STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 245455 Oakland Circuit Court
NATHANIEL LEE, JR., Defendant-Appellant.	LC No. 2000-172582-FC

Before: Murphy, P.J., and O'Connell and Gage, JJ.

GAGE, J. (*concurring in part and dissenting in part*).

While I concur in the result reached by the majority, I write separately to express my conclusion that the trial court erred in admitting the grand jury testimony of the witness Eric Lee at trial.[1] The grand jury is an investigative tool of the prosecutor. *Tyson v Trigg*, 50 F3d 436, 440-441 (CA 7, 1995). As such, the testimony offered to the grand jury is designed to achieve a specific result. Quite simply, all of the reasons that exist for not allowing hearsay testimony into evidence come into play in this case. Eric was not realistically available for cross-examination at the preliminary examination, and he was completely unavailable at trial. His grand jury testimony was never truly subjected to cross-examination.

Admittedly, one could argue that the grand jury testimony could have been properly received at the preliminary examination even though Eric testified that he did not recall the grand jury testimony. MRE 801(d)(1)(a). However, the prosecutor cannot bootstrap the admission of grand jury testimony under MRE 801(d)(1)(a) at trial because Eric was no longer available for purposes of cross-examination. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Eric's testimony was never tested for the trustworthiness that we hope to achieve by the adoption of the rules of evidence.

The question then becomes whether this error was harmless, using the following analysis:

[1] See *People v Russ*, 79 NY2d 173, 179; 589 NE2d 375 (1992) (there was "no cognizable justification" for reading the recalcitrant witness' entire grand jury testimony into evidence).

> In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. [*People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (citations omitted).]

As the majority notes, numerous witnesses testified regarding their dealings with the Lee family organization. Defendant used Helen Alexander's house to "cook up" and sell cocaine for many months in the late 1980s. Ralph McMorris purchased large quantities of cocaine from defendant and his brother Roderick Lee. Defendant received cocaine from codefendant Joe Abraham and disbursed it to other individuals for sale or use. On one occasion, Abraham sold Roderick many kilograms of cocaine, two kilograms of which was earmarked for defendant. Abraham also stated that defendant and Roderick sold more cocaine than any other drug organization.

In September 1994, the Pontiac police executed a search warrant at a house in Pontiac, finding weapons, ammunition, money, a digital scale, and cocaine. They also found defendant's receipts and identification in one of the bedrooms. In September 1998, the Pontiac police executed a search warrant at a home connected to the Lee family organization. They found numerous items of correspondence to defendant, ammunition, a weapon, a medicine bottle bearing defendant's name, a digital scale, and a cellular telephone. One of the letters to defendant referred to doing business with defendant and contained terms that are common names for cocaine. Defendant was not employed during the duration of the drug trafficking conspiracy, and he did not file Michigan tax returns from 1987 through 1998.

If Eric's grand jury testimony had been properly excluded, there would still be sufficient evidence of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i). I therefore conclude that the trial court's error in admitting Eric's grand jury testimony was harmless and agree with the result reached by the majority.

/s/ Hilda R. Gage