

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 9, 2014

v

LASHON TERREL HOLLMAN,

Defendant-Appellant.

No. 316571
Saginaw Circuit Court
LC No. 12-037099-FC

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial for first degree premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), torture, MCL 750.85, and carrying a dangerous weapon with unlawful intent, MCL 750.226. We affirm.

Defendant argues that his rights were violated when the police continued interrogating him after he unequivocally requested the assistance of counsel. We agree that the police interrogation was improper, but, in light of the other evidence against defendant, we hold that it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty even without the erroneously admitted statement.

Sometime between January 31 and February 2, 2012, Cassandra Nelson was killed in her apartment. She was stabbed 54 times in the back and neck. Her body also had slicing wounds on one cheek and on the hands. Nelson appeared to have been struck on the head with a television.

Defendant lived with his mother next door to Nelson and had gone with Nelson on January 30, 2012, when Nelson purchased a new smart phone with a slide-out keypad. Later that day, defendant's friend, Quamay Henne, witnessed defendant purchase a handful of Xanax pills from a woman who came to defendant's house. Afterward, Henne's girlfriend, Candice Parish, and her mother, Cynthia Parish, gave Henne and defendant a ride to Cynthia's apartment. Both Henne and defendant were high and drunk. Cynthia told Candice that the two men had to leave. Cynthia drove defendant to his house around midnight.

Shortly after midnight and before 1:00 a.m. on the morning of Tuesday, January 31, Nelson told her friend, Margaret Torres, that she needed \$20 to help an acquaintance avoid going to prison.¹ Torres refused. Around noon, Torres sent Nelson a text message and received no response. Torres attempted to call Nelson at 8:00 p.m. that evening and received a recorded message that the phone was either turned off or the number had been changed.

That same evening, defendant, Henne, Candice, and Cynthia, gathered at Cynthia's home. Cynthia stated that defendant "looked like he saw a ghost." Defendant privately told Henne that he had "got into it with somebody or whatever and I did some bullshit." Henne testified, "He told me that umm—that shit—he went to umm this chick house the chick was all drunk or high or some shit, started chasing him through the house, shit and he turned around, shit stabbed or something, whatever he said." Henne then indicated that defendant told him that he "stabbed the shit out of her." After this conversation, Cynthia overheard them talking about someone being killed. Also, Henne and Candice noticed that defendant had a cell phone with a slide-out key pad. When they saw him with it, defendant said that he "shouldn't have it," and that he should take the battery out. Candice also testified that defendant showed her scratches on his arm and told her he had gotten into a fight with a girl the night before.

Torres continued trying to contact Nelson and went to Nelson's apartment to check on her on Thursday, February 2, 2012. She knew Nelson took Xanax for seizures and was concerned that she might have had a seizure and been injured.² When Nelson did not respond, Torres called the police. Officers then discovered Nelson's body face down, clothed only from the waist up, with a large amount of blood around her. They also observed a television on the floor close to her head. Investigators found pillows, quilts, and a stuffed animal in Nelson's bedroom soaked with blood, indicating that Nelson had been lying on top of these items bleeding for some time. Investigators also observed "impact splatter" on the bedroom walls, indicating that a bloody object had been struck with some amount of force. Investigators discovered several bloody footprints, which were later identified as prints from a Nike "Swoosh" sneaker.³ Investigators discovered a breadknife and a black-handled steak knife both covered in blood. A single Budweiser beer can was also found at the scene. Investigators could not locate Nelson's cell phone, her Bridge Card, or any Xanax pills in her apartment. Later DNA testing revealed that defendant was the sole source of DNA on the beer can and a likely source of male DNA on

¹ Defendant had outstanding fines in Isabella County and went to pay them on Wednesday, February 1, 2012. Defendant was on probation at the time. The prosecution's theory was that defendant had asked Nelson for the money to pay these fines to avoid violating the terms of his probation.

² Joe Grigg, an investigator with the Saginaw County prosecutor's office, later confirmed through an electronic database that Nelson had been prescribed Xanax and that she had last had her prescription filled on January 24, 2012.

³ The prints matched the size and style of shoes later discovered in defendant's house, but forensic analyst David Bicigo stated that the shoes found in defendant's house had different "mold characteristics" and so were likely not the same shoes that made the impressions.

the handle of the breadknife. The DNA of Lionell Beckom, the other primary suspect in the case, was not found on any of the items tested by the crime lab.

Detectives Joseph Grigg and Ryan Oberle interviewed defendant on February 6, 2012, and asked him to come back the next day. Defendant did not appear for his second interview. When Cynthia Parish heard that Nelson had been killed, she called the police and told them about the conversation she had overheard. Cynthia, Candice, and Henne gave statements to the police on February 7, 2012. Based on these statements, and the fact that defendant had not showed up for his second interview, defendant was located and brought to the police station for questioning.

At the beginning of the second interview, defendant was given his *Miranda*⁴ warnings and agreed to waive them and talk to the police. After the detectives told defendant that they knew he had killed Nelson, defendant stated, “I didn’t do nothin’. No I did not. I want a lawyer. I really do, I want a lawyer, because you just told me what I did and I didn’t do nothin’. I want a lawyer.” The detectives then began photographing defendant’s hands and defendant voluntarily told the detectives about his various injuries. Detective Grigg then said, “Lashon, you asked for an attorney and that’s fine, you can get an attorney. If you don’t wanna talk to us anymore, that’s fine.” Defendant responded, “but I told you I wanted to go home, you’re telling me I did something that I didn’t do.” Detective Grigg then stated, “Well you know, you told [Quamay Henne] what you did,” and “You even told the girl how you got the scratches.” Defendant denied this, and Detective Grigg asked, “So they’re lying?” Detective Grigg then stated, “LaShon, this is—this is the way it is. If you want an attorney and you wanna tell me that you’re done talkin’ to me right now, I’m gonna walk out that room, that’s fine But, I’m gonna tell you this, [Henne] came down here and he told us what you told him.” Detective Grigg told defendant, “you said, ‘Quamay man, I fucked up. I killed that girl. I stabbed her.’ Exactly what you told him.” Defendant denied saying this, and Detective Grigg began questioning defendant about whether Henne was with defendant “when it happened.”

The questioning continued, and the detectives eventually informed defendant that he was not going to be released and that he would go to jail after the interrogation was over. Defendant asked, “How can I go to jail?” to which Detective Oberle responded, “LaShon, because you haven’t been honest with me. . . .” Defendant asked how long he would “have to sit in jail, pending for the investigation,” and Detective Grigg answered, “Might be tonight, might be tomorrow, might be the rest of your life.” The detectives began handcuffing defendant and defendant said, “He said I could finish talking to him.” Detective Grigg then said, “What, you don’t want a lawyer now?” Defendant stated, “Can I please call my mom right now, I’ll keep talking to you, I don’t want a lawyer, I’ll keep talking to you. I will keep talking to you, can you please just let me call my mom right now?”

Detective Oberle then told defendant that he was “100% positive” that defendant had killed Nelson and he only wanted to find out how it happened. Detective Oberle told defendant that he “had nothing to lose by telling the truth” and that he was “not tricking” defendant.

⁴ *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Detective Oberle continued questioning defendant, and eventually defendant stated that he was at Nelson's apartment when she was killed. Defendant denied involvement in the murder, and stated that Lionell Beckom was the person who stabbed Nelson.

Defendant moved to suppress his statements, arguing that the police continued to interrogate him after he unequivocally requested a lawyer, in violation of his constitutional rights under *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 378 (1981). The trial court suppressed a portion of the February 6, 2012 interview and a portion of the February 8, 2012 interview. It reasoned that the statements made after defendant stated that "he does not want a lawyer and will keep talking" should not be suppressed because they were made after waiving his right to an attorney. In closing argument, the prosecution argued that defendant's story was a fabrication and that the more reasonable explanation was that defendant himself had killed Nelson.

A trial court's factual findings in a ruling on a motion to suppress are reviewed for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard, review is de novo. *Id.*

The Fifth Amendment to the United States Constitution states: "nor shall [any person] be compelled in any criminal case to be a witness against himself. . . ." US Const Amend V. This clause applies to the states through the Fourteenth Amendment Due Process Clause. *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964). In *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court held that before subjecting a suspect to custodial interrogation, the police must warn the suspect that he has the right to remain silent and to have an attorney present if he does wish to speak to the police. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

A suspect can waive his *Miranda* rights, but the waiver must be knowing, intelligent, and voluntary. *Edwards*, 451 US at 482, citing *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). In *Edwards*, the United States Supreme Court held, "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 US at 484. The *Edwards* Court further stated that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. "[I]f the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v Illinois*, 469 US 91, 95; 105 S Ct 490; 83 L Ed 2d 488 (1984). The rule in *Edwards* has been described as an additional safeguard above and beyond the *Zerbst*

standard of a knowing, voluntary, and intelligent waiver. See *Maryland v Shatzer*, 559 US 98, 104; 130 S Ct 1213; 175 L Ed 2d 1045 (2010). This so-called “second layer of prophylaxis” is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” *Davis v United States*, 512 US 452, 458; 114 S Ct 2350; 129 L Ed 2d 362 (1994).

It is undisputed that defendant asserted his right to counsel. At issue is whether defendant subsequently initiated further discussion with the police and waived his right to counsel before making incriminating statements. In *Oregon v Bradshaw*, 462 US 1039, 1045-1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983), a four-justice plurality of the United States Supreme Court held that a suspect in police custody reinitiates further discussion with the police when he asks questions that “evinced[] a willingness and a desire for a generalized discussion about the investigation” and are not “merely a necessary inquiry arising out of the incidents of the custodial relationship.” The *Bradshaw* plurality stated, as an example of the latter, that a request for a drink of water or to use the telephone “are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.” *Id.* at 1045. On the other hand, the *Bradshaw* plurality would have held that a suspect who asks “what’s going to happen to me now?” has reinitiated discussion with the police and can subsequently waive his previously asserted right to counsel. *Id.*

In *People v Myers*, 158 Mich App 1, 11; 404 NW2d 677 (1987), this Court held that a suspect in custody waived his right to counsel after invoking the right when the police offered to call an attorney for him and, rather than calling the attorney, the suspect said, “let’s go on.” *Myers* discussed this Court’s previous holdings and distinguished *People v Lewis*, 47 Mich App 450; 209 NW2d 450 (1973), in which the defendant asked for an attorney and was told that one could not be obtained at such a late hour. *Myers*, 158 Mich App at 10. The defendant in *Lewis* then said, “Forget it.” *Id.* This Court held that the defendant’s words in *Lewis* did not constitute a waiver.

In this case the detectives continued interrogating defendant, as that term is defined in *Innis*, 446 US at 301, after defendant asserted his right to counsel. Defendant did not thereafter make an effective post-assertion waiver of his right to counsel under *Edwards/Bradshaw/Zerbst*. The record indicates that the police were aware that discussing defendant’s scratches would be “reasonably likely to elicit an incriminating response.” *Innis*, 446 US 301. Further, telling defendant what Henne and Candice Parish had said was reasonably likely to elicit an incriminating response. In *People v Kowalski*, 230 Mich App 464, 494-495; 584 NW2d 613 (1998), this Court held that the defendant “was interrogated in violation of *Miranda* when, after he asserted his right to counsel, the authorities informed him that his codefendant had made a statement.” *Kowalski* held that there could be no reason for informing the defendant that his codefendant had given a statement other than to encourage the defendant to reconsider his decision to request counsel. *Id.* at 495. Here, likewise, Detective Grigg expressly stated that it was fine if defendant wanted a lawyer, but that he first wanted to tell defendant that Henne had made a statement. When defendant responded to Detective Grigg’s statement about what Henne had said, the direct questioning resumed. The detectives informed defendant that he was going to jail because he would not tell them the truth. The detectives told him he might go to jail for the night or for the rest of his life. Defendant stated “I don’t want a lawyer” as he was being

handcuffed and taken to jail. After this exchange, the detectives told defendant that he had nothing to lose by telling the truth.

Rather than honoring defendant's request for counsel and immediately stopping the interrogation, the detectives continued to engage defendant in dialogue and informed him that they had evidence (Henne's testimony) that he had committed the murder. Defendant was "compelled" by the circumstances of his detention to continue talking to the detectives. Defendant eventually stated he did not want a lawyer only as he was being handcuffed in preparation to remove him from the interrogation room and take him to jail.

Because defendant effectively asserted his right to counsel and did not subsequently waive that right, it was error to admit defendant's statements after he invoked his right to counsel. *Miranda*, 384 US at 479. "The United States Supreme Court has determined that the erroneous admission of a confession into evidence is a nonstructural defect that does not justify automatic reversal but, instead, requires a harmless-error analysis." *People v Whitehead*, 238 Mich App 1, 7; 604 NW2d 737 (1999). "Before a constitutional error can be held harmless, 'the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" *Id.*, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). The court must determine, beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction." *Whitehead*, 238 Mich App at 7-8 (citations and internal quotation marks omitted). To determine whether evidence "contributed to the conviction," "[t]he properly admitted evidence must be quantitatively assessed to determine whether, had the improperly admitted evidence not been presented at trial, there is any reasonable possibility that a factfinder would have acquitted." *Id.* (citations and internal quotation marks omitted). "If the proof against defendant was so overwhelming that all reasonable jurors would have found guilt even without the confession being brought into evidence, the conviction must stand." *Id.* at 10.

The United States Supreme Court has held that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v Fulminante*, 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991). However, defendant's incriminating statements were not a confession. In fact, defendant expressly denied committing the crime. Defendant's statement can only be viewed as a confession that he was at the scene of the crime at the time it happened.

Considering that defendant's statements placed defendant at the scene of the crime, and that significant other evidence (including DNA evidence) also placed defendant at the scene of the crime, defendant's improperly admitted statements did not "contribute to the conviction," as that phrase is used in *Whitehead*. Cynthia Parish dropped defendant off around the time Margaret Torres last heard from the victim. The victim had a recently filled prescription of Xanax that was not found in her apartment. Defendant had purchased Xanax earlier in the day and, according to Henne and Cynthia Parish, was high on Xanax on the night in question. Henne's preliminary examination testimony that defendant told Henne he "stabbed the shit out of" the victim was also strong evidence of defendant's guilt. Defendant's DNA was a near-certain match for the DNA found on the beer can in the victim's apartment, and his DNA was a likely match for male DNA found on one of the knives used to murder the victim. Lionell Beckom was not a match for any of the DNA collected at the crime scene.

The police violated defendant's *Miranda/Edwards* rights by continuing to interrogate him after he unequivocally requested counsel. Accordingly, it was error not to suppress defendant's entire statement to police. However, given the other evidence against defendant, the error does not warrant reversal of defendant's convictions.

Defendant also argues that the trial court abused its discretion when it deemed Quamay Henne unavailable and admitted his preliminary examination testimony into evidence at trial. We disagree.

Henne did not appear at trial, and an evidentiary hearing was held on the third day of trial to determine whether Henne could be deemed unavailable for the purpose of MRE 804(a).⁵ Joseph Grigg⁶ stated that he found out on February 20, 2013, that Henne had been released from prison and was out on parole. Grigg faxed Henne's parole officer a subpoena, which the parole officer agreed to serve on Henne. Grigg made phone contact with Henne on March 5, 2013, and offered to arrange for Henne to travel to Michigan by plane, train, or bus. Henne told Grigg he would like to travel by train. Henne expressed concern that he would have a hard time traveling because he did not have any ID. Grigg told him to contact the Missouri Department of Corrections to see if he could get some type of ID. Grigg spoke to Henne again on March 11, 2013, and Henne still had not obtained ID. Henne also told Grigg that he was getting word through social media that he should not return to Michigan to testify. Grigg explained that defendant's mother had told Henne it would be best for her son if he did not testify. Henne told Grigg that he had been threatened and was concerned for his own safety. Grigg and Christi

⁵ MRE 804 states in relevant part:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

* * *

(b) Hearsay Exceptions. 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.

⁶ At the time of trial, Joseph Grigg worked for the Saginaw County prosecutor's office. His testimony covered events that occurred while he was an officer with the City of Saginaw Police Department.

Lopez, the office manager for the Saginaw County prosecutor, eventually arranged for Henne to travel by train on March 19, 2013. Henne told Grigg and Lopez that he had been unable to get on the train because he did not have a ticket and did not have ID. Lopez testified that Henne had told her he had a prison ID, but that Amtrak would not accept it. When Grigg spoke to Henne that day, he reminded him that he had been subpoenaed and that there may be a warrant issued for his arrest for failing to appear. Grigg told Henne that he could arrange for him to travel to Michigan by bus and return to Missouri the next day. Henne agreed.

Later that day, Grigg and prosecutor Paul Fehrman spoke to Henne on the phone about getting a bus ticket. According to Grigg, Henne hung up after two minutes, and that was the last they heard from him.

The trial court held:

In this particular situation, other than going and personally getting Mr. Henne, and from all indications the Court has heard, that wasn't something that I'd think you would believe was necessary. You've tried to get him tickets. You've talked to him personally, and your office manager has talked to him, and it sounded like Mr. Henne didn't want to be here.

I believe that the Prosecutor's office has shown due diligence in its attempts to get Mr. Henne here. I am going to declare him unavailable as a witness, and we'll proceed from that point as far as Mr. Henne is concerned.

A DVD of Henne's preliminary examination testimony was played to the jury.

Under MRE 804, if a witness is declared unavailable and the party against whom that witness's testimony is offered had an opportunity to cross-examine him at a prior hearing, the testimony from that hearing is not inadmissible as hearsay. In a criminal case, the proponent of prior testimony must demonstrate due diligence in attempting to procure the witness for trial. "The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). "The determination of due diligence by the trial court will not be overturned on appeal absent an abuse of discretion." *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Defendant cites three cases in which Michigan courts have discussed the "due diligence" standard required by MRE 804(a)(5). In *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988), the Michigan Supreme Court held that the prosecution did not make a good faith effort to produce missing witnesses for a retrial following a mistrial when the witnesses were difficult to locate for the first trial, had an incentive to go into hiding, and were known to have left the state. The prosecution found out that one of the witnesses was living in California and sent a certificate to secure the attendance of a witness to the district attorney in California 17 days before the retrial was set to commence. *Id.* at 69-70. The prosecution did not attempt to get in touch with the sole eyewitness until a month after the date for retrial had been set. *Id.* at 70. Even though the

prosecution found out that this witness was missing, it did not follow up on leads until one week before the retrial date. *Id.* Another of the witnesses left the state immediately after the initial trial, and the prosecution did not attempt to locate him until three weeks before the retrial (four-and-a-half months after the mistrial). *Id.* at 71. The Court characterized the prosecution's efforts as "tardy and incomplete," *id.* at 68, and held that the prosecution had failed to exercise due diligence. *Id.* at 67.

In *People v Bean*, 457 Mich 677, 685; 580 NW2d 390 (1998), the Michigan Supreme Court held that the police had not exercised due diligence to procure a witness when their efforts were "limited to placing unsuccessful telephone calls." In *Bean*, the police had the telephone number and address for the witness's grandmother and the telephone number for his mother. *Id.* However, after unsuccessfully attempting to get in touch with these contacts by phone, the police did not follow up either by going to the grandmother's address or by contacting the phone company to try to match the mother's number to an address. *Id.* at 687-688. The police did not check with the Department of Corrections to see if the witness had been incarcerated, and they did not check with the Department of Social Services to see if the witness was receiving public assistance. *Id.* at 688. Under these facts, the Court held that it was an abuse of discretion to find that the police had exercised due diligence. *Id.* at 690. The Court held, "The efforts in the present case to locate [the witness] were less extensive than those described in *Dye*, 431 Mich 58.

In *James*, 192 Mich App at 572, this Court held that the prosecution had failed to exercise due diligence where three-and-a-half years had gone by between the preliminary examination and the trial, and the prosecutor's only effort to secure the witness was to mail the witness a subpoena three weeks before the trial and assume that he would show up. This Court stated, "We believe that the passing of so long a period of time should place any reasonable prosecutor on notice that a witness may have changed residences or would otherwise become difficult to locate." *Id.*

The facts of this case are distinguishable from each of the above cases. Most notably, here plaintiff knew of Henne's location throughout the pendency of this case. In the cases cited by defendant, the police and prosecutors lost track of witnesses and then failed to attempt to locate them in a timely manner. When Grigg found out Henne had been released from prison on parole, he promptly contacted Henne's parole officer and shortly thereafter spoke directly to Henne. Plaintiff made efforts to accommodate Henne's travel and lodging to make him available for the trial. When Henne was unable to get on the train because of issues with his ID, plaintiff immediately made arrangements for Henne to travel by bus the next day. As the trial court noted, the prosecution did everything it could "other than going personally getting Mr. Henne." Due diligence did not require such an effort. Due diligence only required that plaintiff make a reasonable, diligent, good-faith effort. *James*, 192 Mich App at 571. Under the circumstances, it was not outside the range of reasonable and principled outcomes for the trial court to find that plaintiff had exercised due diligence. Therefore, the trial court did not abuse its discretion in finding Quamay Henne unavailable. Henne's preliminary examination testimony was properly admitted into evidence.

Defendant further argues that his Sixth Amendment right to confront the witnesses against him was violated by the admission of Henne's testimony, and that defense counsel was

ineffective for failing to object on this ground. Because Henne was unavailable, there can be no violation of defendant's constitutional right to confrontation. "[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because Henne was unavailable and defense counsel had an opportunity to cross-examine Henne at the preliminary examination, the Sixth Amendment's Confrontation Clause is satisfied. *Id.* Because there was clearly no Sixth Amendment violation, defense counsel was not ineffective for failing to raise an objection below. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) ("Defense counsel is not required to make frivolous or meritless motions.").

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Christopher M. Murray