

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
November 29, 2012

v

STANLEY DUNCAN,

Defendant-Appellee.

No. 312637
Macomb Circuit Court
LC Nos. 2011-003839-FC &
2011-004304-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VITA DUNCAN,

Defendant-Appellee.

No. 312638
Macomb Circuit Court
LC Nos. 2011-004401-FC

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Our Supreme Court has remanded these matters to this Court for consideration as on leave granted. The prosecution appeals Macomb Circuit Judge Matthew S. Switalski's October 2, 2012 order, finding a child complainant in these cases not competent to testify under MRE 601 and not unavailable under MRE 804(a)(4) for purposes of admitting her preliminary examination testimony pursuant to MRE 804(b)(1). We affirm.

Defendant Stanley Duncan (Stanley) was charged with five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(2)(b), and four counts of second-degree criminal sexual conduct, MCL 750.520c(2)(b) (CSC II), involving multiple victims under the age of 13. Defendant Vita Duncan (Vita) was charged with aiding and abetting two counts of CSC I and two counts of CSC II. Vita also faces a misdemeanor charge based on running an unlicensed daycare, MCL 722.125(1)(b). Two of Stanley's CSC I offenses and two of his CSC II offenses

are associated with one complainant: a girl who is currently four years old. All four of Vita's felony charges arise from Stanley's alleged conduct with that same complainant.

Defendants received separate preliminary examinations. The complainant, who was three years old at the time, testified at those preliminary examinations after the district court found her competent under MRE 601. In determining whether she was competent to testify, the court questioned her at each examination regarding her understanding of the concept of truth and her ability to answer questions honestly. At Stanley's preliminary examination, his attorney briefly cross-examined the complainant and asked her specific questions about the alleged incident as well as general questions about her ability to tell the truth. Likewise, Vita's attorney also cross-examined the complainant at her preliminary examination, and inquired about the number of instances of alleged abuse and about whether Vita was present when those acts occurred.

Stanley and Vita were each bound over for a joint trial following their preliminary examinations. Trial commenced on September 26, 2012. On September 28, 2012, the complainant was called to testify. The judge first questioned her to determine whether she was competent to be a witness under MRE 601. He asked her several questions aimed at determining whether she could testify truthfully and understandably. She answered "no" to the judge's questions of whether she knew what the truth is and what a lie is. She told him she could not tell him something that is true. She said she did not know what a promise is. When asked what she would say if he told her that her pink nail polish was purple, she said, "I don't know." The trial court judge stopped questioning the complainant and allowed her to leave the stand. The judge stated that he could not find that she could "pass the threshold to testify."

The prosecution did not challenge the court's ruling that the complainant is not competent under MRE 601. Instead, it requested that the court declare her unavailable under MRE 804(a)(3) on the basis of her "lack of memory." Noting that the complainant testified at defendants' separate preliminary examinations, the prosecution asked that the court allow the transcript of her testimony at those proceedings to be read into the record at the trial.

In response, Vita's counsel argued that the complainant does not satisfy the requirements of MRE 804(a)(3). He noted that she cannot even meet the threshold for qualification and MRE 804(a)(3) refers to persons who have "a genuine lack of memory." Vita's attorney noted he and Stanley's attorney were unable to conduct full cross-examinations because when the complainant testified previously, the judge ruled that "this is really stuff that is not for the exam, this is just a probable cause hearing." Stanley's attorney concurred in this argument.

The court considered each of the separate categories of "unavailability" described in MRE 804(a) and found that the rule did not pertain to the present situation. Regarding lack of memory, the court stated, "I think that once you've started the proceeding, once you have started the testimony, then you start getting the I don't knows. Then at some point, you trigger unavailability. We are not there yet. We didn't get past the threshold." Consequently, the court ruled that the complainant was not able to testify and noted that its ruling also affected the testimony of the first two witnesses: the complainant's parents. This unexpected development prompted the prosecution to request a break in order to investigate the issue that had arisen. Stanley's attorney requested that the court continue trial, while Vita's attorney requested that the court dismiss the charges against her.

The parties appeared before the court on October 2, 2012. On that day, the prosecution asked the court to reconsider its previous ruling. It presented two cases to the court, which it argued supported its request for the court to declare the complainant unavailable under MRE 804(a) and to admit her preliminary examination testimony at trial pursuant to MRE 804(b)(1). In essence, the prosecution argued that the cases supported the premise that a child witness who is found unable to testify truthfully or to communicate at trial should be declared unavailable and where that child was found competent to testify at earlier proceedings, that prior testimony may be admitted. In response, Vita's attorney argued that the cases relied upon by the prosecution were inapplicable because they involved witnesses who were reluctant to testify at trial, not witnesses who were found not competent to testify. He argued further that the defendants' cross-examination at the preliminary examination was more limited. He noted that at the preliminary examination he did not have the opportunity "to fully prepare and gather up all of the relevant information prior to the examination" and he did not have a similar motive in his cross-examination at that time. Stanley's attorney argued that the proposed admission of the preliminary examination testimony raised an issue under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). He noted that he was not present at Vita's preliminary examination and Vita's attorney was not present at Stanley's preliminary examination. Thus, defense counsel did not have the opportunity to cross-examine the complainant at the co-defendant's preliminary examination.

The court reiterated its earlier ruling, as well as its reasons for that ruling. It reviewed MRE 804(a) and found that none of the definitions of unavailability apply. The court noted the cases offered by the prosecution and the fact that the one published case was a pre-*Crawford* case. It also reflected and acknowledged the reality of defendants' comments regarding the lack of an opportunity to conduct a full cross-examination during a preliminary examination. The court declined to declare the complainant unavailable and allow the admission of her preliminary examination testimony at trial. On October 2, 2012, it entered an order reflecting this decision. In that order, it stated that the complainant was not competent to testify under MRE 601. It also ruled that she was not unavailable under MRE 804(a)(4) and her preliminary examination testimony is not admissible under MRE 804(b)(1). The October 2, 2012 order also granted a limited stay of proceedings to allow plaintiff to seek leave to appeal in this Court.

The prosecution filed an emergency application for leave to appeal the October 2, 2012 order. It challenged the trial court's denial of its request to admit the preliminary examination testimony; it did not challenge the court's ruling that the complainant is not competent to testify under MRE 601. Defendants answered the application, arguing that the court's ruling is correct and should not be disturbed. This Court held plaintiff's application for leave to appeal in abeyance and directed the trial court to prepare an opinion, explaining its reasons for its decision. The trial court prepared an opinion on October 5, 2012, and it was filed with this Court.

In its October 5, 2012 opinion, the court considered unavailability under MRE 804(a)(4), which provides that a witness is unavailable if she "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." The court ruled that the complainant was not unavailable under MRE 804(a)(4). It explained that she was "not dead, she's not physically or mentally ill and she's not infirm. Her failure to be able to take the equivalent of the oath did not trigger any of the scenarios in" MRE 804(a). The judge rejected plaintiff's request to declare the complainant unavailable where she is perfectly healthy,

suffers no mental incapacity and is available to testify, yet she is unable to “answer the most basic questions in front of the jury.”

In orders entered October 8, 2012, this Court denied the applications for leave to appeal. *People v Stanley Duncan*, unpublished order of the Court of Appeals, issued October 8, 2012 (Docket No. 312637); *People v Vita Duncan*, unpublished order of the Court of Appeals, issued October 8, 2012 (Docket No. 312638). On October 9, 2012, plaintiff filed applications for leave to appeal in the Supreme Court. On October 10, 2012, the Supreme Court entered an order, remanding these cases to this Court for consideration as on leave granted. It directed this Court to expedite consideration of the cases. The Court also granted plaintiff’s motion for stay, staying trial court proceedings pending the completion of the appeal. *People v Duncan*, ___ Mich ___; ___ NW2d ___ (2012).

On appeal, the prosecution argues that the trial court abused its discretion in determining that the complainant was not unavailable pursuant to MRE 804(a)(4)¹ and in denying the prosecution’s request to admit the complainant’s preliminary examination testimony pursuant to MRE 804(b)(1). We disagree.

In their briefs on appeal, the parties agreed that a trial court’s decision regarding whether to admit evidence at trial is reviewed for an abuse of discretion. *People v Malone*, 287 Mich App 648, 661; 792 NW2d 7 (2010). However, at oral argument, the prosecution asserted that the trial court’s decision is subject to de novo review to the extent that it involved the interpretation of a rule of evidence. This Court has previously acknowledged that “if the inquiry [relating to the admission of evidence] requires examination of the meaning of the Michigan Rules of Evidence, a question of law is presented, which we review de novo.” *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818, 824 (2003). In this case, however, the abuse of discretion standard of review applies.

The prosecution asserts that the trial court should have admitted the contents of the complainant’s preliminary examination testimony pursuant to MRE 804(b)(1). MRE 804(b)(1) provides a hearsay exception if a declarant is unavailable as a witness but has previously testified, and “if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” By its own terms, the hearsay exception set forth in MRE 804(b)(1) is only operable if the declarant is unavailable. Pursuant to MRE 804(a),

“Unavailability as a witness” includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

¹ Although the prosecution initially argued before the trial court that the complainant was unavailable pursuant to MRE 804(a)(3), it makes no such argument on appeal. However, we note that the record is devoid of any evidence that would support a finding of unavailability under that court rule.

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

The prosecution primarily argues that the complainant was unavailable pursuant to MRE 804(a)(4), as she is properly described as having a mental illness or infirmity. We cannot agree.

In support of its argument that the complainant was mentally ill or infirm, the prosecution cites two published decisions of this Court. In *People v Edgar*, 113 Mich App 528; 317 NW2d 675 (1982), the defendant was charged with CSC I, and the complainant was a four-year-old girl. The prosecution offered the girl's testimony at the preliminary examination. The magistrate questioned her regarding her ability to tell the truth. She said she understood what it meant to tell the truth and that she would tell the truth to the court. The magistrate found her competent and bound the defendant over for trial. *Id.* at 530-531. However, the trial judge ruled that the girl was not competent to testify pursuant to MRE 601 and excluded her from testifying at trial. It found that at the time of trial, she could not differentiate what was true from what was false. Importantly (and in contrast to the present case), she failed to respond to questions concerning the incident that formed the basis of the defendant's prosecution. The court also found it "incongruous that [the] complainant was competent to testify at the preliminary examination" but that she was not competent to testify at trial six months later. *Id.* It ruled that the complainant's preliminary examination testimony was inadmissible because it was unreliable. *Id.* at 535. It dismissed the charge against the defendant for lack of competent evidence. *Id.* at 532.

On review, this Court found no error in the magistrate's determination that the complainant was competent to testify at the preliminary examination or the trial court's determination that she was not competent at the time of trial. It ruled that the trial court erred in reversing the magistrate's determination regarding the competency of the complainant, noting that "[a] subsequent showing of the witness's inability to testify truthfully affects credibility, not admissibility." *Edgar*, 113 Mich App at 535. This Court explained:

When the trial court examined [the complainant] she exhibited an inability or reluctance to answer the questions. Whether her sudden failure of memory was due to fear of the defendant or an honest lack of recall does not affect the fact that she was unavailable as a witness during trial. Under MRE 804(b)(1), her prior preliminary examination testimony was admissible due to her inability to testify at trial. [*Id.* at 535-536.]

This Court noted that the complainant was unable or reluctant to answer the questions at trial and attributed her inability to a failure of memory. Notably, MRE 804(a)(3) permits a court

to declare a witness unavailable as a result of deficiencies in memory. The Court did not, as plaintiff implies, specifically hold that where a witness is declared not competent under MRE 601, that the witness is unavailable per se under MRE 804(a).

The prosecution also relies on *People v Karelse*, 143 Mich App 712; 373 NW2d 200 (1985), rev'd 428 Mich 872; 437 NW2d 255 (1987). In *Karelse*, a jury convicted the defendant of fourth-degree criminal sexual conduct, MCL 750.520e, for engaging in sexual conduct with his twenty-year-old mentally retarded daughter. *Id.* at 714. The defendant filed a pre-trial motion, seeking to exclude the complainant's testimony on the ground that she was incompetent to testify pursuant to MRE 601. The trial court agreed, finding that although she had the apparent ability to testify truthfully, her "limited mental ability and her susceptibility to influence made her incompetent as a witness." *Id.* Following this Court's reasoning in *Edgar*, the trial court admitted the complainant's preliminary examination testimony at trial. *Id.* On appeal, the defendant challenged the admission of the complainant's preliminary examination testimony. This Court upheld the trial court's decision that, because of her "mental incapacity," the complainant "was unable to testify and was therefore unavailable as a witness." *Id.* at 715. It found that the defendant utilized his opportunity to cross-examine the complainant at the preliminary examination. *Id.* The Court determined that "despite contrary findings by the examining magistrate and the trial court on the issue of the victim's competency, the preliminary examination transcript was properly allowed into evidence." *Id.*, citing *Edgar* 113 Mich App 535.

The Court in *Karelse* did determine that the complainant was incompetent to testify under MRE 601 and further concluded that the complainant was unavailable pursuant to MRE 804(a)(4). However, it appears that the prosecution, in relying on *Karelse*, mistakes correlation for causation. It was not the complainant's incompetence under MRE 601 that rendered her unavailable, it was her mental incapacity, in the form of mental retardation, which was akin to mental illness or infirmity under MRE 804(a)(4).

In both *Karelse* and *Edgar*, the complainants were declared unavailable to testify because they met the criteria of one of the delineated situations in MRE 804(a). That those complainants were also declared incompetent was of no consequence to the unavailability analysis. Stated differently, that some potential witnesses are both incompetent and unavailable does not mean that *all* incompetent witnesses are also unavailable. Contrary to the prosecution's argument, incompetence and unavailability are two distinct concepts under the Michigan Rules of Evidence. Had the drafters of our rules of evidence intended to classify every witness who was incompetent pursuant to MRE 601 as unavailable, MRE 804(a) would have explicitly stated so. Rather, MRE 601 permits a trial court to declare a witness incompetent to testify when "the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." MRE 804(a)(4) does not address mental *capacity* or sense of obligation, it addresses mental *illness* or *infirmity*. We must assume that the use of distinctly different terms by the rules of evidence was conscious and intentional. Further, even if we were to conclude that deficient mental capacity under MRE 601 was akin to mental illness or infirmity under MRE 804(a)(4), our result would be no different, as the prosecution has not demonstrated that this witness was unable to testify as a result of a problem with capacity, as opposed to a lack of a sense of obligation.

The prosecution in this case has presented no evidence that the complainant suffers from an ascertainable mental illness or infirmity. Rather, it appears that this young child was simply unable to provide the trial court with assurances that she understood the concept of truth and was capable and willing to testify truthfully. Absent those assurances, the trial court was unable to conclude that the proposed witness met the legal requirements of MRE 601. Without some demonstration that her inability to meet the requirements of MRE 601 is attributable to a mental illness or infirmity, we are unable to conclude that the trial court abused its discretion in refraining from declaring the complainant unavailable to testify. Furthermore, in reviewing the trial court's interpretation of MRE 804(a) de novo, we cannot conclude that the trial court committed any error in ascertaining the meaning of that rule of evidence. Rather, the court applied the unambiguous language of the rule of evidence to the facts of this case and made a ruling that was proper in light of its direct observations and the parties' arguments.

Because we conclude that the prosecution has failed to demonstrate that this complainant was not unavailable under MRE 804(a), we need not determine whether the requirements of 804(b)(1) were met. However, like the trial court, we note that defense counsel did not have the benefit of discovery at the time of the pretrial examination, which is certainly relevant in determining whether counsel had a genuine opportunity and motive to cross-examine this complainant. We are cognizant that testimony was introduced about both defendants at the separate examinations. The counsel at each examination owed no duty to the other co-defendant and, therefore, while each counsel had an opportunity to examine, the motives were very different. It is also noteworthy that counsel in one preliminary examination was discouraged from a more probing cross-examination. However, our holding regarding unavailability, like that of the trial court, obviates the need to engage in a detailed analysis of the implications of the *Crawford* decision..

Finally, we note that the prosecution has briefly argued that the list of scenarios that constitute unavailability found in MRE 804(a) is not exhaustive. Citing *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998), in which our Supreme Court held that an individual who asserted her right to not testify under the Fifth Amendment could be properly classified as unavailable, the prosecution argues that there are situations that constitute unavailability that are not contemplated by our rules of evidence. However, in *People v Watkins*, 438 Mich 627, 632 n 2; 475 NW2d 727 (1991), the Court previously indicated that the assertion of the Fifth Amendment falls within MRE 804(a)(1). Consequently, the prosecution has failed to demonstrate that MRE 804(a) does not provide an exhaustive list of when a witness can be declared unavailable. More importantly, even if the list included in MRE 804(a) is not intended to be exhaustive, the prosecution cannot show that the trial court erred. The abuse of discretion standard simply does not require a trial court judge to fashion a ruling that is without precedent. The prosecution presented this trial court judge with no binding authority² that would have supported a finding of unavailability.

² While the prosecution does provide a variety of holdings from foreign jurisdictions in support of its position, we cannot find that the trial court abused its discretion in refraining from following case law that is nonbinding.

This Court is certainly sympathetic to this young complainant in light of the abuse she has allegedly suffered. However, this Court functions as an error-correcting court. In examining the unambiguous language of the Michigan Rules of Evidence, the applicable case law and the record before us, we cannot determine that the trial court's ruling constitutes error.

Affirmed.

/s/ Kathleen Jansen

/s/ Cynthia Diane Stephens