

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE A. WINTERS,

Defendant-Appellant.

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UNPUBLISHED

October 18, 1996

Nos. 171078

LC No. 93-007841 FC

Before: Hoekstra, P.J., and Saad and S.J. Latreille,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony firearm conviction, and a consecutive term of life imprisonment without parole for the first-degree murder conviction. Defendant now appeals, and we affirm.

Prior to the instant convictions, defendant was convicted in United States District Court of conspiracy to use interstate commerce facilities for the commission of murder for hire, 18 USC 371, and use of interstate commerce facilities in the commission of murder for hire, 18 USC 1958. All of defendant's convictions stem from his involvement in the death of his sister's husband (the victim). With regard to the instant convictions, defendant originally pleaded guilty to two counts of second-degree murder in the deaths of the victim and an unrelated individual. He was later allowed to withdraw those pleas and the instant trial and convictions followed.

Defendant first argues that his murder conviction should be reversed because the trial court abused its discretion in allowing the victim's mother to testify to statements made to her by defendant following defendant's plea of guilty to second-degree murder in the death of her son. Defendant argues without merit that the statements should have been excluded pursuant to MRE 410 because they were

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

made during the course of plea discussions. When determining whether MRE 410 applies to a discussion sought to be admitted at trial, a trial court must first determine whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, whether the defendant's expectation was reasonable under the totality of the objective circumstances. *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994). Furthermore, if the defendant cannot show government action on the part of the person to whom the statements were made, MRE 410 will not preclude admissibility of the incriminating statements. *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992).

Here, defendant has failed to establish both that he had an expectation to negotiate a plea at the time the comments were made, and that governmental action was involved. Defendant's comments to the victim's mother, who was clearly not a governmental actor, were made in the hallway outside the courtroom *after* defendant had already tendered his guilty plea. As defendant was leaving the building, the victim's mother began questioning defendant regarding why he had killed her son and, despite assurances from a Cass County Sheriff's Department detective who was escorting defendant from the courthouse that he did not have to talk to the victim's mother, defendant stated that he owed her an explanation. The fact that defendant may have chosen to make the incriminating statements only because of his earlier plea does not render the statements "in the course of" the plea proceeding. Here, the trial court did not abuse its discretion in allowing the victim's mother to testify to statements made to her by defendant.

Defendant next argues that the trial court abused its discretion in allowing the prosecution to introduce into evidence the testimony given by Mark Bass in defendant's federal trial. Because Bass had been recently killed in an automobile accident, the trial court ruled that Bass' testimony from the earlier trial was admissible. While the Sixth Amendment to the United States Constitution and Const 1963, art 1, § 20 guarantee an accused the right to "be confronted with the witnesses against him . . .", prior testimony may nonetheless be used by the prosecution if the witness is unavailable for trial and the party against whom the testimony is offered or a predecessor in interest had an opportunity and similar motive to develop the testimony, MRE 804(b)(1), and if the former testimony bears satisfactory indicia of reliability. *People v Conner*, 182 Mich App 674, 680-681; 452 NW2d 877 (1990). Our review of Bass' testimony convinces us that defendant not only had the opportunity and a similar motive to develop the testimony of Bass, but in fact took advantage of that opportunity and asked numerous questions concerning Bass' bias and credibility, and possible motive to have committed the murder himself.

Defendant next argues that the trial court committed clear error in giving CJI2d 16.2, an instruction involving "lying in wait." Specifically, defendant argues that the evidence that defendant had been lying in wait to kill the victim was insufficient to support the instruction. While we agree with defendant that there are other possible theories as to how the victim was killed, we disagree with his conclusion that there was insufficient evidence supporting this theory. The trial court properly concluded that here there was sufficient circumstantial evidence that the victim, who was shot in a dark parking lot immediately upon exiting a building, was ambushed by someone lying in wait.

Finally, defendant argues that his first-degree murder conviction must be vacated on double jeopardy grounds because he was already convicted of crimes in federal court involving the same factual circumstances. We conclude that neither the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution nor the Double Jeopardy Clause of the Michigan Constitution was violated by defendant's prosecution for first-degree murder following his federal convictions. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was not violated by defendant's state prosecution because each of the involved statutes or code sections contained elements not contained in the others. See *People v McMiller*, 202 Mich App 82; 507 NW2d 812 (1993), citing *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Furthermore, the Double Jeopardy Clause of the Michigan Constitution was not violated here because the interests of the state and the federal government were "substantially different." *People v Cooper*, 398 Mich 450, 462; 247 NW2d 866 (1976). While the federal crimes punish the use of interstate commerce to commit a murder for hire regardless of whether death occurs, the state murder prosecution punishes the homicide.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Henry William Saad  
/s/ Stanley J. Latreille