

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAZ MORRIS DARNALL,

Defendant-Appellant.

---

UNPUBLISHED

August 25, 2009

No. 281999

Macomb Circuit Court

LC No. 2007-001715-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of second-degree murder, MCL 750.317. He was sentenced as a second-offense habitual offender, MCL 769.10, to 30 to 70 years in prison. We affirm defendant's conviction and sentence.

Defendant first argues that his right of confrontation was violated by admission of the prior testimony of a missing witness—his wife Sarah—because the prosecutor failed to exercise due diligence in producing her for trial. We disagree. Because defendant failed to preserve this argument, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Sarah had two opportunities to testify before trial. The first was at defendant's preliminary examination on the charge of assault with intent to commit murder, MCL 750.83. However, Sarah invoked her right not to testify against her husband at this hearing. After the victim died, the original charge was dismissed and defendant was charged with second-degree murder. Sarah did testify at the preliminary examination held on the second-degree murder charge.

The Confrontation Clause guarantees an accused the right to confront the witnesses against him. US Const Am VI; Const 1963, art 1, § 20. However, 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 being admitted had an opportunity and similar motive to cross-examine the witness at that time. MRE 804(b)(1); *People v Farquharson*, 274 Mich App 268, 272, 275; 731 NW2d 797 (2007). MRE 804(a)(5) requires a showing that the proponent of evidence exercised due diligence in attempting to procure the missing witness's attendance. See *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). "The test [for due diligence] 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.* at 684 (citations omitted).

Here, Warren Police Department Detective Keith Keitz testified that he attempted to personally serve Sarah at her last known address. He also attempted to contact her by telephone, but her last-known number had been disconnected. Keitz then asked Jerry Didorosi, Sarah and defendant's former roommate, to have Sarah call. Keitz spoke with her the week before trial and she provided him with a call-back number. He called that number at least three times in the days leading up to trial, leaving unanswered messages for her to return his call. Keitz then tracked that number to an address in Roseville, and he went to that address and left his card. When Sarah subsequently contacted him, she stated that she would be at Didorosi's house the morning of trial for a ride to the courthouse. However, she did not show up. Given these efforts, we conclude that the trial court properly determined that the police department exercised due diligence in this case. *Id.*

While defendant asserts that the police failed to exercise due diligence because they did not pursue "very obvious areas of investigation," such as checking with Sarah's family, the secretary of state, the post office, utility companies, police databases, local hospitals, or local shelters, or by examining Didorosi under oath as to his knowledge of Sarah's whereabouts, the police department was not required to investigate these additional avenues. "Due diligence is an attempt to do everything reasonable, not everything possible, to obtain that presence of a witness." *People v Howay*, 222 Mich App 104, 107; 564 NW2d 72 (1997).

Defendant also asserts that his right of confrontation was violated because he did not cross-examine Sarah as extensively at the preliminary examination as he would have at trial because the burdens of proof are different at the two proceedings. While the nature of a preliminary examination is different from that of a trial, Sarah's credibility was in issue in both circumstances. Thus, we must consider not whether defendant chose not to pursue the matter because of differing burdens of proof, but whether he had a similar motive to develop her testimony. In this analysis, we are guided by the following non-exhaustive list of applicable factors:

- (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue";
- (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and
- (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities). [*Farquharson, supra* at 278 (citation omitted).]

Here, defendant had an opportunity and similar motive to discredit Sarah's testimony at both preliminary examinations and at trial. If defendant chose to forgo his opportunity to do so, that was a strategic decision and not an incursion on constitutional rights. Accordingly, because defendant had an opportunity and similar motive to cross-examine Sarah at the preliminary examinations, her prior testimony was admissible under both MRE 804(1)(b) and the Confrontation Clause. No plain error is shown. Further, because counsel cannot be faulted for failing to raise a futile objection, *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004), we also reject defendant's claim of prosecutorial misconduct predicated upon defense counsel's handling of Sarah's unavailability.

Next, defendant argues that he was denied a fair trial by several instances of prosecutorial misconduct. Again, we find no plain error requiring reversal. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first argues that the prosecutor was improperly appealing to the sympathy of the jury when he referred to Sarah and Didorosi's fear of defendant during his opening statement, during his closing argument, and during testimony of certain witnesses. It is indeed improper for a prosecutor to appeal to the jury's sympathy for a victim. *Id.* at 591. Here, however, the prosecutor was not improperly appealing to the sympathy of the jury for the victim by commenting on Didorosi and Sarah's testimony about their fear of defendant. Rather, it is clear from the context in which these comments were made that the prosecutor was trying to explain to the jury why Didorosi and Sarah did not immediately call 911, and why Sarah never showed up for trial and Didorosi was a day late.

We also reject defendant's contention that the prosecutor improperly introduced and commented on bad acts evidence. This assertion also is focused on testimony by Sarah and Didorosi regarding their fear of defendant. As we just observed, it is clear from the context of the trial that the testimony was offered for the proper purpose, not to show defendant's bad character or propensity to commit a crime. Therefore, because the evidence "did not involve an intermediate inference of character, MRE 404(b) was not implicated." *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2005), citing *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994).

Defendant also argues that the prosecutor's remarks that "Jerry puts his trust in the legal system" and "the witnesses get up here with their fear, it's important to them as well" were improper appeals to the jury to return a conviction as part of their civic duty. See *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). A civic-duty argument appeals to the jurors' fears and prejudices or urges the jury to convict the defendant for the good of the community, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); the cited remarks do neither.

Defendant further argues that the prosecutor improperly disparaged defense counsel. He refers this Court to the following excerpt from the prosecutor's rebuttal closing argument:

It's easy for him [defense counsel] to get up and say they should've done this, and they should've done that. I was a prosecutor in Detroit for a number of years and that was the best, that was the favorite argument by defense counsel. Get up and rip on the Detroit Police Department. They could've done this, this, this and this. It's not CSI. It's not CSI.

The prosecutor may not question defense counsel's veracity or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Here, however, the prosecutor's comments are responsive to defendant's trial argument that the police department should have done more in this case. Such a responsive argument is not improper. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). In any event, the trial court properly instructed the jury that the lawyers' statements and arguments were not evidence that could be considered during deliberations, and we see nothing precluding application of the well established legal principle that the jurors are presumed to have

diligently followed their instructions. See, e.g., *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also contends that it was prosecutorial misconduct for the prosecutor to vouch for the people's case. A prosecutor may not improperly vouch for the defendant's guilt by using the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Here, in rebuttal argument, the prosecutor stated, "We charged it as a second degree murder 'cause that's what it is." Defendant argues that by making this statement, the prosecutor improperly used his power of office to persuade the jurors that they should disregard the law given by the court, thereby assuring them that the only appropriate charge was second-degree murder.

However, the prosecutor did not imply that the jury should disregard the law given by the trial court, nor did he use "the prestige of his office" to persuade the jury. Rather, the prosecutor's remarks were in direct response to defense counsel's assertion that this case should have been charges as an involuntary manslaughter, not second-degree murder. "An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson, supra* at 593.

There being no misconduct on the part of the prosecutor, there is no cumulative effect warranting reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546, 577 (2007). Similarly, there being no prosecutorial misconduct, counsel cannot be faulted for failing to object. *Moorer, supra*, 262 Mich App at 76.

Finally, we reject defendant's argument that he is entitled to resentencing because the trial court's minimum sentence of 30 years was motivated by vindictiveness. He argues that doubling the 15-year minimum sentence agreed to as part of his plea bargain shows that the court was punishing defendant for exercising his constitutional right to trial by jury because, defendant maintains, there was no other reason for such an increase from the *Cobbs*<sup>1</sup> evaluation.

While defendant refers this Court to the remarks made by the trial court at the time his plea was withdrawn, he fails to show how these remarks actually affected his sentence, which was imposed three months later. Further, the trial court did articulate a reason for the increased sentence. Specifically, the court noted that it believed that defendant actually committed first-degree murder in this case, and that he got a break by the prosecutor not charging him with that crime. This was consistent with what the court indicated when the plea was withdrawn, i.e., a discomfort with imposing a 15-year minimum given the brutality of the crime. In essence, the court was not signaling to defendant that he was going to be punished for exercising his right to trial, but that he was going to get an unwarranted break if he chose to plead guilty. In addition, by withdrawing his negotiated plea, defendant gave up the people's waiver of his habitual offender status, which increased his possible sentence range in the event he was convicted. Consequently, defendant's sentence fell within the recommended minimum sentence range of the guidelines, so it is presumed to be proportionate and must be affirmed. MCL 769.34(10).

---

<sup>1</sup> *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Alton T. Davis