

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LAMONT RAY,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 262728

Calhoun Circuit Court

LC No. 03-003370-FC

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to 6 to 20 years' imprisonment for the assault conviction, 3 to 10 years' imprisonment for the felon in possession conviction, and 2 years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand for the ministerial task of making a correction in defendant's judgment of sentence, which inaccurately denotes that defendant was also found guilty of assault with intent to commit murder, MCL 750.83.

On appeal, defendant first argues that the trial court erred in concluding that the victim, Danny Troup, was unavailable to testify at trial under MRE 804(A)(5) and erred in admitting Troup's preliminary examination testimony in lieu of his testimony at trial. Decisions regarding whether to admit or exclude evidence are reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence[, and this] Court reviews questions of law de novo." *Id.* Additionally, the Confrontation Clause is implicated here, and we review constitutional issues de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause regardless of whether the statement is deemed inherently reliable, unless the witness is deemed unavailable to testify

and the defendant had a prior opportunity to cross-examine the witness. In the present case, Troup's testimony at defendant's first preliminary examination was indisputably testimonial in nature. Therefore, Troup's preliminary examination testimony could be admitted at trial if Troup was unavailable and defendant had a prior opportunity to cross-examine him.

A declarant may be unavailable as a witness when the declarant is absent and the proponent of the statement has been unable to procure his attendance by process or other reasonable means, and in a criminal case, due diligence must be shown. MRE 804(a)(5); *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). A declarant is constitutionally unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good-faith effort to obtain the declarant's presence at trial. *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). The party attempting to admit the former testimony must demonstrate that a reasonable, good-faith effort was made to secure the declarant's presence at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The test for due diligence "is one of reasonableness and depends upon 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, supra* at 684. A trial court's due diligence determination is reviewed for an abuse of discretion. *Id.*

In the present case, the record indicates that, between February 18, 2004, and the first day of trial on March 16, 2004, Battle Creek police cadets tried to locate Troup at eight different addresses. Several of these addresses were checked more than one time. The cadets also conducted a search for defendant using the police department's computer network, by conducting a "post office" search, and by checking the county jail. They also contacted Troup's family members, to no avail. They followed up on, and returned several times to, the address where Troup's girlfriend supposedly lived. They also followed up on a lead discovered at one address, where Troup returned monthly to pick up a check. Cadet Herbstreith staked out the address after he learned on March 15, 2004, that a check was there for Troup. He obtained the cooperation of the mission staff located at the address. Additionally, the person who usually cashed checks for Troup agreed to cooperate with police in locating Troup. The police were unable to find Troup and procure his attendance at trial.

We find that the trial court properly concluded that the prosecutor made reasonable, good-faith efforts to locate Troup before trial. The trial court did not abuse its discretion in finding due diligence. Additionally, there was no error in allowing the presentation of Troup's preliminary examination testimony at trial. Our review of the record indicates that defense counsel engaged in a lengthy cross-examination of Troup at the preliminary examination, during which he attempted to expose inconsistencies in Troup's testimony and undermine his credibility as a witness. In sum, Troup was unavailable, considering the prosecutor's exercise of due diligence, and defendant had a more than adequate opportunity to cross examine Troup at the preliminary exam. Therefore, there was no Confrontation Clause violation and no error with respect to the trial court's ruling.

Next, defendant claims several instances of alleged ineffective assistance of counsel. He additionally argues, in regard to his claims, that the trial court improperly denied his motion for a new trial or *Ginther*<sup>1</sup> hearing. Defendant preserved his claim of ineffective assistance of counsel by moving for a new trial based in part on ineffective assistance of counsel. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record. *Id.* A claim of ineffective assistance of counsel concerns a mixed question of fact and constitutional law that are reviewed, respectively, for clear error and de novo. *LeBlanc, supra* at 579.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Furthermore, decisions regarding what evidence to present are matters of trial strategy, and we will not assess the competence of such decisions with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call or question witnesses, or present other evidence, constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant’s first allegation of ineffective assistance arises out of his trial counsel’s failure to object to the admission of Troup’s preliminary examination testimony at trial. Considering that the trial court entertained testimony regarding due diligence, which related to the question of unavailability and ultimately to whether the preliminary examination testimony could be utilized, and that defense counsel argued that there was a two-week time period shortly before trial in which no search efforts were made, we cannot conclude that counsel failed to have

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the issue preserved or addressed. Moreover, assuming that defense counsel insufficiently preserved the issue, we concluded above that the trial court properly admitted the testimony at trial. Because an objection to the introduction of this evidence would have been without merit and futile, defendant has not shown that his trial counsel was ineffective. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

Defendant additionally claims that his trial counsel failed to adequately cross examine the prosecution's witnesses at trial and deprived him of a substantial defense. Although not lengthy, defense counsel's cross-examination of the prosecution's witnesses focused on the inconsistencies in each witnesses' testimony. Defendant's trial counsel employed a trial strategy, clearly aimed at highlighting the circumstantial nature of the evidence against her client and the lack of physical evidence linking him to the crime. And, while defendant claims that his counsel should have investigated an alibi defense and tried to identify the other alleged participants in the crime, he has not offered any support or theory relative to an alibi defense, nor any information that unidentified participants could be located. Defendant has not demonstrated that he was deprived of a substantial defense that might have affected the outcome of the trial. *Dixon, supra* at 398. He also has not demonstrated that different or more extensive cross-examination would have resulted in a different outcome at trial.

Defendant also argues that the cumulative impact of defense counsel's alleged deficiencies in his representation of defendant prejudiced him by rendering an unreliable trial result. He argues that he is entitled to reversal and a new trial. However, we have not identified any errors in counsel's representation that would warrant relief. Thus, reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Furthermore, we find that the trial court's denial of defendant's motion for a *Ginther* hearing was not error because either defendant did not provide arguments sufficient to suggest the need for an evidentiary hearing or the claims presented did not depend on facts contained outside the record.

In reviewing the issues presented, we found that defendant's judgment of sentence inaccurately indicates that defendant was convicted of assault with intent to commit murder. Although we affirm defendant's convictions and sentences, we remand for ministerial correction of the judgment of sentence to conform to the jury's verdict. Resentencing is not required.

Affirmed.

/s/ William B. Murphy  
/s/ Patrick M. Meter  
/s/ Alton T. Davis