STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 24, 2010
v	No. 294287 Wayne Circuit Court
JASUBHAI KESHUBHAI DESAI, Defendant-Appellee.	LC No. 95-007158-FC

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

The prosecutor appeals by leave granted an order granting defendant's motion for relief from judgment. We reverse.

On October 16, 2001, a jury found defendant guilty of first-degree premeditated murder in the death of Anna Marie Turetzky, defendant's business partner in the operation of two medical clinics. On November 7, 1983, Turetzky was found strangled to death in her car that was located in a Best Western hotel parking lot. The prosecution's theory was that defendant solicited his codefendant, Stephen Adams, to kill Turetzky. Defendant and Adams were tried together, but with separate juries. Adams' jury failed to reach a verdict and the prosecution did not retry him. Defendant was convicted and sentenced to a term of life imprisonment.

Defendant appealed his conviction, arguing, inter alia, that his Sixth Amendment right to confront the witnesses against him was violated when the trial court admitted an unreliable hearsay account of a confession allegedly made by his non-testifying codefendant, Adams, that implicated defendant. *People v Desai*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2003 (Docket No. 238210), slip op, p 1 (*Desai I*). This Court disagreed, holding that Adams' confession was admissible, through the testimony of Lawrence Michael Gorski, under MRE 804(b)(3) as a statement against penal interest, and met the reliability requirements of the confrontation clause. *Desai I*, slip op, pp 2-5.

Thereafter, defendant filed a petition for writ of habeas corpus, which was granted on confrontation clause grounds. *Desai v Booker*, 2007 WL 1343718 (ED Mich, May 8, 2007) (*Desai II*). The Sixth Circuit Court of Appeals, however, reversed the district court. *Desai v Booker*, 538 F3d 424, 425-426 (CA 6, 2008) (*Desai III*). The federal court of appeals explained that codefendant's statement was nontestimonial and, pursuant to *Davis v Washington*, 547 US 813, 823-826; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the confrontation clause no longer

applied to nontestimonial statements. That court of appeals noted, however, that defendant "also has raised the argument that the introduction of Adams' non-testimonial hearsay statement violates due process, a theory he has yet to exhaust in state court. Because [defendant] had no reason to raise this claim at his criminal trial or in the Michigan court of appeals in view of the existing *Roberts* doctrine, the district court may wish to give him an opportunity to exhaust that claim in the state courts now." *Desai III*, 538 F3d at 431. On remand, the district court did afford defendant such opportunity.

Accordingly, on February 24, 2009, defendant filed a motion to set aside judgment under MCR 6.502 in Wayne Circuit Court. Following oral arguments, the circuit court granted defendant's motion, holding that the requirements for relief from judgment under MCR 6.502 were met. First, defendant established "good cause" because his appellate counsel's challenge to the admission of the confession on confrontation clause grounds pursuant to *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980)[1], rather than on due process grounds, was reasonable and "the route most likely to succeed." Second, defendant established "actual prejudice" because the admission of Adams' alleged confession "made the difference between conviction and acquittal." Next, the circuit court turned to the due process challenge. The court held that the hearsay confession was unreliable considering, as discussed at length below, the lack of credibility of Adams and Gorski, the confession setting, and the lack of other evidence against defendant. The court concluded that "Adams' alleged confession was wrongly admitted and used by the Prosecution as the only damning evidence of Defendant's guilt of the charged crime." Further, "[t]he hearsay was not Constitutionally reliable and its use secured Defendant's conviction in violation of his rights under the Due Process Clause." Accordingly, the circuit court entered an order granting defendant's motion for relief from judgment. The prosecution's application for leave to appeal to this Court followed, and was granted. *People v Desai*, unpublished order of the Court of Appeals, entered November 12, 2009 (Docket No. 294287).

On appeal, the prosecutor argues that the circuit court abused its discretion in granting defendant's motion for relief from judgment because defendant failed to establish good cause, actual prejudice, or a due process violation. We agree.

This Court reviews a court's decision to grant a motion for relief from judgment for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). A court abuses its discretion when the decision falls outside the range of reasonable and principled outcomes, *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008), or involves an error of law, *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). We review the court's findings of fact supporting its ruling for clear error, which may be found even when there is some evidence to support them. *McSwain*, 259 Mich App at 683 (citation omitted). The determination whether a party has been afforded due process is a question of law subject to de novo review on appeal. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007).

[1] This case was overruled by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

A criminal defendant's motion for relief from a judgment of conviction is governed by MCR 6.500 *et seq*. Pursuant to MCR 6.508(D), a defendant has the burden to establish entitlement to relief. At issue here is MCR 6.508(D)(3), which precludes a court from granting relief if the motion

> alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
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> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
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> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
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> * * *
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
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> * * *
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. [MCR 6.508(D)(3).]

As discussed above, the circuit court held that defendant met his burden of establishing both the good cause and actual prejudice requirements. We consider each holding in turn.

A. GOOD CAUSE

The circuit court, citing *Reed v Ross*, 468 US 1, 14-15; 104 S Ct 2901; 82 L Ed 2d 1 (1984), noted that good cause "is established when it would not have been reasonably expected to argue or pursue the current basis for relief under the then-controlling law." In light of the *Roberts* doctrine, the court reasoned, defendant's appellant counsel's reliance on a confrontation clause challenge to the admission of the hearsay confession instead of a due process challenge was reasonable. However, the circuit court's interpretation of the gravamen of the *Reed* holding is a bit askew. Although the *Reed* Court did not attempt to give the term '"cause' precise content," it noted:

> Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct.

* * *

> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably **unknown** to him is one situation in which the requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment exactly what is meant by 'reasonable basis,' it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.
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> * * *
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> Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. [*Reed*, 468 US 13-16 (citations omitted, emphasis supplied).]

In this case, the "exceptional circumstances" referenced by the *Reed* Court do not exist. *Id*. at 13. A due process challenge grounded on a claim that the conviction lacked a reliable evidentiary basis because of the admission of the hearsay evidence was neither "a constitutional issue reasonably unknown" nor "a constitutional claim [ ] so novel that its legal basis is not reasonably available to counsel." *Id*. at 14, 16. As the prosecution argues on appeal, defense counsel simply elected not to raise the available due process claim on direct appeal to this Court. Similarly, our Supreme Court, in *People v Reed*, 449 Mich 375, 378-379; 535 NW2d 496 (1995), has held: "'Cause' for excusing procedural default is established by proving ineffective assistance of appellate counsel . . . or by showing that some external factor prevented counsel from previously raising the issue." *Id*. Defendant has also failed to show "that some external factor prevented counsel from previously raising" the due process challenge.

The additional cases cited by defendant in his brief on appeal, *Montejo v Louisiana*, __ US __; 129 S Ct 2079, 2091-2092; 173 L Ed 2d 955 (2009), and *People v Bryant*, 483 Mich 132; 768 NW2d 65 (2009), cert gtd __ US __; 130 S Ct 1685; 176 L Ed 2d 179 (2010), do not alter our conclusion. These cases dealt with changes to specific constitutional rules, which either remove or add an argument to a defendant's arsenal of claims, but a general due process argument, at issue in the case at bar, has always been available and is not addressed by these cases. Thus, defendant cannot show that he had good cause for failing to raise a due process argument on direct appeal. Accordingly, we disagree with the circuit court's conclusion that defendant has established good cause for previously failing to raise this due process challenge on direct appeal. Nevertheless, even if we were to conclude that defendant established good cause for failing to raise this claim, we hold that he has failed to establish the second requirement, "actual prejudice."

B. ACTUAL PREJUDICE

The circuit court also held that the "actual prejudice" requirement, i.e., "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal," MCR 6.508(D)(3)(b)(i), was established. The court held that the

> absence of Adams' alleged confession would have created a void in the proofs against defendant. The admission of Adams' alleged confession had the impact of materializing the plot of Ms. Turetzky's death. Without the confession, nothing links Defendant and Adams; and in turn to the murder. Essentially, Adams' confession is the only substantive evidence supporting Defendant's involvement and status as a suspect. Its admission made the difference between conviction and acquittal.

We disagree with the circuit court's characterization of the quality and quantity of the evidence that was before defendant's jury.

Prosecution witness Janine Bazzana, who was employed at defendant and Turetzky's Trenton medical clinic in 1983, testified that defendant and Turetzky fought on several occasions. The fighting usually involved yelling but one time the fighting got physical and Turetzky emerged from defendant's office with her face "all scratched up" and bleeding. She was also aware that defendant and Turetzky were involved in a business dispute and that, as a result, in about September of 1982, a second clinic was formed—the Monroe clinic—and defendant worked out of that clinic. Bazzana further testified that codefendant Adams also worked at the Trenton clinic, primarily on weekends. Bazzana was working on the day Turetzky disappeared and, when she left the office, Turetzky was wearing white pants, a white lab coat, and a colored blouse.

Prosecution witness Daniel Landau, who also worked at one of defendant and Turetzky's medical clinics, testified that defendant had discussed the difficulties that he had with Turetzky and told Landau that it would probably be for the best if their partnership was dissolved and that he would like complete ownership of the corporation. Landau recalled that defendant spoke about Turetzky in an angry manner, using derogatory terms, including "bitch" and a few other "choice words." Landau recalled that one time, about a year before the murder in late fall or early winter of 1982, he and defendant were driving from the Trenton clinic to the Monroe clinic, when defendant asked him if he was interested in earning some extra, tax-free cash in the amount of $10,000 "to take people out, to be a hitman, he used the word, and he asked if I would be interested in such an arrangement."

Prosecution witness Leilani Sigman, who worked at one of defendant and Turetzky's clinics, testified that she witnessed defendant and Turetzky argue about billing practices. She explained, "generally, it was that [Turetzky] did not want to charge for some things that were not done or did not want to charge as much for things that were done . . . ." The arguments went beyond verbal disputes and Sigman saw Turetzky slap defendant and defendant grabbing her arms on at least three occasions. On one occasion, defendant had three scratches on the side of his neck, on another occasion, defendant had a bloody nose. On one occasion, Turetzky had bruising about her forearms and an abrasion on her chin. Sigman also testified that, in about October or November of 1983, defendant asked her to meet him at his home. When she did,

defendant asked Sigman to become his office manager for the Trenton clinic to begin shortly after Christmas. Turetzky was the office manager of the Trenton clinic. When Sigman said that she did not want to work with Turetzky, defendant responded "you don't have to worry about her; she'll be gone by then." A short time later, Sigman testified, she learned of Turetzky's murder.

Prosecution witness Lawrence Gorski testified that he had been friends with codefendant Adams since the mid-1960s because they were neighbors growing up and went to school together. Adams worked as a medical assistant at defendant's medical clinic for years. Gorski also worked at one of defendant's clinics for a short time in the early 1980s and it was Adams who got him the job. Adams at one time told him about an incident in which Adams took some prescription pads from the clinic, forged them, and got arrested. Gorski testified that at some point, Adams told him that defendant had spoken to him and "was looking for somebody to murder someone." The intended targets were a Dr. Lee, Turetzky, and Turetzky's boyfriend Charles. Gorski could not recall when the conversation took place, but it was within months of Turetzky's death. Gorski had actually conducted surveillance of Dr. Lee and Charles in order to give information to Adams. Gorski asked around but did not find anyone who was interested in carrying out the murders. Gorski also testified that, after the murder, defendant had given codefendant Adams a car and money, enabling him to move to Arizona. Through stipulation, telephone records were admitted into evidence which showed that collect calls were placed to defendant's medical clinics from Arizona during 1984, corroborating this testimony.[2]

Prosecution witness and Woodhaven police officer David Hesburn testified that he responded to the scene where Turetzky's body was found lying across the front seat of her car. The position of her body and clothing indicated to him that she had been pulled into the car because her overcoat was bunched up under her arms. Under the overcoat, Turetzky was wearing a white medical jacket and a multi-colored blouse, and she had on white slacks and white shoes. Turetzky was wearing two gold chain necklaces and a gold ring with about six diamonds. Her checkbook and charge cards were inside of her purse. Hesburn testified that he asked two other officers to conduct surveillance of defendant who was at his Monroe clinic. About 10:00 p.m. the officers notified Hesburn that they were following defendant. Defendant drove to the back of the lighted pharmacy parking lot that was adjacent to the Best Western hotel parking lot—where Turetzky's vehicle and body were found—and stopped his vehicle. Prosecution and police witness Detective James Spradlin, who conducted the surveillance, confirmed this testimony. And prosecution and police witness Officer Marvin Dudzinski testified that he used to park at the pharmacy adjacent to the Best Western parking lot because the location offered a straight line of sight to the area where Turetzky's car was located and, in fact, he had seen Turetzky's car parked at the Best Western hotel for a couple of days.

Prosecution witness Daniel Turetzky, the victim's son who lived in Philadelphia, testified that he got a call from his sister on November 6, saying that their mother had not been heard from or seen in three days. He testified that his mother would never leave his two 18 year-old twin sisters, who lived with their mother, alone like that so he immediately flew home. He

[2] Gorski's testimony regarding Adams' confession will be discussed below.

looked for his mother and could not find her. On November 7, at about 2:00 p.m., Daniel called defendant at his Monroe clinic and, rather than ask him why he was home or anything else, the first thing defendant asked him was whether they found the body—but that was before Turetzky was found dead. Daniel also testified that after his mother's death, litigation commenced regarding insurance proceeds in the amount of $1.4 million dollars which settled in 1987 with defendant receiving all of the interest on the money and gaining control of both medical clinics. Records stipulated into the evidence indicated that an insurance policy was purchased in June of 1983. Daniel testified that at the funeral home, during a prayer service for his mother, he heard codefendant Adams, who was standing directly behind him, say that he thought she was going to come out of the casket and yell at him.

Considering all of this evidence, we cannot agree with the circuit court's conclusions that, but for the admission of the hearsay confession, "nothing links Defendant and Adams," or defendant to the murder, or that its "admission made the difference between conviction and acquittal." Viewed in a light most favorable to the prosecution, the evidence established that: (1) defendant had several physically violent altercations with Turetzky, (2) defendant had significant hostile feelings for Turetzky and used vulgar, derogatory terms in reference to her, (3) the hostility between defendant and Turetzky was so bad that they could not work together and, consequently, a second clinic was formed in Monroe where defendant worked, (4) defendant was deceitful as evidenced by his billing practices, (5) defendant had been actively shopping for a "hitman," including among his own employees, within months of the murder and Turetzky was on his "hit list," (6) codefendant Adams worked for defendant at one of his medical clinics for several years, despite the fact that he had stolen prescription drug pads and forged prescriptions under defendant's employment, (7) defendant wanted complete ownership of the corporation that he and Turetzky had formed together because of his feelings of hostility towards her, (8) shortly before the murder, in November, defendant told a prospective employee that she did not have to worry about working with Turetzky at the Trenton clinic after Christmas—the clinic that Turetzky had always managed and "ran on her own" according to defendant's brief on appeal—and defendant said, "you don't have to worry about her; she'll be gone by then," (9) Turetzky had not been robbed of her gold necklaces, gold six-diamond ring, checkbook, or charge cards during or after her murder, (10) after the murder defendant was followed by the police to a location that was adjacent to and offered a straight line of sight of Turetzky's vehicle where her dead body was located, i.e., the scene of the crime, (11) before Turetzky was found dead, defendant asked her son whether her body had been found, (12) after her murder, defendant gave Adams a car and money, enabling him to move to Arizona, (13) telephone records confirmed several collect calls were made to defendant's clinics from Arizona, and (14) after Turetzky's death, defendant benefited from an insurance policy purchased a few months before the murder and had the option of gaining complete ownership of the medical clinics. Further, to the extent that defendant established, as he repeatedly claims, that Turetzky had a "'domineering' office-management style" and that "Turetzky treated her staff and others at the clinic so poorly that some refused to work with her or to be anywhere near her," this evidence too might lead defendant's jury to conclude that defendant could have easily persuaded Adams, one of defendant's employees under Turetzky's supervision at the Trenton clinic, to be involved in her murder.

We cannot turn a blind eye to all of this evidence and we are confident that the jury did not either. That is, with or without Adams' hearsay confession testimony, defendant would *not*

have had a reasonably likely chance of acquittal. See MCR 6.508(D)(3)(b)(i). Our conclusion is buttressed, in a sense, by the fact that Adams' jury, who heard the testimony relating to Adams' confession, did not find Adams himself guilty of the charged crime. In any case, we disagree with the circuit court's holding that defendant established actual prejudice warranting relief from his judgment of conviction. It follows, then, that we likewise reject defendant's argument that he meets the requirement of MCR 6.508(D)(3), that "there is a significant possibility that the defendant is innocent of the crime," which is an even "higher standard than the 'actual prejudice' standard." See *People v Swain*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293350, issued June 8, 2010), slip op at 13. However, because such a procedural default may not foreclose future appeals related to defendant's due process claims, we next turn to the issue whether the admission of the hearsay confession violated defendant's due process rights.

C. DUE PROCESS

Defendant argues that his conviction, which he claims rested entirely upon the alleged hearsay confession, lacked a reliable evidentiary basis in violation of the Due Process Clause of the Fourteenth Amendment. In light of the evidence, and as discussed above, we disagree with defendant's claim that his conviction rested entirely upon the alleged hearsay confession. Nonetheless, because the circuit court agreed with defendant, we first consider whether the hearsay confession was reliable evidence.

The hearsay statements at issue here were nontestimonial and were against the declarant's penal interest; thus, their admissibility is governed solely by MRE 804(b)(3). See *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008). Our Supreme Court in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), overruled on other grounds by *Taylor*, 482 Mich at 374-375, set forth the applicable standard for determining the admissibility of a codefendant's statements under the hearsay exception for statements against a declarant's penal interest and the standard remains valid. See *Taylor*, 482 Mich at 378. In a case much like ours, *People v Deshazo*, 469 Mich 1044; 679 NW2d 69 (2004), our Supreme Court reversed a holding that confession testimony very similar to the testimony at issue in this case—"that a non-testifying co-defendant told the witness that defendants hired him to kill the victim"—was not reliable. After stating that the statement was admissible as a statement against penal interest under MRE 804(b)(3), the Court also held:

> The co-defendant's statement bears adequate indicia of reliability, in that it was voluntarily given to a friend or confederate, and was uttered spontaneously without prompting or inquiry. The statement was not made to law enforcement officers. Although the circuit court found that the statement was not reliable because the co-defendant minimized his role in failing to pay the witness for helping dispose of evidence and because co-defendant had a motive to lie about this in order to avoid paying the witness, these considerations are irrelevant to the question whether the co-defendant was probably speaking the truth when he allegedly confessed to the witness that he participated in a murder. [*Deshazo*, 469 Mich at 1044.]

In our previous opinion, *Desai I*, we discussed at length the *Poole* requirements and why the hearsay confession was admissible under MRE 804(b)(3). *Desai I*, slip op, pp 2-8. We remain confident in that opinion. "Under the law of the case doctrine, an appellate court's

determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). It is true that, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice. . . . [T]he law of the case need not be applied where the prior opinion was clearly erroneous." *People v Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997). Defendant claims that our prior opinion was clearly erroneous with respect to the issue of reliability and cites extensively to, and relies on, the United States District Court's opinion, *Desai II*, in support of his claim.

In rendering its opinion, the district court looked to whether "particularized guarantees of trustworthiness" existed by considering whether cross-examination would be of marginal utility or if the totality of the circumstances that surrounded the making of the statement rendered the declarant worthy of belief. *Desai II*, slip op at 13. Defendant summarizes that court's opinion as holding that the hearsay confession "was unreliable for two reasons: (1) there was substantial evidence that Adams would have denied making the confession and would have contradicted the substance of the alleged confession had he been subject to cross-examination, and (2) under the totality of the circumstances the hearsay statements were not worthy of belief." Without countering each and every purported "fact" that the district court relied on in ruling that the hearsay confession lacked particularized guarantees of trustworthiness, we find it necessary to discuss some of our disagreements in light of defendant's reliance of that holding.

First, the district court held that cross-examination of Adams would have had "more than marginal utility" and "enormous utility" because (1) Adams would have denied his involvement in the murder, he had consistently denied his involvement, and he passed a polygraph examination, (2) Adams could have been asked about his hearing loss, which would have undermined the description of the confession that occurred "while they were in separate stalls in the bathroom of a loud bar while a band was playing," and (3) Adams' history of lying and committing crimes of dishonesty, and involvement in a conspiracy to assault defendant could have been established. *Desai II*, slip op at 13-14. We disagree with that court's reasoning and the conclusion.

We have no doubt that Adams would have denied making the confession—he was on trial for murder. And the prisons are filled with criminal defendants who continue to deny their involvement in criminal activity. That Adams "passed a polygraph examination" is not persuasive; Gorski, too, "passed" a polygraph examination. And, we disagree that Adams' hearing loss testimony would have undercut Gorski's claim since Adams was the one speaking, not listening. Gorski also testified, repeatedly, about Adams' hearing loss and evidence that was admitted by stipulation also established Adams' hearing loss. Further, as discussed below, there was no evidence that the bathroom was loud, or that the band was playing at the time of the confession. And, typically people with a hearing loss tend to speak louder than a person with normal hearing. Additionally, there was testimony that Adams committed prescription drug fraud, and was at some prior time involved in a conspiracy to assault defendant as well as other people; therefore, these "facts" were before the jury. In summary, cross-examination of Adams would not have "had more than marginal utility."

We likewise disagree with the district court's "totality of the circumstances" analysis. The district court held that (1) Adams was not worthy of belief because he had a long criminal record, was a drug abuser, and "may well have been using drugs and alcohol at the time of his

alleged confession," (2) Adams' alleged confession "shifted to [defendant] the lion's share of the blame," and (3) the location of the purported confession—"the men's restroom of a noisy and crowded bar"—undercuts its reliability. *Desai II*, slip op at 14-15.

First, the district court failed to set forth law in support of its position that confessions made by people with criminal records or who abuse drugs are not admissible as evidence and we could find no such law. And there was no evidence, as that court concedes, that Adams was using drugs and alcohol at the time of the confession. Second, we disagree with the court's holding that Adams' confession "shifted to [defendant] the lion's share of the blame." Adams claimed that he alone fought with and strangled to death Turetzky, then placed her dead body in her car, and took some money from her purse. Third, we are unable to discern why a men's restroom—which may or may not have been noisy, compared to any other possible location outside of a court of law, is not a setting that induces truthfulness; privacy is inherent in such a place. In short, we are not persuaded by defendant's arguments or the district court's analysis that our prior decision with regard to the reliability of the hearsay confession was clearly erroneous or created an injustice. Next, we turn to the Wayne Circuit Court's holding that the hearsay confession was unreliable.

In holding that the hearsay confession was unreliable, the circuit court looked at "Adams himself, Gorski himself, the confession setting, and finally the Defendant." With respect to codefendant Adams, the circuit court held that he was untrustworthy in that he had a criminal history that included crimes of dishonesty, and he was a drug addict, "whom according to Gorski's testimony, consumed alcohol and used narcotics at the time of the alleged confession." The circuit court continued,

> Such characteristics raise concerns about Adams' credibility and capacity in the context of a bathroom stall and confession to a murder that he allegedly committed because Defendant paid him to do so. The eighteen to forty-eight hour window during which the medical examine [sic] testified Turetzky was killed fell on a weekend during which Adams, the alleged killer, was punched in at work for the whole time. Additionally, Adams took a polygraph where his denial of the murder were passed on as true.

As we noted with respect to the district court's analysis, the circuit court failed to set forth any legal support for the conclusion that a confession from a person with a criminal history or who used drugs is inadmissible evidence. Further, we have reviewed Gorski's testimony and, although he testified that he had "probably" been drinking beer the night Adams confessed, Gorski did not testify that Adams had been drinking alcohol or used drugs that night.[3] In his brief, defendant even concedes that there was no such evidence, noting that Adams "may well have been under the influence." Obviously, and equally possible, he may not have been under the influence.

[3] Gorski's preliminary examination testimony was consistent in that he testified that he did not remember if Adams had a drink the night of the confession and he did not know if Adams used drugs that night.

Additionally, Turetzky was last seen alive on Thursday, November 3, 1983, and her dead body was found four days later on Monday, November 7, 1983. She was found wearing clothes that fit the description of the clothes she was last seen wearing on Thursday, including her white lab coat that she wore at the medical clinic that day. There was no evidence that Turetzky contacted anyone, including her two 18 year-old daughters who lived with her, after she disappeared on Thursday, which was uncharacteristic of her. A medical examiner testified that her time of death could have been four days, a week, or more than a week earlier than the "eighteen to forty-eight hour window" the court references, because the outside temperatures ranged between 32 and 40 degrees which would have preserved her body. Further, according to Gorski's testimony, Adams had told Gorski that "the time of death that the coroner had arrived at [*the eighteen to forty-eight hour window*] was incorrect and that the time of death that he arrived with would have shown that he was actually working that weekend." There is no evidence that Adams was working on that Thursday or Friday, when Turetzky was last seen, or heard from, alive. Moreover, that Adams took a polygraph test and "passed" means as much as the fact that Gorski, too, took a polygraph test and "passed."

With respect to Gorski, the circuit court held that Gorski had incentive to fabricate the confession as diversion to shift attention away from him as the potential killer, Gorski failed to tell police about the confession when he was questioned by police a few months after the murder, Gorski could not remember the time or date of the confession, and Gorski said that Adams used a tie to strangle Turetzky although the autopsy revealed no ligature marks. These findings are not persuasive.

Although Gorski may have had a motive to lie, it is equally true that he may not have had a motive to lie. And we do not find it suspicious that he would not tell the police immediately about Adams' confession. Adams and Gorski had been good friends since the mid-1960s and Adams had confided his other past criminal activity to Gorski. Adams even got Gorski a job at defendant's medical clinic. It is not the unusual circumstance that a friend would keep another friend's secret—albeit grizzly secret—for a period of time. And Gorski also testified that he was scared to tell the police, also not an unusual condition when one has knowledge about a gruesome murder that someone else committed at the behest of another. Further, review of Gorski's testimony reveals that he actually could not recall when many, if not most, significant moments occurred in his life, i.e., he had no specific date recall about events in his life, not just the events at issue here. And contrary to the circuit court's conclusion, the medical examiner testified that Turetzky was "likely" manually strangled, but that a ligature with a broad surface (like a tie, not a rope) could have also been used. Thus, a combination of manual and ligature strangulation could have been employed which is consistent with Gorski's testimony that Adams said that he first collapsed her windpipe with his hands and then, because she was still gasping for air, he used his necktie to finish strangling her.

Next, the circuit court held that "the setting in which the alleged confession transpires is problematic." The court considered that the confession occurred in a bar, with music and noise present, and it occurred in a men's bathroom, while Gorski and Adams were in separate stalls. The court continues, "[p]resumably other patrons were shuffling in and out of the bathroom to relieve themselves. These logistics make it questionable that Adams, possibly drunk/high and reliant on lip reading is going to confess to a gruesome murder . . . ."

We find some of these factual findings unsupported by the evidence and purely speculative. Although the confession occurred in a bar and in a bathroom, there is no evidence as to whether the bathroom was noisy or soundproofed; whether other people were going in and out of the bathroom or the door was locked; whether the band was playing at the time of the confession or was on a break or done for the evening. Gorski also testified that he was the listener, not a speaker, in the conversation and "it wasn't like it was a two sided conversation;" thus, lip reading would be unnecessary. And, again, there is no evidence that Adams was either drunk or high at the time of the confession.

Next, the circuit court considered defendant personally and noted that the police "were unable to recover any evidence placing Defendant at Ms. Turetzky's vehicle" and the police were unable to "recover evidence tying Defendant to Ms. Turetzky's actual killer." The circuit court also relied on the expert witness testimony that "the crime scene was consistent with a robbery-murder" and noted that "Defendant himself denied any involvement in the murder."

Again, these factual findings are inconsistent with the evidence. The police actually conducted surveillance of defendant after Turetzky was found dead and he did, in fact, drive to the illuminated pharmacy parking lot adjacent to the Best Western hotel—which offered a straight line of sight to Turetzky's vehicle where her body was—and stopped for a time before driving off. As defendant admits in his brief on appeal, return to the scene of the crime is strong evidence of guilt. Further, Adams worked for defendant at one of his clinics for a number of years thus defendant knew Adams well before the murder. And after the murder, defendant provided a car and money to Adams, enabling him to move to Arizona. Additionally, when Turetzky was found dead she was still wearing two gold chain necklaces as well as a gold ring with six diamonds and her checkbook and charge cards were still in her purse; thus, defendant's expert witness testimony that "the crime scene was consistent with a robbery-murder" is weak and not very persuasive. Finally, it is not surprising that defendant "himself denied any involvement in the murder," defendant was charged with murder. And even though he did not confess when Turetzky's son was threatening him with "violent force," if defendant *had* confessed to being involved in the gruesome murder of the young man's mother, surely it is more likely that defendant would have actually met with such "violent force."

For all of the above reasons, we cannot agree with the circuit court that "these four overlapping areas ostensibly demonstrate the unreliability of the [hearsay confession] evidence." Comparing the circumstances, and content, of the actual confession, which occurred within weeks of the murder, to the other evidence, supports our conclusion that the confession testimony was reliable. According to Gorski's testimony about the circumstances of Adams' confession, he and Adams were at a bar when Adams asked to see Gorski in private and they proceeded to the restroom where Adams told Gorski that Turetzky was dead and that he did it. Adams' statement was voluntary, spontaneous, and without prompting, made to a good friend—and sometimes cohort in criminal activity—to whom he had previously confessed criminal activity, and was against Adams' penal interest. See *Poole*, 444 Mich at 165.

In particular, Gorski testified that Adams told him that defendant had prearranged to get a hotel room and Turetzky was supposed to meet him at the hotel room, but Adams was there instead of defendant. This statement explains how Turetzky was lured to, and why she was at, a Best Western hotel. It also explains how defendant knew where to go to look for Turetzky's vehicle—with the police following behind—after she was murdered.

Gorski also testified that Adams told him that after Turetzky got in the room, there was a fight between her and Adams. And "during the fight he tried to strangle her and he said that he collapsed her windpipe and that she was still gasping for air and that's when he took his necktie off and continued to strangle her." This is consistent with the medical examiner's testimony that Turetzky had other scratches and bruises consistent with a struggle, as well as the manual and/or ligature strangulation injuries. Gorski further testified that Adams said that he wrapped Turetzky's body in something and placed it in her car, which was in the parking lot. This is consistent with Turetzky being strangled in another location before being taken to her vehicle, thus explaining why her body was found in a position that looked like she had been pulled into the vehicle, i.e., her overcoat was bunched up under her arms.

Gorski also testified that Adams said that he took money from Turetzky's purse, which was consistent with the fact that her expensive jewelry, checkbook, and credit cards remained on her and in her vehicle, circumstances that are inconsistent with a robbery. Further, Gorski's testimony that Adams said that the time of death arrived at by a coroner was wrong because it was within a day or two of the body being found on a Monday is also consistent with the facts that Turetzky was found wearing clothes, including her white lab coat, that fit the description of the clothes she was wearing when she was last seen alive on the previous Thursday—when Adams was not working—and Turetzky had not contacted anyone, including her young daughters who lived with her, the entire time she was missing. Thus, there was significant corroborating evidence to support the reliability of the hearsay confession.

For all of the reasons discussed above, we conclude that Gorski's testimony regarding Adams' confession was sufficiently trustworthy and reliable; thus, its admission into evidence was proper. Further, Gorski was available and testified at trial about the confession and was subject to cross-examination about such testimony. Therefore, his credibility and the weight to be accorded the evidence were properly before the jury for determination. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Next, we turn to the circuit court's conclusion that defendant's conviction lacked a sufficient evidentiary basis and thus violated the due process clause.

As the United States Supreme Court noted in *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed 2d 560 (1979), citing in *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970), due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Thus, as to an inquiry whether the evidence was sufficient to support a conviction, the court must "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 US at 318-319. The *Jackson* Court continued:

> But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime

> charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. [*Jackson*, 443 US at 319 (citations omitted).]

In this case, the circuit court concluded that the hearsay confession was the "only damning evidence" of defendant's guilt and, because it was "wrongly admitted and used by the Prosecution," defendant's conviction must be overturned. Throughout its opinion, the circuit court refers to this hearsay confession as the *only* evidence against defendant. It follows, then, that the circuit court must have either ignored or found that all of the evidence detailed above, considered in the light most favorable to the prosecution, did not meet the *Winship* threshold of sufficient proof of defendant's guilt. We disagree and would reverse the circuit court's ruling on that ground alone.

It appears that the circuit court did what the *Jackson* Court admonished courts not to do—"ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 US at 319. In light of the quantity and quality of evidence against defendant, with or without the confession evidence, viewed in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found defendant guilty beyond a reasonable doubt from the properly admitted evidence. Nevertheless, for the reasons discussed above, we conclude that the hearsay confession testimony was reliable and properly admitted into evidence. That is, defendant's due process right to be convicted by sufficient evidence was not violated; his conviction by jury was supported by a reliable evidentiary basis, with or without the confession evidence. Accordingly, defendant's due process challenge of his conviction fails and reversal is not required.

In summary, defendant failed to establish entitlement to relief under MCR 6.508(D)(3). Defendant did not have good cause for failing to raise his due process challenge, but even if he did, he failed to establish either actual prejudice or actual innocence. Defendant also failed to establish that his conviction lacked a reliable evidentiary basis in violation of the due process clause. The hearsay confession was reliable and properly admitted into evidence. However, even if the confession was improperly admitted, viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt from the properly admitted evidence; thus, its admission was harmless. See *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Therefore, the circuit court abused its discretion in granting defendant's motion for relief from judgment.

Reversed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad