

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MOHAMED AL-LAHHAM,

Defendant-Appellee.

UNPUBLISHED
December 9, 2008

No. 280030
Wayne Circuit Court
LC No. 07-006797

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order barring plaintiff from using the preliminary examination testimony of a deceased victim at trial. Because the trial court properly determined that admission of the victim's preliminary examination testimony would be a violation of defendant's right to confront the witnesses against him, it did not err when it excluded the victim's preliminary examination testimony from use at trial. For that reason, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

I. Facts and Procedural History

In November 2006, Marlon Ozier suffered multiple injuries during an assault. Ozier claimed that defendant and one other man were responsible for the assault. Based on Ozier's allegations, the prosecution charged defendant with assault with intent to commit murder. See MCL 750.83.

The district court held defendant's preliminary examination in March 2007. On direct examination, Ozier testified that he worked at an auto sales business that was approximately one and one-half blocks down the street from defendant's auto repair business. Ozier indicated that he had had frequent business dealings with defendant's shop and also had business dealings with defendant's brothers. Ozier claimed that they all got along well.

Ozier testified that, in November 2006, he served as a middleman between defendant and his brothers and a man, who claimed to have an interest in a warehouse that defendant and his brothers wished to purchase. Ozier stated that he accepted \$17,500 from defendant to give to this other man as part of the real estate transaction. Ozier said that the other man gave him papers to return to defendant and his brothers and that he gave those papers to defendant's

brother. Ozier testified that the papers turned out to be “false” and that the other man apparently took the money and disappeared.

Ozier explained that, after the incident, he felt obligated to repay the money to defendant and his brothers. He also stated, “they basically told me if I don’t give them their money, I might as well move.” Ozier testified that defendant later called him and asked him to come down to the shop so they could discuss the situation. Ozier said he went down to the shop and that defendant asked him to step into the back garage because he did not “want everybody knowing my business.” Ozier said he then followed defendant through the door into the back garage. When he heard the door open again, Ozier said he turned to look and was immediately struck in the head with a lead pipe by another man. Ozier stated that defendant and this other man then proceeded to beat him with lead pipes. After beating him for approximately ten minutes, Ozier stated that defendant and the other man opened the back door and told him to “get the f*** out.” Ozier stated that he was then told: “You better have my f***ing money tomorrow. I know where the f*** you live at.”

After the prosecution closed its direct examination, defendant’s trial counsel began to vigorously cross-examine Ozier. Defendant’s counsel asked Ozier about whether he had difficulties with defendant over the repair of Ozier’s car. Defendant’s counsel also elicited testimony about the real estate deal, which suggested that Ozier might have had a more involved role in the disappearance of the money. Shortly after defendant’s trial counsel began to explore these issues, the district court interrupted and asked defendant’s counsel to confine “any further questions to the charge.” Nevertheless, defendant’s counsel continued to explore the possibility that there was a dispute between Ozier and defendant over the repair of Ozier’s car and that this was the real reason that Ozier went to defendant’s shop. Indeed, defendant’s counsel elicited testimony that, after the alleged assault, Ozier filed a complaint against defendant about the car. The district court again interjected and explained that, “[u]nless it’s a defense, what provoked the defendant is irrelevant.” Defendant’s counsel then asked Ozier if the real reason he went to defendant’s shop was to repossess his car without payment to which Ozier responded he did not.

After exploring the alleged dispute over Ozier’s car, defendant’s counsel began to aggressively examine Ozier about apparent inconsistencies concerning his description of the incident. After a few questions, the court again interrupted, noting that “[t]his is a preliminary exam” and stating that “I’m going to give you about five minutes to close it up....” Defendant’s counsel again began to explore inconsistencies between Ozier’s statements to the police and his testimony at the preliminary examination. The court then warned defendant’s counsel about repeating questions: “It’s not necessary and if you have another witness, sir, if you want this court to hear it, you’re going to have to close this one out.” Despite this warning, defendant’s counsel continued the line of questioning exploring the alleged beating. The following colloquy then occurred between the court and defendant’s counsel:

THE COURT: Okay. We’re closing this out, Mr. Cripps [defendant’s counsel]. I assume you’re done.

MR. CRIPPS: No, I’m not done.

THE COURT: Well, you are, you are. I'm not allowing you anymore questions. The Court gave you fair warning, five minutes. It's now after five minutes, so the Court is not allowing anymore questions by you of this witness.

MR. CRIPPS: I object to that, but you're the Court, you're cutting me off.

THE COURT: You cannot object. I'm cutting you off. It is now 1:21. This Court is not supposed to take the staff through the lunch break and we have done that and we have allowed you a great latitude to question this witness. You're cut off. You're cut off. Mr. Burton [the prosecutor], if you have anything brief you may ask it, otherwise I'm going to excuse this witness. This is ridiculous.

At this point, defendant's counsel explained that he had only been cross-examining Ozier for twenty minutes and that he need more time. Indeed, defendant's counsel asked to adjourn for lunch and continue the cross-examination afterwards. But the court refused. After defendant's other counsel explained that there was evidence of further inconsistencies with Ozier's testimony that needed to be explored, the court noted that the standard for a preliminary hearing was different than that for a trial and that the testimony and evidence defendant's attorney's wanted to present went to questions of fact that would "be determined by the next—at the next stage of the proceeding" For that reason, the court precluded further argument about continuing the examination.

The trial court then determined that there was no evidence that defendant intended to kill Ozier and, on that basis, concluded that defendant should not be bound over on the charge of assault with the intent to commit murder. Instead, the trial court bound defendant over on the lesser charge of assault with the intent to do great bodily harm less than murder. See MCL 750.84.

Sometime after the preliminary examination, Ozier was murdered. Because Ozier was no longer available to testify, the prosecution gave notice that it intended to use Ozier's preliminary examination testimony against defendant at trial. In response, defendant's counsel moved to prohibit the admission of Ozier's preliminary examination testimony on the ground that it would violate his right to confront the witnesses against him. Specifically, defendant's counsel argued that, because he did not have a full opportunity to cross-examine Ozier, Ozier's testimony from the preliminary examination was not admissible under the rule stated in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

In August 2007, the trial court held two hearings on whether Ozier's preliminary examination testimony should be admissible. At the second hearing, the trial court noted that defendant's counsel did have an opportunity to cross-examine Ozier, but also acknowledged that the district court cut the examination short. The trial court then asked defendant's counsel what more he would have asked Ozier. Defendant's counsel explained that he had explored some potential bias on the part of Ozier, but had only just begun to explore the inconsistencies in Ozier's initial description of the incident and his testimony on direct examination. Defendant's counsel stated that he wanted to ask Ozier about the description of the assailant that he initially gave police, about how he managed to get away from his assailants, about the discrepancies between the injuries reported in his medical records and the description of his injuries on direct examination, about indications in the medical records that he had been drinking, and about his

failure to identify defendant as his assailant at the hospital and in the descriptions of the incident he gave to his friends.

From this, the trial court concluded that the defendant's counsel was not afforded sufficient opportunity to cross-examine Ozier. The trial court also noted that there was currently no direct evidence that linked defendant to Ozier's death.¹ Hence, the trial court explained, it could not conclude that defendant had forfeited his right to confront Ozier by wrongdoing. For these reasons, the trial court determined that the admission of Ozier's preliminary examination testimony would violate defendant's right to confront the witnesses against him and, consequently, was inadmissible.

On August 10, 2007, the trial court signed an order granting defendant's motion to prohibit the use of Ozier's preliminary examination testimony at trial. On August 13, 2007, the trial court dismissed the case against defendant without prejudice. This appeal followed.

II. The Exclusion of Ozier's Preliminary Examination Testimony

A. Standard of Review

This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). However, this Court reviews de novo preliminary questions of law, "such as whether a rule of evidence, constitutional provision, or statute precludes the admission of evidence" *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006).

B. The Right to Confront Witnesses

The Sixth Amendment to the United States Constitution guarantees a defendant the right to confront the witnesses against him. US Const, Am VI; See also Const 1963, art 1, § 20. The right to confront witnesses was meant to redress certain practices that the framers thought repugnant—namely, the use of *ex parte* testimonial statements against an accused. *Crawford*, *supra* at 50-53. To that end, the Amendment ensures "that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." *Giles v California*, 554 US ___, ___; 128 S Ct 2678; 171 L Ed 2d 488 (2008). Although the Court in *Crawford* declined to spell out a comprehensive definition of "testimonial," it recognized that testimony from a preliminary hearing would qualify under any definition. *Crawford*, *supra* at 52, 68. Because Ozier's statements at the preliminary examination were clearly testimonial, they may not be admitted against defendant unless Ozier is unavailable and defendant had the prior opportunity to cross-examine. *Id.* at 68; see also MRE 804(b)(1).

¹ The prosecution noted that Ozier had given a statement to the police indicating that defendant had threatened him and reported that his car had been "bombed."

In the present case, there is no doubt that Ozier is unavailable and that defendant's counsel did in fact have some opportunity to cross examine Ozier. However, that does not end the inquiry. The Confrontation Clause does not require that the defendant be afforded only some opportunity to cross-examine the witnesses against him; rather, it requires that the defendant be afforded the opportunity to *effectively* cross-examine the witnesses against him. *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Nevertheless, the right to cross-examine is not without limits: the defendant is not entitled to a "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (internal quotations and citations omitted). At the preliminary examination, the district court clearly prevented defendant's counsel from cross-examining Ozier to the full extent that he had planned. Hence, we must determine whether the district court's decision to curtail defendant's cross-examination deprived defendant of the opportunity to effectively cross-examine Ozier.

At the preliminary examination, Ozier unequivocally identified defendant as one of the men who beat him. Ozier also gave compelling testimony about defendant's possible motive and described the event in a manner that suggested that defendant premeditated the assault. In response, defendant's counsel tried to elicit testimony and present evidence that suggested that Ozier might have falsely accused defendant. Defendant's counsel questioned Ozier about his prior dealings with defendant and the possibility that Ozier had a grudge against defendant. Although this line of questioning suggested a motive to falsely accuse defendant, it was not by itself particularly compelling. In order to effectively support this theory, defendant's counsel needed to demonstrate that Ozier's description of the beating and his injuries were not plausible and that his actions and statements to others after the beating were not consistent with his testimony on direct. If done properly, this line of questioning—especially when coupled with other evidence—could have dramatically bolstered defendant's theory of the case. Unfortunately, the district court severely limited defendant's counsel's ability to raise questions during Ozier's cross-examination. By limiting defendant's counsel's opportunity to develop this line of questioning, the district court precluded defendant's counsel from effectively cross-examining Ozier. Because defendant's counsel did not have the opportunity to effectively cross-examine Ozier, the admission of Ozier's preliminary examination testimony against defendant without the opportunity to cross-examine Ozier would violate defendant's right to cross-examine the witnesses against him. *Crawford, supra* at 68.

The trial court did not abuse its discretion when it prohibited the prosecution from using Ozier's preliminary examination testimony against defendant.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski