STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2008
v	No. 271693 Kalamazoo Circuit Court
JOSEPH AVERON CAMPBELL, Defendant-Appellant.	LC No. 05-000905-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced him to 20 to 35 years' imprisonment. We affirm.

Defendant's conviction arose from the stabbing death of Albert Weatherspoon. At trial, the preliminary examination testimony of Robert Ford was admitted because Ford was unavailable as a witness. Ford had testified at the preliminary examination that defendant made incriminating statements about the death of Weatherspoon. On appeal, defendant argues that Ford's testimony should not have been admitted because defendant did not have the same motive and opportunity to cross-examine Ford at the preliminary examination as he would have had during trial.

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). Here, however, because the trial court's evidentiary ruling implicated defendant's constitutional right of confrontation, the standard of review is de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

MRE 804 states, in part:

> **(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable[1] as a witness:

[1] Defendant does dispute on appeal that Ford was unavailable.

> (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.

In *People v Meredith*, 459 Mich 62, 69-71; 586 NW2d 538 (1998), the Michigan Supreme Court held that MRE 804(b)(1) is a firmly rooted exception to the hearsay rule and that, therefore, the Confrontation Clause of the United States Constitution is satisfied when prior testimony is admitted under this rule. The United States Supreme Court expounded upon this principle in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, *supra* at 68-69. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 61. It is the prior *opportunity* to cross-examine that is dispositive. See *id*. at 55.

Defendant essentially argues that neither MRE 804(b)(1) nor the *Crawford* requirement was satisfied here because the type of cross-examination at the preliminary examination was not the same as the type that would take place at trial. We reject defendant's argument.

This Court recently adopted a non-exhaustive list of factors to consider when determining whether a party had a similar motive to develop testimony at a prior proceeding. See *People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007). These factors include whether the party's interests at the hearings were of similar intensity, whether what was at stake at the proceedings and the burden of proof were similar, and whether the party actually cross-examined the witness during the prior proceeding. *Id*.

Here, the issues were similar at the preliminary examination and at trial. Defendant was charged with open murder by the time of the preliminary hearing. At trial the jury was charged with determining whether he was guilty of first- or second-degree murder. Defendant's aim at both hearings was to challenge the credibility of witnesses and to find inconsistencies in their memories of events. At stake in both proceedings was defendant's freedom. The burden of proof was different, but the higher burden at trial was on the prosecution, not defendant. Defendant would likely have to cross-examine more vigorously, or at least as vigorously, at the preliminary hearing for the court to find there was no probable cause than he would have to at trial for the jury to find him not guilty. Finally, defense counsel took advantage of the opportunity to cross-examine Ford at the preliminary hearing. His cross-examination went on for 15 pages of the transcript. He covered all the important points of Ford's testimony and had an adequate opportunity to test Ford's bias and lack of credibility. The *Farquharson* factors were clearly satisfied, as was the requirement of *Crawford*. Defendant had an adequate opportunity for cross-examination at the preliminary hearing. *Crawford*, *supra* at 55. See also *California v Green*, 399 US 149, 165-168; 90 S Ct 1930; 26 L Ed 2d 489 (1970) (admission of preliminary examination testimony not violative of Confrontation Clause).

The use of Ford's preliminary examination testimony at trial did not violate defendant's right of confrontation.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter