STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY DEMETRY HARDY,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 168869
LC No. 93-7408-FC

Before: McDonald, P.J., and White and P. J. Conlin*, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree premeditated and deliberated murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree premeditated and deliberated murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment without parole on the murder and conspiracy convictions, preceded by a twenty-four month sentence for felony-firearm. We remand with instructions.

Defendant asserts that the admission of Denise Barnes' preliminary examination testimony violated his rights to confrontation and due process. In brief testimony outside the jury's presence, Barnes indicated that she told the trial prosecutor that her trial testimony would not be the same as her preliminary examination testimony. According to Barnes, the prosecutor threatened her with a perjury charge and life imprisonment if she testified differently. Eventually, she indicated that, because of the threats, she was invoking the Fifth Amendment. Barnes' preliminary examination testimony was read to the jury at the prosecution's request.

A prosecutor may not intimidate a witness in or out of court. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988); *People v Dalessandro*, 165 Mich App 569, 583; 419 NW2d 609 (1988). This Court has determined that regardless of the prosecutor's motives and the factual accuracy of the prosecutor's statements, remarks in the presence of the witness in which the prosecutor

* Circuit judge, sitting on the Court of Appeals by assignment.

threatened the possibility of charges that could result in life imprisonment, improperly "drove the defendant's witness from the stand." *People v Callington*, 123 Mich App 301, 306; 333 NW2d 260 (1983). In a criminal trial, the burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, "unavailable," and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable. *People v McIntosh*, 142 Mich App 314; 370 NW2d 337 (1985). Accordingly, if Barnes' account of the prosecutor's threats was true, the prosecutor's conduct was improper. However, because of the discussions among the trial judge and counsel that occurred off the record, it is unclear whether the prosecutor disputed the truth of Barnes' allegations and whether those allegations should be accepted as true or whether findings of fact by the trial court are necessary to resolve a credibility contest. If the prosecution so intimidated Barnes, then the admission of her preliminary examination testimony violated defendant's constitutional right to confrontation because the prosecution did not make good faith efforts to obtain her trial testimony, but rather effectively rendered her unavailable to testify at trial. See *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). In this event, the error was not harmless beyond a reasonable doubt because Barnes provided important incriminating evidence in her preliminary examination testimony. *People v Spinks*, 206 Mich 488, 493; 522 NW2d 875 (1994). We remand for an evidentiary hearing.

If the trial court finds that the prosecutor threatened Barnes with perjury charges if she changed her testimony at trial, it should enter an order reversing defendant's convictions. However, if the court finds that the prosecutor did not cause Barnes' refusal to testify, then it should not disturb the instant convictions based on this issue. We note that if the prosecutor's actions did not cause Barnes' refusal to testify, her preliminary examination testimony was properly admissible consistent with the Confrontation Clause because the former testimony exception to the hearsay rule is a firmly rooted hearsay exception. *United States v Koon*, 34 F3d 1416, 1426 (CA 9, 1994); *United States v Miller*, 284 US App DC 245; 904 F2d 65, 67 (1990). Also, defendant has not established that the prosecution violated the Fourteenth Amendment by knowingly offering false testimony. *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986).

Defendant did not preserve his claim that the trial court should not have accepted Detective John Willmer as an expert in firearms identification. Regardless, had this issue been properly preserved, the admission of Detective Willmer's expert testimony would not have constituted an abuse of discretion. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). Detective Willmer indicated that he had extensive training and experience in firearms identification. The limits in his knowledge and memory went to the weight of his testimony rather than to its admissibility. *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 175; 530 NW2d 7 (1995).

Although not preserved below, defendant on appeal attacks various testimony from three witnesses as improperly offered during the prosecution's rebuttal. Defendant testified that he asked Lloyd Bodiford to give alibi testimony because defendant thought he saw Bodiford at the party. Bodiford stated in his rebuttal testimony that defendant asked him to support defendant's alibi sometime after the party and that he never attended that party. Similarly, Detective Barrie Lockwood's testimony

that his questioning of defendant did not involve threats or attempts to confuse him rebutted defendant's assertions in his testimony that he was threatened by the police and that the police would not give him the chance to really understand their questions. This testimony, which directly tended to disprove defendant's testimony, was proper rebuttal testimony. *People v Vasher*, 449 Mich 499, 505; 537 NW2d 168 (1995). Detective Tamie Reinke's testimony that a defense alibi witness had expressed that defendant threatened to harm her if she did not testify in support of his alibi was likewise offered to rebut the alibi witness' testimony. Detective Lockwood's testimony, which was repetitive of a defense witness' testimony, was improper as rebuttal testimony because it did not tend to contradict or otherwise oppose defense evidence. *People v Holland*, 179 Mich App 184, 193; 445 NW2d 206 (1989). However, its admission was harmless beyond a reasonable doubt because it did not impeach the defense witness' credibility, but merely repeated his testimony in an essentially neutral way. We conclude that this error could not have been decisive of the outcome. *People v Lee*, 212 Mich App 228, 240-241; 537 NW2d 233 (1995).

Remanded for further proceedings consistent with this opinion. We do no retain jurisdiction

/s/ Gary R. McDonald
/s/ Helene N. White
/s/ Patrick J. Conlin