STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 16, 2001
v	No. 217570 Wayne Circuit Court
NICKOLA JUNCAJ and ANTON JUNCAJ, Defendants-Appellees.	LC No. 98-002793

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

The prosecution appeals as of right orders dismissing the charges against defendant Nickola Juncaj and defendant Anton Juncaj; Nickola Juncaj and Anton Juncaj are father and son. Defendants were charged with first-degree premeditated murder,[1] conspiracy to commit first-degree premeditated murder,[2] and possession of a firearm during the commission of a felony,[3] all relating to the killing of Allan Johnson. The case involves complex evidentiary issues, some of which were decided in a previous order of this Court and others of which we decide in this opinion. We affirm the decision of the circuit court to deny the stay requested by the prosecution despite our determination that the circuit court erred with respect to several evidentiary issues.

I. Basic Facts

A. Overview

In mid-November 1995, Allan Johnson was shot to death as he was driving on the Lodge Freeway. Skender Kajoshaj and Mike Paljuesvic testified under oath at an investigative subpoena hearing regarding conversations that they had with Anton Juncaj concerning this shooting. In their sworn statements, Kajoshaj and Paljuesvic alleged that Anton Juncaj told them that he and another individual, Chris Palukaj, had shot Johnson while they were traveling on the Lodge Freeway. Kajoshaj and Paljuesvic also alleged that Anton Juncaj told them that Nickola Juncaj helped plan the shooting and provided the guns that were used in the shooting. According

[1] MCL 750.316(1)(A); MSA 28.548(1)(A).

[2] MCL 750.157(a); MSA 28.354(1); MCL 750.316(1)(A); MSA 28.548(1)(A).

[3] MCL 750.227(b); MSA 28.424(2).

to Paljuesvic, this killing was revenge for a fight Johnson had with Nickola Juncaj at their workplace.

It is of critical importance, at the outset, to distinguish between the "statements" in this case. The first set of statements consists of the sworn testimony Kajoshaj and Paljuesvic gave during the investigative subpoena hearing; these statements consist of the words that Kajoshaj and Paljuesvic spoke to the prosecution at that hearing. We refer to these statements as the "Kajoshaj/Paljuesvic statements."

Contained within the Kajoshaj/Paljuesvic statements are the second set of statements: the remarks that Anton Juncaj allegedly made to Kajoshaj and Paljuesvic which they repeated to the prosecution. We refer to these statements as "Anton Juncaj's statements." To complicate matters further, contained within Anton Juncaj's statements were his remarks concerning his *own* involvement in the crime and his *father's* involvement. Thus, there are two subsets of statements contained within Anton Juncaj's statements. Without a clear distinction between the various statements, this case becomes something of a hall of mirrors.

Fortunately, the substance of these statements is easier to understand than their relationship to each other. Kajoshaj and Paljuesvic revealed that Anton Juncaj told them without questioning or prompting that he, Anton Juncaj, and another individual, Chris Palukaj, had shot and killed Johnson by chasing him on the Lodge Freeway. According to Kajoshaj and Paljuesvic, Anton Juncaj told them that Johnson was in one car while Palukaj and Anton Juncaj were in another car. Kajoshaj and Paljuesvic also stated that Anton Juncaj told them that his father, Nickola Juncaj, helped plan the shooting and provided the guns that they used to kill Johnson. According to Paljuesvic, this killing was revenge for a fight Johnson had with Nickola Juncaj at their workplace.

B. Procedural History

Despite swearing at the investigative subpoena hearing that the statements that they made to the prosecutor were true, Kajoshaj and Paljuesvic recanted these statements at the preliminary examination after they were granted immunity from prosecution for any perjury they might have committed. They explained this sudden change by claiming that their sworn statements were untrue and only the result of police coercion.[4] The prosecution impeached Kajoshaj and

[4] Kajoshaj alleged that, while he was imprisoned for an unrelated offense, the police approached him at least three times to ask him to report that defendants were involved in Johnson's murder. He claimed that only after the police allegedly locked him in a cell under deplorable conditions for four days and promised that he would be transferred to another facility if he cooperated did he give the prosecution false information about defendants.

Paljuesvic said that the police told him that someone wanted to speak with him for an hour, but that he was not under arrest. Paljuesvic claimed that the police put him in a police car and drove him to a police station in Detroit, where he was questioned under oath from about 1:00 p.m. until 1:30 a.m.; according to Paljuesvic, he made the statement incriminating defendants after approximately four hours of questioning. Paljuesvic alleged that, despite his requests to call his family so that they could find an attorney for him, the police did not allow him to make contact with anyone during this time. Paljuesvic further testified that he felt threatened during this interrogation, that the police were attempting to connect him to this crime, and that he would

Paljuesvic by using the Kajoshaj/Paljuesvic statements; thus, portions of the Kajoshaj/Paljuesvic statements are in the transcript of the preliminary examination. The district court concluded that there was probable cause to find that defendants committed the crimes and bound them over for trial.

Defendants brought a motion to quash the information in the circuit court. At the May 1998 hearing on that motion, defendants' attorneys argued that the Kajoshaj/Paljuesvic statements would not be admissible at trial because both Kajoshaj and Paljuesvic were available to testify, rather than being "unavailable" as that term is defined in MRE 804(a). Accordingly, defendants' attorneys contended, the prosecution lacked sufficient evidence to proceed to trial without the Kajoshaj/Paljuesvic statements.

The prosecution contended that the Kajoshaj/Paljuesvic statements were made under oath and were admissible under MRE 801(d)(1)(A), the prior inconsistent statement rule. MRE 801(d)(1)(A) provides that a statement otherwise inadmissible as hearsay may be admitted if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person[.]

Specifically, the prosecution contended that an investigative subpoena hearing fits the definition of a "proceeding" under the prior inconsistent statement rule.

However, the circuit court first considered whether the Kajoshaj/Paljuesvic statements were admissible under MRE 804(b)(3), the statement against interest rule. MRE 804(b)(3) makes a statement admissible if it

> was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The circuit court determined that Kajoshaj and Paljuesvic did *make* their sworn statements, but that the Kajoshaj/Paljuesvic statements were not admissible pursuant to *People v Poole*[5] because (1) the Kajoshaj/Paljuesvic statements were not against the pecuniary or penal interests of

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have done "anything to get out of there, anything."

[5] *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993). Additionally, in *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000), this Court reaffirmed its commitment to the *Poole* analysis.

Kajoshaj and Paljuesvic, (2) the Kajoshaj/Paljuesvic statements were not made "contemporaneously with" the shooting, and (3) Kajoshaj and Paljuesvic made the statements to the police while in custody, rather than to their usual confidantes. The circuit court determined that, at the time of the hearing, Kajoshaj and Paljuesvic were available to testify at trial, precluding admissibility under MRE 804(b)(3).

However, the circuit court also concluded that, in order to determine if the Kajoshaj/Paljuesvic sworn statements were admissible under MRE 803(d)(1)(A), the prior inconsistent statement rule, it had to conduct an evidentiary hearing to determine whether Kajoshaj and Paljuesvic made their statements voluntarily. Although the circuit court did not distinguish between the two defendants in this case, the context of its ruling and its reference to *Poole* suggests that it intended for its ruling under this rule of evidence to affect only Nickola Juncaj. *Poole* dealt with the circumstances that make statements by a codefendant implicating another person in a crime admissible against that *other* person at trial.[6] The rule from *Poole* would therefore apply to determining whether Anton Juncaj's statements implicating Nickola Juncaj, his father, in the shooting are admissible at trial; in the context of this case, codefendant Nickola Juncaj would be the *other* person implicated by Anton Juncaj's statements. *Poole* would not be factually relevant to whether the portion of Anton Juncaj's statements relating to his *own* involvement in the crime would be admissible against him at trial.

As a result of its ruling, the circuit court ordered the parties to submit briefs discussing whether the circumstances surrounding the sworn statements constituted a hearing or other proceeding within the meaning of MRE 801(d)(1)(A), the prior inconsistent statement rule. The circuit court scheduled a hearing to determine whether Kajoshaj and Paljuesvic made these statements in accordance with the procedures set forth in the investigative subpoena statutes and whether their statements were given voluntarily. Before the circuit court could hold the hearing, the prosecution filed an interlocutory appeal with this Court, arguing that the circuit court erred as matter of law in ordering an evidentiary hearing because defendants did not have standing to challenge whether the sworn statements were voluntary.

In June 1998, this Court entered an order prohibiting the circuit court from conducting the evidentiary hearing.[7] The Court reasoned that "[t]he circuit court's review of a defendant's motion to quash an information based on insufficient evidence is a narrow inquiry based on the record before the examining magistrate. Accordingly, the circuit court may not conduct an evidentiary hearing to expand the record." Further, this Court questioned whether defendants' arguments in the circuit court were akin to a motion to dismiss or a motion to suppress the sworn statements as evidence. As a result, this Court held that defendants did not have standing to move to suppress the sworn statements because they were not the result of extreme coercion. Finally, the order simply stated that "we hold as a matter of law that the statements made at the investigative subpoena hearing are excluded from the definition of hearsay under MRE 801(d)(1)(A). Therefore, the statements are admissible at defendants' trial."

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[6] *Id*. at 160-165.

[7] Technically, this Court denied the application for leave to appeal and by order answered the questions raised in the application. We refer to this part of the procedural history in this case as an interlocutory appeal only for convenience.

At a hearing in September 1998, which followed this Court's disposition of the interlocutory appeal, the prosecution asked the circuit court to enter orders permitting the Kajoshaj/Paljuesvic statements to be used at trial. The circuit court refused to sign the prosecution's proposed orders, stating that they were too broad and it was unnecessary to enter orders simply to admit evidence at trial.

In January 1999, on the day set for trial, the prosecution asked the circuit court to declare that Kajoshaj and Paljuesvic were unavailable to testify, noting that they were not present in court that day and had also failed to appear at a previous hearing. In light of its position that Kajoshaj and Paljuesvic were unavailable, the prosecution moved the circuit court to enter an order admitting the Kajoshaj/Paljuesvic statements, as well as the testimony of Kajoshaj and Paljuesvic at the preliminary examination in which portions of the Kajoshaj/Paljuesvic statements were used for impeachment, as substantive evidence. The prosecution also asked the circuit court to stay trial for forty-eight hours so that he could appeal its ruling that the portion of Anton Juncaj's statements relating to Nickola Juncaj[8] were not admissible against Nickola Juncaj pursuant to MRE 804(b)(3), the statement against interest rule. While the prosecution did not ask the circuit court to dismiss the charges against both defendants if it denied its motion, the prosecution conceded that if it could not admit the portion of Anton Juncaj's statements relating to Nickola Juncaj, there would be no case against Nickola Juncaj.

Both defense attorneys opposed the prosecution's motion to admit the sworn statements as substantive evidence. Nickola Juncaj's attorney argued that the trial court had previously ruled that the sworn statements were not admissible under MRE 804(b)(3). Anton Juncaj's attorney contended that admitting the sworn statements as substantive evidence was improper because he did not have an opportunity to cross-examine Kajoshaj and Paljuesvic. Further, according to Anton Juncaj's attorney, admitting the sworn statements as substantive evidence would deprive both defendants of their right to confront these two witnesses. Both defense attorneys indicated that they were prepared to go to trial and, therefore, opposed delaying trial for an additional interlocutory appeal.

In response to the prosecution's motions, the circuit court stated it had ruled that it had excluded the sworn statements under MRE 804 months before trial. According to the circuit court, this gave the prosecution sufficient time to appeal the decision but the prosecution simply failed to take advantage of that time. The circuit court denied the prosecution's motion for a stay, stating that any further delay would be unfair to defendants, defense counsel, and the court itself. Because the prosecution was not ready to proceed, the trial court dismissed the charges without prejudice.

[8] Again, this is our interpretation of the meaning of the circuit court's ruling on this point.

On appeal, the prosecution contends that the circuit court erred in dismissing the charges against both defendants by relying on that court's May 1998 ruling barring the prosecution from using the portion of Anton Juncaj's statements relating to Nickola Juncaj at trial.[9] We agree that this evidentiary issue is connected to the circuit court's order ultimately dismissing the charges in this case. However, it is connected to this final order only through the prosecution's decision to ask the circuit court to delay trial further by granting a stay. Additionally, this evidentiary issue revolves primarily around Anton Juncaj's statements. Thus, to resolve the issue of whether the circuit court erred when it dismissed the charges against both defendants, we must first address the effect of this Court's June 1998 order.

II. This Court's June 1998 Order

This Court's June 1998 order makes it clear that the testimony at the investigative subpoena hearing is admissible as substantive evidence at trial. However, that order does not distinguish between the Kajoshaj/Paljuesvic statements as a whole and Anton Juncaj's statements. In its original interlocutory appeal to this Court, the prosecution did not ask this Court to decide whether the circuit court erred when it determined that the portion of Anton Juncaj's statements relating to Nickola Juncaj were inadmissible against Nickola Juncaj. Accordingly, we have no reason to believe that this Court's June 1998 order decided, one way or another, whether the portion of Anton Juncaj's statements relating to Nickola Juncaj were admissible against Nickola Juncaj at trial. Further, this Court did not determine whether the circuit court erred when it analyzed the evidentiary issue under MRE 804(b)(3) and *Poole*. It is these issues, among others, that are now before us.

This Court's June 1998 order did, however, resolve part of the problem when it addressed the classic hearsay-within-hearsay situation that would occur by permitting the Kajoshaj/Paljuesvic statements to be used to repeat what Kajoshaj and Paljuesvic originally claimed that Anton Juncaj said concerning his father's involvement in the crime.[10] This Court implicitly concluded that an investigative hearing is the sort of hearing that MRE 801(d)(1)(a) contemplates under the language referring to a prior inconsistent statement made at "a trial, hearing, or other proceeding, or in a deposition . . . ." Further, as the record of the preliminary examination in this case indicates, Kajoshaj and Paljuesvic both took oaths at the investigative

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[9] The issue presented in the prosecution's brief states that, before the circuit court dismissed the charges, it "had previously given explicit and implicit assurances that the evidence would be admissible notwithstanding" the circuit court's May 1998 order. We cannot find any point in the record where the circuit court gave any sort of assurances, whether implicit or explicit, that it would admit the evidence at trial, despite the prosecution's repeated efforts to secure a written order admitting the statements against Nickola Juncaj pursuant to MRE 804(b)(3). In fact, at its later hearing, the circuit court explained at length that it ordinarily ruled on evidentiary issues as they arose at trial rather than entering orders resolving every dispute in advance of trial. Fortunately, the prosecutor who appeared at oral arguments in this appeal clarified this matter, agreeing that there had been no such ruling by the circuit court.

[10] As becomes relevant later in this opinion, we assume without deciding that hearsay-within-hearsay is admissible in a criminal trial if "each part of the combined statement . . . conform[s] with an exception to the hearsay rule." See *Cooley v Ford Motor Co*, 175 Mich App 199, 203; 437 NW2d 638 (1988).

subpoena hearing that would subject them to the penalties for perjury. In fact, they each secured an agreement immunizing them from prosecution for their statements at the investigative subpoena hearing.

Almost certainly, Anton Juncaj will be unavailable[11] to testify at his own trial because of his constitutional right to silence.[12] Therefore, we interpret this Court's June 1998 order as meaning that when Anton Juncaj made statements to Kajoshaj and Paljuesvic about *his* involvement in the crime, these statements, as contained in the Kajoshaj/Paljuesvic statements, can be used against *him* as a statement against interest under MRE 804(b)(3). Alternatively, regardless of whether Anton Juncaj decides to testify, the portion of his statements about *his* involvement in the crime, as contained in the Kajoshaj/Paljuesvic statements, would be admissible against *him* as an admission of a party opponent under MRE 801(d)(2).[13]

However, this Court's June 1998 order did not reverse, modify, rely on, or address the circuit court's apparent ruling that the portion of Anton Juncaj's statements relating to his *father's* involvement in the crime could not be admitted against Nickola Juncaj at trial. Therefore, this Court's June 1998 order does not bind our decision on *this* evidentiary issue in any respect[14] and it is to this issue that we now turn.

III. Anton Juncaj's Statements Implicating Nickola Juncaj

A. Standard Of Review

We review evidentiary rulings for an abuse of discretion.[15] However, the Michigan Supreme Court has also recognized that

> decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.[16]

B. Legal Standard

In *Poole, supra*, the Michigan Supreme Court addressed "whether a declarant's noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to

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[11] MRE 804(a).

[12] US Const, Am V; Const 1963, art 1, § 17.

[13] See, generally, *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990).

[14] See *City of Marysville v Pate, Hirn, & Bogue, Inc*, 196 Mich App 32, 34; 492 NW2d 481 (1992) (discussing the law of the case doctrine).

[15] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

[16] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (citations omitted).

someone other than a law enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to MRE 804(b)(3)" as a statement against interest.[17] In other words, the Court was considering whether "carry over" statements, meaning statements that incriminate someone other than the declarant, made spontaneously in a noninvestigative atmosphere could be used against the accomplice at trial.[18] The Court concluded that

> the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal and interest and as such is reliable, the whole statement – including portions that inculpate another – is admissible as substantive evidence at trial pursuant to MRE 804(b)(3).[19]

Further, the *Poole* Court noted, introducing the declarant's statement against the accomplice does not violate the accomplice's rights under the Confrontation Clause[20] "if the prosecutor can establish that [the declarant] is unavailable as a witness and his statement bears adequate indicia of reliability *or* falls within a firmly rooted hearsay exception."[21] What constitutes indicia of reliability must be determined on a case-by-case basis.[22] However, this indicia "must exist by virtue of the inherent trustworthiness of the statement" and may include evidence that the inculpatory statement was made (1) voluntarily, (2) contemporaneously with the events identified in the statement, (3) to "family, friends, colleagues, or confederations – that is, to someone to whom the declarant would likely speak the truth," and (4) "spontaneously at the initiation of the declarant and without prompting or inquiry by the listener." However, a statement is ordinarily inadmissible if the inculpatory statement was made (1) "to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor," or (4) "the declarant had a motive to lie or distort the truth."[23] These factors are neither an exhaustive list nor dispositive of whether the inculpatory statement is admissible.[24] Rather, courts must view the circumstances surrounding the statement as a whole in order to determine if the "totality of the circumstances" suggest that the statement is reliable.[25]

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[17] *Id*. at 153-154.

[18] *Id*. at 159-160.

[19] *Id*. 161.

[20] US Const, Am VI; Const 1963, art 1, § 20.

[21] *Poole*, *supra* at 163.

[22] *Id*. at 163.

[23] *Id*. at 165.

[24] *Id*.

[25] *Id*.

C. MRE 804(b)(3)

We therefore consider the circumstances surrounding Anton Juncaj when he allegedly made his statements incriminating his accomplice, his father Nickola Juncaj, to Kajoshaj and Paljuesvic. According to the fragments of the Kajoshaj/Paljuesvic sworn statements read into the record at the preliminary examination, Anton Juncaj initiated conversations with Kajoshaj and Paljuesvic at separate times. While we are not certain how close in time to the crime Anton Juncaj made these statements, he evidently spoke with Kajoshaj while they were socializing and with Paljuesvic while they were driving in a car. During each of these conversations, Anton Juncaj essentially told a story of the shooting, including the motivation for that shooting. Part of this story included references to Nickola Juncaj's role in securing the weapons used to shoot Johnson and Nickola Juncaj's help planning the crime.

As a whole, Anton Juncaj incriminated himself in premeditated murder while talking to Kajoshaj and Paljuesvic, making these declarations classic statements against his penal interest. Mentioning his father's role in the crime was only a natural part of this narrative. Anton Juncaj had no apparent motive to lie when incriminating his father. In fact, the statements suggested that Anton Juncaj tended to act to *protect* his father. These statements were made without prompting to individuals with whom Anton Juncaj had a friendly relationship. None of these statements were made to the police or in situations that might be inherently coercive, as might be the case with a police station. We conclude that these factors all would make Anton Juncaj's statements admissible against Nickola Juncaj under *Poole* and MRE 804(b)(3) *unless* admitting them would violate Nickola Juncaj's right to confrontation.[26]

D. Right To Confrontation

Poole held that a statement that is inherently reliable *or* falls under a well-established exception to the rule against hearsay is admissible as substantive evidence against a person who did not make the statement, but is implicated in a crime because of it. In this case, the factors that we have identified that made the portion of Anton Juncaj's statements relating to Nickola Juncaj's involvement in the crime admissible under MRE 804(b)(3) also indicate that they are inherently trustworthy. The statements were made without a motivation to lie, were made spontaneously, did not tend to incriminate Nickola Juncaj while exculpating Anton Juncaj, and were not aimed at seeking revenge or currying favor with the listener. The totality of the circumstances surrounding each statement shows that they are inherently trustworthy. Further, while *Poole* expands the concept of an admissible statement against interest, it has done so within narrow confines and for 7 ½ years. This suggests that *Poole* describes a "firmly rooted" exception to the rule against hearsay. Thus, we conclude that admitting the portion of Anton Juncaj's statements regarding Nickola Juncaj's involvement in the crime would not violate Nickola Juncaj's constitutional right to confrontation.[27]

[26] *Id*. 161.

[27] *Poole, supra* at 163.

E. The Circuit Court's Reasoning

As a matter of law, we conclude that Anton Juncaj's statements, as contained in the Kajoshaj/Paljuesvic statements, are admissible, both regarding his own involvement in the crime and his father's involvement. What puzzles us, however, is the reasoning the circuit court used to rule them inadmissible, at least regarding Nickola Juncaj. So that there will be no further confusion, we think it appropriate to comment that the *Poole* analysis applies to the circumstances surrounding the *declarant* at the time he made the statement. Here, Anton Juncaj was the declarant. Therefore, the *Poole* analysis required the circuit court to examine the circumstances surrounding *Anton Juncaj's* discussions with Kajoshaj and Paljuesvic, *not* the circumstances surrounding *Kajoshaj's and Paljuesvic's* repetition of Anton Juncaj's statements at the investigative subpoena hearing. Thus, the factors that the circuit court found troubling, especially the role of police detention and questioning, were absolutely irrelevant to determining whether the words Anton Juncaj spoke to Kajoshaj and Paljuesvic could be used at trial.

IV. Introducing The Evidence

Having determined that Anton Juncaj's statements are admissible against both Anton Juncaj *and* Nickola Juncaj, the next question is how the prosecution might be able to introduce Anton Juncaj's statements to a jury. As a practical matter, this will involve the use of the Kajoshaj/Paljuesvic statements and we now turn to the question of their admissibility. Whether the Kajoshaj/Paljuesvic statements and the preliminary examination testimony of Kajoshaj and Paljuesvic (in which the prosecution used portions of the Kajoshaj/Paljuesvic statements for impeachment purposes) are admissible depends entirely on whether Kajoshaj and Paljuesvic are "available"[28] at trial. On the basis of the record before us, we have no way of knowing whether either Kajoshaj or Paljuesvic will be available at trial and therefore we cannot at this time resolve whether the Kajoshaj/Paljuesvic statements can be used against either defendant. Below, we outline the situations that might arise in the future in which the Kajoshaj/Paljuesvic statements may or may not be admissible. Rather self-evidently, if the Kajoshaj/Paljuesvic statements are admissible under the circumstances we describe, then Anton Juncaj's statements are, consistent with our conclusions above, also admissible.

If Kajoshaj and Paljuesvic appear at trial and testify *consistently* with what they said at the investigative subpoena hearing – and therefore *contrary* to what they said at the preliminary examination – then the prosecution has no need to rely on the transcript of the investigative subpoena hearing to admit the substance of their sworn statements and, contained within those statements, Anton Juncaj's statements regarding his own involvement and his father's involvement in the crime. By testifying at trial, Kajoshaj and Paljuesvic would remove one of the layers of hearsay in this case. Further, the prosecution will have no need to impeach their testimony through the use of the Kajoshaj/Paljuesvic statements since they will be testifying consistently with those statements.

[28] See MRE 801(d)(1); MRE 804(a); see, generally, *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994).

If Kajoshaj and Paljuesvic appear at trial and testify *contrary* to what they said at the investigative subpoena hearing[29] – and therefore *consistently* with what they said at the preliminary examination – under this Court's June 1998 order, the Kajoshaj/Paljuesvic statements in their entirety, including Anton Juncaj's statements contained within them, can be admitted as substantive evidence. The testimony at the preliminary examination also fits well under this evidentiary rule. Therefore the portion of Anton Juncaj's statements about *his* involvement in the crime, as contained in the Kajoshaj/Paljuesvic statements or in the transcript of the preliminary examination, can be used against him as a statement against interest under MRE 804(b)(3) or as an admission of a party opponent under to MRE 801(d)(2). In this opinion, we have above determined that the portion of Anton Juncaj's statements, as they relate to Nickola Juncaj's involvement in the crime, are admissible against Nickola Juncaj under *Poole* and MRE 804(b)(3) and that admitting them would not violate Nickola Juncaj's right to confrontation. The preliminary examination testimony of Kajoshaj and Paljuesvic is also admissible under these circumstances.[30]

If Kajoshaj and Paljuesvic are not available to testify at trial, the Kajoshaj/Paljuesvic statements, including Anton Juncaj's statements contained within them, are not admissible under MRE 801(d)(1)(a).[31] To admit the Kajoshaj/Paljuesvic statements, when the defense lacked an opportunity to cross-examine Kajoshaj and Paljuesvic as they were testifying at the investigative subpoena hearing, would be a serious violation of the confrontation clause. Further, if Kajoshaj and Paljuesvic are not available to testify at trial, the Kajoshaj/Paljuesvic statements are *not* admissible as former testimony under MRE 804(b)(1) for the same reason. However, the testimony of Kajoshaj and Paljuesvic at the preliminary examination would be admissible under this former testimony rule because the defense was present at the preliminary examination and had an opportunity to cross-examine both witnesses.

We hope that the following matrix makes the analysis of this issue easier to understand. It applies separately to Kajoshaj and Paljuesvic:

	Witness Available At Trial	Witness Unavailable At Trial
Investigative Subpoena Hearing Transcript	Can be used only if trial testimony is inconsistent. See MRE 801(d)(1)(a).	Cannot be used. Unavailability defined by case law. See People v Chavies, 234 Mich App 274, 283-284; 593 NW2d 655 (1999).
Preliminary Examination Transcript	Can be used only if trial testimony is inconsistent. See MRE 801(d)(1)(a).	Can be used. Unavailability defined in MRE 804(a).

[29] *People v Chavies*, 234 Mich App 274, 282-283; 593 NW2d 655 (1999) makes clear that the sort of inconsistency meriting admission of a prior inconsistent statement is widely defined and need not involve a direct statement by Kajoshaj and Paljuesvic that they reject their earlier testimony.

[30] See *People v Morrow*, 214 Mich App 158, 164; 542 NW2d 324 (1995).

[31] See *Chavies, supra* at 283.

V. The Stay And The Dismissal

A. Standard Of Review

This Court reviews a lower court's decision regarding a motion to stay the proceedings for an abuse of discretion.[32] Similarly, this Court reviews a motion to dismiss for an abuse of discretion.[33]

B. The Reasons To Deny The Stay

The prosecution contends, at least in its statement of the issue on appeal, that the circuit court erred when it dismissed this case and, ultimately, we must decide whether the circuit court abused its discretion in refusing to issue a stay and in dismissing the case without prejudice. As we have explained at length above, the circuit court essentially put itself in the position of making the decision to dismiss the charges against defendants because it had misapplied the law. We might, therefore, be compelled to reverse under other circumstances. However, we see no reason to infringe on the circuit court's discretion here because the dismissal was without prejudice and, with the evidentiary issues now corrected, the prosecution is free to refile charges against defendants.

In this regard, we note that by January 5, 1999, defendants had been incarcerated for approximately one year, they had demanded a speedy trial, and they were prepared to proceed. Trial was delayed in May 1999 for the interlocutory appeal filed with this Court by the prosecution, that appeal did not challenge the circuit court's evidentiary ruling under *Poole*, and trial was again delayed in September 1999 to accommodate the prosecution's schedule. Despite the three latest months of inactivity in the case, the prosecution did not move for a stay until the day of trial while the potential jurors were waiting to be selected.[34] The prosecution declined an opportunity to sever the trials and proceed against Anton Juncaj while appealing the circuit court's ruling. The prosecution was the first, on the record at least, to suggest dismissing the charges without a favorable evidentiary ruling. The circuit court also properly commented on the prejudice it and the defense would suffer from additional delay.

We therefore conclude that there was no abuse of discretion in the refusal to grant a stay and in the decision to dismiss without prejudice, especially in relation to the charges against Anton Juncaj. We note that the prosecution could have tried Anton Juncaj separately.

Affirmed.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck

Kelly, J. did not participate.

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[32] See, generally, *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988).

[33] See *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

[34] See *People v Dilling*, 222 Mich App 44, 53; 564 NW2d 56 (1997) (trial court properly refused to adjourn sentencing when defense counsel had adequate opportunity to prepare).