

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 14, 2013

v

BRUCE MATHIS,

No. 305687
Wayne Circuit Court
LC No. 11-002170-FC

Defendant-Appellant.

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 3 to 20 years for the AWIGBH conviction and 3 to 10 years for the felon-in-possession conviction. He was also sentenced to a consecutive term of two years in prison for the felony-firearm conviction. We reverse.

Defendant argues that the trial court abused its discretion by denying his request to read the missing witness jury instruction, CJI2d 5.12. We agree.

We review for an abuse of discretion the trial court's determination of due diligence and the appropriateness of a missing witness jury instruction. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004); see also *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

We conclude that the trial court misapprehended the law regarding due diligence, resulting in an abuse of discretion. We further conclude that the prosecutor did not exercise due diligence in its attempts to locate Mancil Brannon, a *res gestae* witness endorsed by the prosecution.

A *res gestae* witness is someone who has "witness[ed] 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). "A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles*, 260 Mich App at 388. In fact, the prosecution is required to produce a listed witness at trial even if the prosecution was not actually required to

endorse the witness in the first instance. See *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991).

“A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence.” *Eccles*, 260 Mich App at 388. “Due diligence” is the attempt to do everything reasonable to obtain the presence of a witness, not everything possible. *Id.* at 391; see also *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). “If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness’s testimony would have been unfavorable to the prosecution’s case.” *Eccles*, 260 Mich App at 388; see also CJI2d 5.12.¹ A prosecutor’s efforts to secure a witness must be reasonable based 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.” *Bean*, 457 Mich at 684.

The trial court abused its discretion when it determined that defendant was not entitled to the missing witness jury instruction set forth in CJI2d 5.12. First, the trial court misapplied the law regarding what prosecutorial actions constitute due diligence in general. Second, the trial court incorrectly concluded that the prosecution’s efforts in locating Brannon constituted due diligence in this case.

The prosecution endorsed Brannon as a witness. However, on the day of trial, the prosecution notified the court and defendant that Brannon would not testify because the prosecution could not locate him. To establish that it exercised “due diligence,” the prosecution was required to prove that it attempted to do everything reasonable in order to obtain Brannon’s presence at trial. *Eccles*, 260 Mich App at 391.

The trial court based its decision, in part, on the erroneous assumption that defendant was required to show that the missing witness would have testified in his favor. As previously discussed, a defendant is entitled to a missing witness jury instruction whenever an endorsed witness cannot be located and the prosecution has not exercised due diligence in locating the witness. “[A] trial court’s misapplication or misunderstanding of the law in reaching its decision . . . may constitute an abuse of discretion.” *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669 (2002), rev’d on other grounds 468 Mich 678 (2003).

Moreover, the trial court applied the wrong law to its analysis. As explained earlier, due diligence “is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness.” *Eccles*, 260 Mich App at 391. But the trial court determined that the prosecution exercised due diligence in its attempts to locate Brannon because “some effort was made.” “[S]ome effort” is not enough to prove due diligence. Because the court applied a lower standard to the facts of this case when a higher standard was required by law, the court’s decision fell outside the range of reasonable and principled outcomes and therefore constituted an abuse of discretion.

¹ The missing witness jury instruction, CJI2d 5.12, provides that the jury may infer that the missing witness’s testimony “would have been unfavorable to the prosecution’s case.”

The prosecution's efforts to locate Brannon did not constitute due diligence. According to Investigator Philip Wassenaar of the Detroit Police Department, the Detroit Police exercised very little effort to locate Brannon. Wassenaar was unsure if he ever spoke with Brannon at any time during the investigation, and he admitted that he never documented any of the efforts to locate Brannon. Wassenaar's only attempts at locating Brannon and ensuring his attendance at trial included issuing a subpoena and going to an address given to investigators by Brannon, which turned out to be a vacant home. It is unclear from the testimony whether Brannon actually received the subpoena. In addition, the prosecutor said the phone numbers she had for Brannon were disconnected; neither Wassenaar nor the prosecutor attempted to obtain a new working phone number for Brannon. While these actions were reasonable first steps, they were only *some* reasonable efforts to locate Brannon, not *every* reasonable effort as required by this Court's decision in *Eccles*.

In *Bean*, 457 Mich at 685-687, our Supreme Court determined that the prosecution had failed to exercise due diligence because, although the police made several attempts to locate the missing witness in the Detroit area, once the officers learned that the witness had moved to Washington, D.C., they ended their search. Because the police took no steps to locate the witness "in the area to which [he] evidently moved," the *Bean* Court determined that "the steps taken . . . did not constitute due diligence." *Id.* at 690.

In this case, like in *Bean*, the prosecution stopped searching for Brannon each time its first attempt was fruitless. For example, no efforts were made to contact Brannon by telephone after the prosecution reached disconnected numbers. Moreover, it does not appear that the prosecution or police even looked for an accurate phone number. They did not interview anyone close to Brannon, the other witnesses to the crime, or any family members who might have provided an accurate phone number. Similarly, Wassenaar made no attempt to determine if any of the neighbors living near the vacant home knew where Brannon lived. Instead, Wassenaar simply ended his search when he discovered that the house was vacant.

The prosecution took only minimal steps to ensure Brannon's presence at trial and did not "do everything reasonable," *Eccles*, 260 Mich App at 391, to locate Brannon. Thus, the trial court abused its discretion when it determined that defendant was not entitled to the missing witness jury instruction.

This is not the end of our inquiry, however. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495.

We conclude that it is more probable than not that the trial court's failure to give the missing witness jury instruction affected the outcome of defendant's trial. Unlike *Lukity*, the present case *did* "present a simple credibility contest between [the victim] and defendant." *Id.* at 496. The victim and defendant were the only testifying witnesses who were present at the time of the dispute. If the jurors had been given the missing witness instruction, they could have

inferred that another eyewitness to the incident would have testified in favor of defendant, who claimed that he never shot the victim. This easily could have led the jury to conclude that defendant was not guilty and that defendant did not possess a gun. Defendant was prejudiced by the outcome-determinative error and is consequently entitled to a new trial.

Reversed.

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro