdoing was the cause of her unavailability. In *Crawford, supra* at 62, the Court stated "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds." The Court referenced *Reynolds v United States*, 98 US 145, 158-159; 25 L Ed 244 (1879), where the Court stated:

[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; *but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.* The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; *but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.* If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. [*Reynolds, supra* at 158 (emphasis added).]

Here, Detective Timothy DeVries testified that he reviewed telephone calls placed from the Kent County Jail by defendant before the start of trial. Defendant telephoned Nachica and informed her that he loved her and that the two would be married after he was released. Nachica agreed not to appear at court or cooperate with the detectives. Defendant telephoned another friend and stated he planned on continuing a relationship with a woman named Brittany after his release, but, according to DeVries, defendant indicated that he "needed Nachica to cooperate, not come into court, so she was supposed to think that he was going to be coming back to her" Because defendant manipulated and influenced Nachica so that she refused to cooperate with police and failed to appear at court to testify, defendant waived any right to confront Nachica at trial pursuant to the doctrine of forfeiture by wrongdoing. *Crawford, supra* at 62; *Reynolds, supra* at 158; *Giles v California*, ___US___; 128 S Ct 2678; 171 L Ed 2d 488 (2008) (holding forfeiture doctrine applies when actions are undertaken for the purpose of preventing a witness

from testifying). Defendant has failed to show that the admission of Nachica's preliminary examination testimony amounted to plain error on the record. *Carines, supra*.

Defendant also contends the trial court violated his due process rights when it refused to grant his request for an adjournment. Defendant did not raise a due process challenge at trial and, therefore, our review is limited to plain error affecting substantial rights. See *Bauder, supra; Carines, supra*.

A request for an adjournment is governed by MCR 2.503(B)(1), which requires that the request be based on "good cause." Whether a trial court's decision to deny a request for an adjournment violates a defendant's due process rights depends on the facts and circumstances of the case, "particularly in the reasons presented to the trial judge at the time the request is denied." *People v Holleman*, 138 Mich App 108, 112; 358 NW2d 897 (1984) (quotations omitted). Here, the trial court did not abuse its discretion in denying defendant's request for an adjournment or violate defendant's constitutional rights; thus, there was no plain error. As discussed, the prosecutor and police made numerous attempts to locate the missing witnesses and defense counsel agreed there was not much more that could be done to locate them. A review of the efforts put forth in attempting to find the missing witnesses suggests further efforts to locate the witnesses would have been futile even with additional time. There was no good reason to adjourn the trial where extensive efforts had already failed to procure the witnesses.

Defendant further argues that the trial court's admission of Officer Patrick Baker's testimony describing the content of a detailed statement Nachica gave to him minutes after the incident violated his Confrontation Clause rights because the statement was testimonial in nature and he did not have the opportunity to cross-examine Nachica at the time she made the statement. The trial court admitted the officer's testimony under MCL 768.27c(1) (statement by declarant involving domestic assault and contains elements of trustworthiness). Defendant failed to preserve this issue for review because he did object to the evidence at trial on Confrontation Clause grounds. *Bauder, supra*. Therefore our review is for plain error affecting substantial rights. *Carines, supra*.

Nachica provided a statement to police after defendant was arrested, and at a time when no ongoing emergency existed; therefore, we conclude that the statement was testimonial in nature pursuant to *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Accordingly, because defendant did not have an opportunity to cross-examine Nachica at the time she made the statement, its admission at trial would ordinarily violate defendant's Confrontation Clause rights pursuant to *Crawford, supra*; and *Davis, supra*. However, the doctrine of forfeiture by wrongdoing is not dependant upon a prior opportunity to confront a witness, *Giles, supra* at 2689-2690. For the same reasons discussed above, we find that defendant has waived any Confrontation Clause claim with respect to the statement provided by Nachica to Officer Baker. *Crawford, supra* at 62; *Reynolds, supra* at 158; *Giles, supra*.

B. Sentence

Defendant also contends that the trial court erroneously scored Offense Variables (OVs) OV 4, MCL 777.34; OV 7, MCL 777.37; OV 8, MCL 777.38; and OV 9, MCL 777.39. We review a sentencing court's scoring decision to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."

People v McLaughlin, 258 Mich App 635, 671; 672 NW2d 860 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Additionally, we review interpretation of the applicable statutes de novo. *McLaughlin, supra*.

MCL 777.34 governs the scoring of OV 4, and ten points is scored if “Serious psychological injury requiring professional treatment occurred to a victim.” Here, the evidence shows that defendant choked the victim, slammed her head against a door, threw her to the ground, pointed a gun at her head, and repeatedly threatened to kill her. In addition, the victim told Officer Baker that she believed she was going to be shot on several different occasions. Moreover, Officer Baker testified that the victim was crying hysterically and hyperventilating, and on that basis, he sought medical attention for her. The evidence supports scoring OV 4 at ten points.

MCL 777.37 governs the applicability of OV 7. It relates to aggravated physical abuse and is scored at 50 points if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37. We hold that the same evidence discussed above supports the trial court’s finding that defendant engaged in conduct designed to substantially increase the fear and anxiety of Nachica during the offense. Therefore, the trial court properly scored OV 7 at 50 points.

We disagree, however, that there was evidence in the record that supports the trial court’s scoring of OV 8 at 15 points. MCL 777.38 relates to victim asportation or captivity and 15 points is scored if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” “Asportation,” in terms of OV 8, involves movement in furtherance of the crime that is not incidental. *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). Here, the record shows that only incidental movement around the interior of the apartment took place, and that defendant did not hold Nachica or any other victim captive longer than necessary to complete the ongoing crime of extortion. While we find error, however, rescoring OV 8 at zero points would not result in a difference in the recommended minimum sentencing range under the legislative guidelines. See MCL 777.63 (Class B); 769.11 (habitual offender). Thus, defendant is not entitled to resentencing, *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), although correction of the Sentencing Information Report is appropriate.

MCL 777.39 governs the application of OV 9, which is scored at ten points where two to nine victims are placed in danger of physical injury or death. Here, Nachica informed Officer Baker that both Taylor and a friend were present when defendant was choking her, when he threw her to the ground, and when he forced her to telephone her brother. Defendant had a gun and was waving it around. This evidence supports the trial court’s finding that two people were placed in danger of physical injury or loss of life when defendant committed the act of extortion. The trial court properly assessed 50 points for OV 9.

Defendant further contends that he was denied his due process rights when the trial court refused to credit him 232 days credit for time served in jail. Defendant does not contest that he was on parole at the time he committed the offenses in the instant case; therefore, pursuant to

People v Filip, 278 Mich App 635, 640; 754 NW2d 660 (2008), we find the trial court properly declined to award him credit for time served in this case.

Affirmed, but remanded with instructions to correct the scoring of OV 8 on the Sentencing Information Report. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra