

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY LYNN TINCHER,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 246891

Wayne Circuit Court

LC No. 02-004819-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER M. MULLINS,

Defendant-Appellant.

No. 246892

Wayne Circuit Court

LC No. 02-004819-01

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendants were each convicted, following a joint jury trial, of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant Tinchler was sentenced to concurrent prison terms of fourteen to thirty years for the robbery conviction, and 6-1/2 to 15 years for the assault conviction. Defendant Mullins was sentenced to concurrent prison terms of fifteen to thirty years for the robbery conviction, and 6-1/2 to 15 years for the assault conviction. Both defendants appeal as of right. We affirm.

I. Facts and Proceedings

Defendants' convictions arise from the beating, stabbing, and robbery of Eric Cunningham. According to Cunningham, he met Tinchler at a gathering hosted by Natisha Baker. Cunningham sold Tinchler some cocaine for \$20. Tinchler and Mullins later came to Cunningham's trailer and asked for more cocaine. Cunningham claimed that Tinchler and Mullins then beat him, and Tinchler stabbed him with a steak knife. Afterward, defendants bound

Cunningham's hands with an appliance cord, and stole clothes, jewelry, knives, a Play Station, and \$400 in cash.

At the preliminary examination, Baker testified that Tincher left her trailer to buy cocaine from Cunningham, and that he returned angry because Cunningham had sold him fake cocaine. He then called Mullins and asked him to come over. When Mullins arrived, Tincher urged him to go to Cunningham's trailer with him to beat up Cunningham. Mullins and Cunningham then left Baker's trailer together.

The prosecutor endorsed Baker as a witness for defendants' trial. On the second day of trial, the prosecutor informed the trial court that Baker, who was in the twenty-fourth week of a high-risk pregnancy, had just been taken to the hospital. The prosecutor asked the court to declare Baker unavailable, and allow him to admit Baker's preliminary examination testimony pursuant to MRE 804(b)(1), redacted to exclude hearsay statements. The court responded that it would not declare Baker unavailable until the prosecutor provided medical documentation that she was unable to testify in court. On the third day of trial, the prosecutor supplied a letter from Baker's treating physician, Dr. Bryant, who was not one of the physicians who attended to her in the emergency room. Dr. Bryant indicated that he had ordered bed rest, and that it would pose a "terrible risk" to Baker's unborn child if she testified. Baker was instructed to rest on her side as much as possible and go to Dr. Bryant's office for a follow-up examination. The prosecutor acknowledged that Dr. Bryant had not examined Baker during her emergency. Over Tincher's objections, the trial court ruled that Baker was not available as a witness, and allowed the prosecutor to introduce her preliminary examination testimony.

Defendants did not present any witnesses. On the third day of trial, defendants' attorneys informed the trial court that they had discovered a new witness, and moved to add him to their witness lists. The witness, Jimmy Baugh, was an inmate in the Wayne County lockup and a defendant in an unrelated case. Defendants had met Baugh in the "bull pen" while being transported from the jail to their respective courtrooms. They learned that Baugh had a conversation with Cunningham, who was also in the jail, awaiting trial for a charge of reckless discharge of a firearm. Defendants contended that Cunningham told Baugh things that contradicted Cunningham's trial testimony.

The trial court allowed defendants to make an offer of proof as to Baugh's testimony. Baugh testified that he had complained to Cunningham that his accomplices were testifying against him, and Cunningham replied that the same thing was happening to him. Cunningham then told Baugh that he had been selling drugs with some other men when their supplier demanded they return the drugs or pay for them. Cunningham did not have enough money, so he was beaten. The other men were later caught with drugs, and they were now trying to implicate Cunningham. Cunningham did not say anything about being robbed. Cunningham showed Baugh a scar on his hand. Baugh believed that Cunningham was a defendant in a drug case, and he did not know until the morning he talked to defendants that Cunningham was the complainant in an assault case.

The trial court found Baugh's testimony irrelevant because it described an incident in which Cunningham was assaulted over a drug deal involving two other persons, and not the instant case. It denied defendants' request to add him to their witness list.

II. Admissibility of Baker's Preliminary Examination Testimony

Tincher argues that the trial court erred in declaring Baker unavailable and in permitting the prosecutor to introduce her preliminary examination testimony. He argues that the prosecutor failed to show that Baker was unavailable. He also argues that the use of Baker's preliminary examination testimony deprived him of an opportunity to impeach Baker's testimony, or to elicit testimony that favored defendants.

MRE 804 provides exceptions to the hearsay rule when the declarant is unavailable as a witness. According to the rule, unavailability includes when a declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." MRE 804(a)(4). If the declarant is unavailable, MRE 804(b)(1) provides an exception for 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.

We review a trial court's finding that a witness is unavailable for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). This Court reviews a trial court's decision to admit testimony under MRE 804 for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The trial court did not clearly err in finding that the prosecutor made a satisfactory showing that Baker was unable to attend because of her physical condition. Baker's physician submitted a letter indicating that Baker required bed rest and that the stress of testifying could jeopardize her pregnancy. There was no reasonable basis for inferring, as Tincher suggests, that Baker's problems would have resolved within a few days.

Tincher also argues that MRE 804(b)(1) does not apply because he did not have the same attorney at the preliminary examination and, therefore, did not have an opportunity to cross-examine Baker. We disagree. MRE 804(b)(1) requires only that the *party* in the current proceeding, not the party's present counsel, had an the opportunity for cross-examination.

Tincher also argues that the use of Baker's preliminary examination testimony in lieu of live testimony denied him his constitutional right to confront a witness. In *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998), our Supreme Court held that "[e]ven when evidence of an unavailable witness is admissible under the Michigan Rules of Evidence, it is still necessary to determine whether use of the testimony would violate a defendant's constitutional right to confront prosecution witnesses." The Court noted that it had previously explained this principle in *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993), wherein it quoted *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980),¹ which stated:

¹ In *Crawford v Washington*, ___ US ___, 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment requires that testimonial statements be subject to cross-examination. (continued...)

“In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”

In *Meredith*, this Court had held that the witness’ preliminary examination testimony was not reliable because the witness (a courier in the charged drug transaction) avoided testifying at the trial by asserting the Fifth Amendment and explaining that she might subject herself to perjury charges if she testified at trial. *Meredith, supra* at 68. Our Supreme Court found two problems with this Court’s analysis. First, the witness’ assertion of her Fifth Amendment rights did not necessarily mean that she committed perjury at the preliminary examination; it could also mean that she would commit perjury if she gave exculpatory testimony at trial. *Id.* at 69. The Court then stated:

Second, and more importantly, *Poole* and *Roberts* teach that the reliability requirement is satisfied “without more” if the proposed testimony falls within a firmly rooted exception to the hearsay rule. 444 Mich 162. To determine the admissibility of the courier’s prior testimony in this case, we will thus look at whether MRE 804(b)(1) is a firmly rooted exception.

This Court has not previously found MRE 804(b)(1) to be firmly rooted, but the federal courts have so characterized FRE 804(b)(1), which is worded nearly identically. Indeed, the exception has been described as “deeply embedded in American jurisprudence.” *United States v McKeeve*, 131 F3d 1, 9 (CA 1, 1997). [*Id.* at 69-70.]

Similarly, in *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999), this Court held that the trial court erred in dismissing charges against a defendant after the complainant refused to testify at trial. The complainant testified against the defendant at the preliminary examination, but left the courthouse and disappeared on the day of trial, possibly because the defendant’s friends had threatened her. *Id.* at 654-655. The trial court denied the prosecutor’s motion to use the complainant’s prior testimony under MRE 804(b)(1), and dismissed the charges. *Id.* at 656. Citing *Meredith*, this Court held that the preliminary examination testimony could be admitted without violating the defendant’s right to confront witnesses because MRE 804(b)(1) was a “firmly rooted” hearsay exception. *Id.* at 659-660.

Accordingly, Tinch’s right to confront prosecution witnesses was not violated when the trial court permitted the prosecution to introduce Baker’s preliminary examination testimony. Tinch contends that if Baker had testified at trial, she might have exculpated defendants, or if

(...continued)

States Supreme Court overruled *Roberts* to the extent that *Roberts* permitted testimonial hearsay statements where the defendant had not had an opportunity to cross-examine the declarant. Because the instant case involves preliminary examination testimony, where defendant had the opportunity to cross-examine Baker, the decision in *Crawford* does not undermine the decisions in *Meredith* and *Poole*.

she had not, he would have called witnesses to testify that Cunningham threatened to harm Baker if she did not testify against defendants. These are purely speculative claims, unsupported by any record evidence. Further, the admission of Baker's preliminary examination testimony did not preclude Tincher from calling witnesses to testify about any alleged threats. Moreover, although both defendants contended that Baker was an essential witness, neither defendant moved to adjourn the trial until the completion of Baker's pregnancy. We therefore find no error.

III. Denial of Request to Add a Witness

Both defendants claim that the trial court erred in denying their motions to add Baugh as a defense witness. We disagree. A trial court's decision on a motion for late endorsement of a witness is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

We find no abuse of discretion here because the trial court correctly determined that Baugh's proposed testimony was irrelevant. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich*, *supra* at 113.

Because defendants failed to show that Baugh's testimony was relevant to their theory that Cunningham received his injuries not from defendants, but from some other enemies, it was properly excluded. The primary feature of Baugh's testimony was Cunningham's complaint that his accomplices in a drug delivery offense were trying to implicate Cunningham. There was no indication that Tincher or Mullins ever sold drugs with Cunningham, or that they tried to implicate Cunningham in any criminal activity. Although defendants argued that Baugh's testimony would reveal that Cunningham was falsely accusing Tincher and Mullins, Baugh never said anything about Cunningham making false accusations. On the contrary, Baugh did not even know that Cunningham was the complainant in an assault case. There was no error in this regard.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly