

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER GILBERT MOORE, III,

Defendant-Appellant.

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UNPUBLISHED

February 8, 2002

No. 225196

Oakland Circuit Court

LC No. 96-146091-FC

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for conspiracy to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i). We affirm.

On appeal, defendant argues that he was denied a fair trial when a witness asserted his Fifth Amendment privilege against self-incrimination in the jury's presence. Defendant alleges that constitutional and evidentiary errors resulted from the prosecution calling Duane Moten to testify at trial because the prosecution could not have reasonably expected that he would testify. We disagree.

An attorney may not call a witness to testify knowing that he will claim a valid privilege. *People v Gearns*, 457 Mich 170, 193; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity*, 460 Mich App 484, 495; 596 NW2d 607 (1999); *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). In this case, the record illustrates that the prosecutor had a reasonable expectation that Moten would testify. See *Gearns*, *supra* at 201. Moten had an agreement with the Oakland County Prosecutor's Office that he would testify in exchange for the assurance that he would not be charged in this case or with a drug offense. The prosecutor denied that he knew that Moten was going to assert the privilege and had spoken with Moten about a half an hour before the proceeding and Moten told him he was going to testify. Moten admitted to the court that he did not inform the prosecutor that he intended to assert a Fifth Amendment privilege. Moreover, Deputy Ciofu testified that he had been with Moten prior to him being called to the witness stand and "had every indication that he [Moten] was going to testify." Although Moten may have been a reluctant witness, it was reasonable for the prosecutor to believe Moten would testify and no evidentiary error occurred. However, even if evidentiary error occurred, such error was harmless because defendant failed to demonstrate that

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

it is more probable than not that the error was outcome determinative in light of the weight and strength of the untainted evidence. See *Lukity, supra* at 495-496. Further, defendant's constitutional error argument premised on this alleged prosecutorial misconduct claim also fails. See *Gearns, supra* at 192-193.

Next, defendant argues that he was denied his right to confront a witness by the trial court's admission of the preliminary examination testimony of Moten, an unavailable witness. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Lukity, supra* at 488; *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999).

A witness who asserts a Fifth Amendment privilege as justification for not testifying is "unavailable" for purposes of MRE 804(b)(1). *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). Consequently, preliminary examination testimony from the unavailable witness may be introduced at trial if the party against whom it is offered had an opportunity and similar motive to develop the testimony through cross-examination. MCR 804(b)(1); *Meredith, supra* at 66-67. Further, because MCR 804(b)(1) is a firmly rooted hearsay exception, the testimony bears satisfactory indicia of reliability to satisfy the Confrontation Clause. *Meredith, supra* at 71.

In this case, defendant argues that he did not have an opportunity to develop Moten's testimony at the preliminary examination because the magistrate in that proceeding limited his opportunity to fully cross-examine the witness. The record does not support defendant's assertion. The magistrate's only comment limiting the scope of the preliminary examination occurred during the prosecutor's direct examination of Moten and came in response to defense counsel's objection to the prosecutor's questions about Moten's prior acts. At no time did the magistrate attempt to limit defense counsel's cross-examination of the witness. Consequently, the trial court did not abuse its discretion by admitting Moten's preliminary examination testimony. See *Adams, supra* at 659; *Meredith, supra* at 67.

Next, defendant argues that he was denied a fair trial by the trial court's exclusion of the grand jury testimony of two unavailable witnesses, Lavinia Peoples and Moten. Defendant argues that the transcripts were admissible under MRE 804(b)(1) and, without explanation or citation to apposite supporting authority, claims that their exclusion implicated his constitutional right to call witnesses. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Lukity, supra*; *Adams, supra*. Defendant did not request the admission of Moten's grand jury testimony; therefore, this claim is not preserved and is reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). To the extent that defendant claims his constitutional rights were violated by the exclusion of Peoples' grand jury testimony, reversal is not warranted if the error was harmless beyond a reasonable doubt. See *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001).

Out-of-court statements offered for their truth are usually inadmissible hearsay. See MRE 801(c); MRE 802; *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). In this case, defendant argues that the grand jury testimony was admissible under MRE 804(b)(1). However, for such former testimony to be admissible under this rule, the party against whom it was to be offered must have had an opportunity and similar motive to develop the testimony. See *Chavies, supra* at 284; see, also, *United States v Salerno*, 505 US 317; 112 S Ct 2503; 120 L

Ed 2d 255 (1992). Here, although the prosecution had an opportunity to develop the testimony, in light of the inculpatory nature of Peoples' and Moten's grand jury testimony, we cannot conclude that the prosecution had the requisite motive to develop the testimony.

Further, although defendant does not indicate for what purpose he would have introduced the grand jury testimony, it is apparent that, in light of the inculpatory nature of the testimony, defendant's motive was to attack the credibility of the witnesses, not to offer exculpatory evidence. However, Peoples' and Moten's preliminary examination testimony was read to the jury and contained substantially similar testimony as that given during the grand jury proceedings. Further, during the preliminary examination, defendant impeached Peoples' credibility on numerous occasions, including that she lied to the grand jury, lied to the police, had a criminal record, and that she told police that she would do anything to get out of being charged in the case. Consequently, the admission of the grand jury testimony would have merely amounted to the presentation of cumulative evidence. See MRE 403. In sum, the exclusion of Moten's grand jury testimony was not preserved for appellate review. Further, the trial court properly excluded Peoples' grand jury testimony; however, even if the testimony was admissible, reversal is not required because the error was harmless beyond a reasonable doubt.

Defendant also argues that he was denied a fair trial because certain comments made by the prosecutor during closing arguments amounted to prosecutorial misconduct. We disagree. Appellate review of unpreserved claims of prosecutorial misconduct is precluded unless the defendant demonstrates plain error that affected his substantial rights. *Carines, supra* at 752-753; *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). We review preserved claims of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *Id.*; *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant claims that the prosecutor improperly denigrated defense counsel by commenting on the defense strategy of deeming a key witness a liar and improperly implied that defense counsel had attempted to mislead the jury. Defendant failed to object to the comments, therefore, these claims are not preserved. Further, a prosecutor's arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Here, the prosecutor's comments did not constitute a personal attack on defense counsel, but were permissibly responsive to defendant's repeated attacks on Peoples' credibility. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). In addition, the prosecutor did not argue that defense counsel was intentionally attempting to mislead the jury but, rather, responded to defense argument regarding the weight to be accorded to Peoples' transcript testimony by reminding the jury that the judge would provide them with the law on the issue. See *Watson, supra* at 592-593. Consequently, defendant has failed to demonstrate plain error affecting his substantial rights regarding these claims.

Defendant also claims that the prosecutor committed misconduct when he allegedly misstated the law regarding the possible penalty that defendant faced if convicted. Defendant refers to the comment, "[s]econd of all, trust me, you don't know what the punishment is. There ain't nobody coming out in no box." However, considered in context, this comment was in response to the defense argument that Peoples testified against defendant only to avoid leaving prison in a wooden box. The prosecutor's comment could not reasonably have been interpreted as referring to defendant's likely sentence if convicted and did not deny defendant a fair and impartial trial. See *Aldrich, supra*.

Finally, defendant argues that the prosecutor's reference to Shannon Smoot apparently having fled to avoid prosecution improperly interjected a fact that was unsupported by evidence. Defendant objected to the statement and the trial court promptly instructed the jury that they were to determine the facts of the case based only on the evidence presented at trial. This instruction cured any possible prejudice resulting from the prosecutor's brief comment, and defendant was not deprived of a fair and impartial trial.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie