STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN WAYNE HEATH,

Defendant-Appellant.

UNPUBLISHED
August 20, 2013

No. 310897
Kent Circuit Court
LC Nos. 11-011910-FH;
11-011911-FH

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Kelvin Wayne Heath appeals of right his jury convictions of two counts of unarmed robbery, MCL 750.530; and two counts of false personation of a public officer, MCL 750.215. The trial court sentenced him as a habitual offender, fourth offense, MCL 769.12, to serve concurrent sentences of 8 to 20 years in prison for each unarmed robbery and time served for the false personation counts. Because we conclude that there were no errors warranting relief, we affirm.

Heath's convictions arise out of a pair of robberies committed within two weeks of each other. In both cases, there was evidence that he used text messages to direct the victims to a particular apartment where they could purchase "massage" services. When the victims arrived at the apartment complex, Heath confronted them and identified himself as a police officer conducting a sting operation. Heath then took the victims' wallets to "check their identification" and took the victims' money. He then returned the wallets and told the victims that they were free to go.

The second victim, Barry Isaacson, testified that he was from Illinois but came to Grand Rapids for unspecified "business." He said he went to the apartment complex at issue for an "adult service." After Heath stopped him and took his money, Isaacson drove around the parking lot and saw Heath getting into his car. He drove up to Heath and took a picture of him with his phone's camera. He then called the number given as a contact for the massage service and Heath answered. Isaacson called the police department and, after an officer arrived at the parking lot, he gave the officer a copy of Heath's picture and the contact number. The officer traced the phone number to Heath and verified Isaacson's photo as a match for Heath's driver's license photo. The first victim later identified Heath as the person who robbed him.

On appeal, Heath argues that the trial court erred when it allowed the prosecutor to have Isaacson's preliminary examination testimony read into evidence. Specifically, he contends that the trial court erred to the extent that it determined that the prosecutor had exercised due diligence in procuring Isaacson's presence. He notes that there is no evidence that the prosecutor sought to obtain his presence under the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, see MCL 767.91 *et seq*., which, he maintains, precludes a finding of due diligence. This Court reviews a trial court's decision to permit the admission of evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). "However, this Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law." *Id.* at 91. This Court reviews de novo issues of constitutional law, such as the right to confront witnesses. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010). Heath's lawyer, however, did not contemporaneously object to the reading of Isaacson's testimony into the record. Rather, she first brought up the issue of confrontation in a motion for a mistrial. Therefore, this issue was not properly preserved and our review is limited to determining whether there was plain error affecting Heath's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). When a claim has been forfeited, we will only grant relief if we conclude that there was in fact an error, that the error was plain (i.e., was clear or obvious), and the error affected the outcome of the lower court proceeding. *Id.*

A criminal defendant has the right to confront the witnesses against him or her. *People v Yost*, 278 Mich App 341, 369-370; 749 NW2d 753 (2008). Generally, this includes the right to examine the witness at trial. *Rose*, 289 Mich App at 513. Nevertheless, the Sixth Amendment does not bar "testimonial statements by a witness who does not appear at trial" if the witness "is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Yost*, 278 Mich App at 370, citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Consistent with the exception to the right to confront witnesses, MRE 804(b)(1) provides that a witness' testimony from a prior hearing may be admitted into evidence when the declarant is unavailable "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A witness is unavailable if he "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). Whether the prosecution showed due diligence is a question of whether a reasonable, good-faith effort was made in attempting to procure the witness, not "whether more stringent efforts would have produced [him]." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). This determination is dependent on the facts and circumstances of each case. *Id*.

Although the record is sparse because the trial court did not conduct a hearing on the issue, it appears that the prosecutor knew Isaacson's home address and knew that Isaacson was reluctant to testify at trial; indeed, the prosecutor reminded the trial court that they took Isaacson's full testimony during the preliminary examination because he "was less than cooperative" even then and they wanted to be sure that they made a record. The prosecutor

indicated that Isaacson had been subpoenaed, but did not respond.[1] In the months leading to the trial, the prosecutor also made several unsuccessful attempts to contact Isaacson by telephone. No other efforts were made to secure his presence.

Heath's lawyer acknowledged that the prosecutor had attempted to get Isaacson to appear and that Isaacson refused to come, but nevertheless argued that the prosecutor could have done more to ensure his presence. On the basis of the existing record, the trial court apparently determined that the prosecutor had made sufficient efforts to establish due diligence in procuring Isaacson's presence. As such, the trial court determined that Isaacson was unavailable for purposes of MRE 804(b)(1) and determined that it was proper to read Isaacson's testimony from the preliminary examination into the record.

Here, the record was not fully developed and, for that reason, we cannot state with any degree of certainty that the prosecutor failed to exercise due diligence—that is, we cannot say that the trial court's implicit determination that the prosecutor's efforts were reasonable was on its face erroneous. *Bean*, 457 Mich at 684 (stating that the test is one of "reasonableness and depends on the facts and circumstances" unique to each case). As such, we cannot conclude that it was plain error to admit Isaacson's preliminary examination testimony.

Even if we were to conclude that the trial court plainly erred and the error prejudiced Heath's trial, this Court would nevertheless have to determine whether to exercise its discretion to grant relief. *Carines*, 460 Mich at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (quotation marks and citation omitted). Because Heath is not actually innocent and because any error does not—on this record—undermine the fairness, integrity or public reputation of judicial proceedings, Heath would not be entitled to the requested relief. *Id.*

Next, Heath argues that the trial court improperly scored offense variable (OV) 10 and OV 19. This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). However, because Heath did not object to the trial court's scores, our review is limited to plain error affecting his substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

The trial court must score OV 10 at 15 when the defendant uses predatory conduct to exploit a vulnerable victim. MCL 777.40. Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). This has been interpreted to not include all preoffense conduct, but only that which is predatory in nature, such as lying in wait. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). Vulnerability

[1] Because the subpoena was served in Illinois, it was not enforceable. See *People v Nieto*, 33 Mich App 535, 538 n 7; 190 NW2d 579 (1971).

refers to the victim's susceptibility to "injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The vulnerability need not be inherent in the victim, but can arise from the circumstances surrounding the offense. *Huston*, 489 Mich at 464.

On appeal, Heath argues that he did not engage in predatory conduct and that the victims were not vulnerable. The record evidence established that Heath lured the victims to a particular apartment so that when they arrived he could approach and rob them; a clear example of lying in wait. Moreover, the victims were vulnerable because Heath caused them to believe he was a police officer and exploited the victims' apprehension that they might be thought to be involved in an illegal activity. Indeed, the victims were susceptible to physical restraint because they believed Heath had the authority to restrain them. Accordingly, the trial court did not plainly err in scoring this variable.

The trial court had to score OV 19 at 10 points if the offender interfered, or attempted to interfere, with the administration of justice. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010). Interference with the administration of justice has been broadly construed to go beyond acts constituting obstruction of justice and includes interference with law enforcement officers. *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004). Here, Heath argues that he was incorrectly scored under OV 19 for making perjured statements without a specific finding that he committed perjury. But the trial court did not score this variable on that basis; it scored OV 19 because Heath made false statements to the police regarding whether he had been at the apartment complex where the robberies occurred. Giving false information to a police officer investigating a crime interferes with the administration of justice. *Id.* at 288. Accordingly, there was no plain error.

Next, in a Standard 4 brief, Heath argues that he was denied effective assistance of counsel. However, his allegations related to this claim are devoid of factual and legal support and amount to nothing more than a declaration of Heath's position. Therefore, we conclude that he has abandoned this claim of error on appeal. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Similarly, Heath argues in his Standard 4 brief that the prosecution engaged in racial discrimination by using peremptory challenges to exclude all African-Americans from the jury. Heath failed to raise this issue in his statement of questions presented, thus it is not properly presented for review. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). In any event, on reviewing the record, we can find no support for this claim; thus, he has not shown the existence of a plain error warranting relief. *Carines*, 460 Mich at 764.

There were no errors that warrant relief.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly