

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GRADY ALVIN WILKEY, JR.,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 245055

Van Buren Circuit Court

LC No. 02-012721-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b),¹ in the shooting death of Clyde Tellas. Mr. Tellas, eighty-two years old at the time of the murder, was shot once in the head while in his home after defendant broke into the home around midnight on January 27, 1990, and demanded money from Tellas and his wife Catherine, both of whom were sitting in their living room watching television. Defendant was sentenced, as mandated by law, to life in prison without the possibility of parole. He appeals as of right. We affirm.

I. BASIC FACTS

The focus of the trial was on the identity of the perpetrator. Defendant maintained that he did not commit a breaking and entering at the Tellas home, nor did he shoot Mr. Tellas. Defendant testified that he was nowhere near the crime scene at the time of the shooting. The murder occurred in January 1990, and although defendant had been a suspect from the beginning, along with a number of other possible suspects, defendant was not arrested and tried until 2002.

On January 15, 1993, the prosecutor conducted a deposition of eighty-two year old Mrs. Tellas in order to preserve her testimony for future use in any criminal proceeding should the offender be arrested. We note that attorney Paul Hamre, now a sitting judge on the Van Buren Circuit Court, was appointed by the court to appear at the deposition and conduct cross-examination, representing the interests of any future defendant in the case and protecting that

¹ The underlying felony was breaking and entering of a dwelling.

defendant's constitutional rights. A transcript of the deposition was read to the jury during defendant's trial, which defendant alleges on appeal was improper because it constituted hearsay without exception.

Mrs. Tellas testified that in the early morning hours of January 27, 1990, a little after midnight, she and her husband were watching the Tonight Show in their living room. The only light on in the house at the time was a light that hung over Mr. Tellas' chair, and the room was also lit somewhat by the brightness beaming from the television. The couple heard a loud noise coming from the backdoor, and when they stood from their chairs and turned to see what was happening, they saw a stranger standing in a doorway between the dining room and the kitchen. Mrs. Tellas stated that the individual had a gun in his hand, was dressed completely in dark clothes, and had a dark ski mask over his face. Mrs. Tellas testified that she was not wearing her eye glasses at the time the crime transpired, and that she was about eight to ten feet away from the perpetrator when he was standing in the doorway. Counsel had Mrs. Tellas remove her glasses in the deposition to test her sight, and she indicated that she could not see that well at a distance of eight to ten feet. Her eyesight was worse at the time of the deposition, but Mrs. Tellas stated that her eyesight was also fairly poor at the time of the crime.

The intruder pointed the gun at the couple and stated: "I want all your money." Mrs. Tellas believed the intruder was a white male on the basis of his voice, although she later acknowledged that it was possible he was not Caucasian. Mrs. Tellas testified that the gun did not look like a shotgun, but it was not a pistol either. It was longer than a pistol, and may have been a sawed off weapon. The intruder was cocky and a "smart aleck," and he was very steady and appeared not be scared. After the money demand was made, Mrs. Tellas walked by the perpetrator, down the hall, and headed toward Mr. Tellas' bedroom, thinking that her husband had some money in a dresser drawer; Mr. Tellas followed, as did the intruder. Once in the bedroom, Mrs. Tellas opened her husband's drawer to look for money, and she saw Mr. Tellas' pistol. Mr. Tellas' pistol was not loaded. Ammunition clips were taped to the side of the weapon because Mr. Tellas, a former auxiliary police officer in Detroit, did not believe in keeping a loaded gun in the house. Mrs. Tellas thought possibly the gun was loaded.² Her intention when she went to the dresser drawer was to find some money. Mr. Tellas typically kept his billfold in the drawer.

Mrs. Tellas picked up her husband's gun while in his bedroom, at which time the intruder and Mr. Tellas were standing near the bedroom doorway and an adjacent bathroom with the intruder holding his weapon on Mr. Tellas. Mrs. Tellas began moving toward her husband, attempting to give him the gun while trying to conceal the weapon with her leg. The intruder saw the gun and demanded that the weapon be put down. The record is unclear whether Mrs. Tellas herself laid the gun down, or actually handed the gun to her husband; she made statements supporting both versions, although ultimately she asserted that she put the gun down on a dresser. Regardless, as the Tellas' gun was being handled, and soon after the intruder demanded

² She did not notice that the clips were taped to the side of the gun until later when she attempted to hand the gun to Mr. Tellas.

that the gun be dropped, the intruder fired a shot, striking Mr. Tellas in the head. The intruder then immediately raced out of the home without saying another word.

Mrs. Tellas described the intruder as being about 5' 8" or slightly taller, and he was not fat but rather had a slim build. She did not detect any alcohol on his breath, nor did she see or hear anything that would suggest that the intruder was drunk or high. Mrs. Tellas did not see any of the intruder's skin. She believed that he was a young man based on how he walked. The intruder did not give any indication that he was familiar with the Tellas' home. Mrs. Tellas did not know the identity of the intruder. She did testify that someone had cut a phone wire such that she could not telephone from one of the phones; however, whoever cut the wire missed another phone wire that allowed her to use another phone in the house. Counsel, in a very respectful manner, asked questions of Mrs. Tellas to show that she was of sound mind, e.g., what is the date, and she answered appropriately. Attorney Hamre opined at the close of the deposition that, although he could make no judgment as to the truth of her testimony, Mrs. Tellas "was not easily confused and that despite her advanced age of 82 years old, appeared to fully understand the proceedings and all the questions that were asked." The prosecutor concurred.

We now turn to the trial testimony. A nearby neighbor, Doug Monacelli, testified that he was looking out of his kitchen window around the time of the murder and saw a white person with what appeared to be a gun, possibly a rifle, standing in Monacelli's side yard. He was unable to tell whether the person was male or female. He immediately called the Michigan State Police. Monacelli could not identify the individual, nor give any physical characteristics other than the person appeared to be white.

A responding South Haven police officer testified that he removed a bullet casing that was lying by Mr. Tellas' left knee. On cursory inspection, the officer did not see signs of forced entry. The South Haven police, who were merely providing initial assistance, turned over the investigation to the state police.

A canine handler for the state police testified that his tracking dog was able to track a scent from the Tellas' home to Monacelli's home. From there, the dog tracked to another residence, the Smith home, but then tracked back to Monacelli's house. The canine officer was not involved in questioning any one at the Smith residence. From Monacelli's house, the dog tracked a scent to another residence, an A-frame house (hereinafter the "Dell" residence), and again, the officer was not privy to any interviews at the residence. The dog was unable to go any further from there.

The prosecution next called William Councilor who was in his early twenties at the time of the crime. Councilor testified that defendant had been a friend of his in 1990. Councilor knew where Mr. and Mrs. Tellas lived; they resided about a half a mile from his residence. Councilor acknowledged that he was contacted by the police about the murder shortly after the homicide, and that he, defendant, and Richard Brockless, another friend, had been rumored to have been involved in the murder. On the night of the murder, Councilor, defendant, and Brockless were at Councilor's home sitting around drinking alcohol and smoking marijuana. Councilor testified that the three of them discussed finding a house to break into, and that defendant suggested the Tellas' house. Defendant thought that, because the couple were elderly and did not get around much, they might have money and jewelry.

Councilor further testified that he became uncomfortable when defendant started talking about bringing a gun along to the Tellas' home. Councilor indicated that he himself had never used a gun before while committing previous break-ins. Brockless and Councilor tried to talk defendant out of bringing a gun. Subsequently, defendant, and then later Brockless, left Councilor's home about 10:30 and 11:30 p.m., respectively, but Councilor was unaware if the two had any definite plan to actually carry out the break-in. Defendant told Councilor that he was going home. Councilor had made a statement to police that Brockless left first that night instead of defendant. He admitted that he may have been confused. Councilor did not see defendant or Brockless again that night. He stated that, although the three of them wrestled around as part of horseplay that evening, no one got hurt; Councilor saw nothing wrong in the way defendant walked on leaving.³

Councilor saw defendant the following morning when Councilor's mother gave him and defendant a ride into South Haven so that defendant could take a bus from South Haven to Saginaw to visit friends and family. Councilor and defendant had made these plans previously. Defendant was limping that morning, and he told Councilor that he hurt his ankle during horseplay at Councilor's home the night before. Councilor did not learn of the murder until later in the day. He testified that defendant acted normally the morning after the murder.

Councilor further testified that he did not have any conversation with defendant about the murder until about two years later. Defendant told Councilor that defendant "went into the house and the old man there pulled a gun on him so he shot him and ran out." Defendant referenced the Tellas' home. Councilor acknowledged that he had never been charged with anything related to the crime, and that he was aware that Brockless made a statement that Councilor had left the home together with Brockless and defendant the night of the murder. Councilor denied ever leaving his home that night. He testified that he was aware that the statute of limitations barred any charges against him outside of murder.

On cross-examination, Councilor admitted that he had been angry with defendant before the crime because defendant had engraved a 666 pentagram tattoo on Councilor's shoulder instead of the skull and cross bones that Councilor expected. He testified that he was upset at first but got over it. Councilor also acknowledged that he had been a suspect in the murder for twelve years. On redirect, Councilor recalled that he had seen defendant carrying a sawed-off weapon around the date of the murder, and that defendant cut the gun off so he could fit it in the sleeve of his jacket so as to carry it around.

Defendant's cousin next testified that around the date of the crime, defendant visited him in Saginaw, and that defendant had a kind of leg brace on because of a sprained ankle. Defendant told him that the injury was the result of slipping and falling on ice.

³ This is relevant, as will be discussed below, to a claim by defendant that he hurt his ankle during horseplay at Councilor's house, which explained why he went to the emergency room for treatment in the early morning after the night of the crime.

Christy Czarnowski testified that she was defendant's former girlfriend having met him in 1994, and that they subsequently lived together for about three years in Grand Rapids. She stated that after they broke up, the state police questioned her about the murder. Czarnowski had been aware of the rumors circulating about the murder and the possible involvement of Brockless and defendant. Initially, defendant denied any involvement. Periodically throughout the relationship, and after the initial denials, defendant made the statement that Czarnowski did not know what it was like to have killed a man, and that he and Brockless had committed a breaking and entering together. She recalled an incident in 1995, where a Polaroid picture of an elderly man was sent to their Grand Rapids' home with a statement underneath saying: "I remember you, do you remember me," or "I remember you, fucker." Defendant turned a sickly, green, pale color when Czarnowski confronted him with the picture, but he assured her that there was no reason to worry. Czarnowski did not know who sent the picture; there was no return address and it was postmarked in Grand Rapids.

Czarnowski recalled another time when defendant stated, "I wish he never would have went for the gun." Czarnowski told detectives that defendant had made the following statements in her presence: "I killed a man, I've got to live with it[,]and "they should have never went for the gun." Defendant admitted to her that he never would have shot but the old man surprised him.

On cross-examination, Czarnowski, when faced with a prior statement made by her pursuant to an investigative subpoena wherein she stated that defendant had never in fact told her that he killed someone, she explained that "[h]e never bluntly flat out said quote for quote, I have killed someone or I have killed a name of a person."

Anita Gray, a resident of the area around the crime scene in 1990, testified that she knew Councilor, Brockless, and defendant, and that they would hang out with her and her now deceased husband Joe Wescott. On the same day as the crime, Wescott loaned Brockless and defendant two .22 caliber weapons for hunting. One was a Remington rifle; the other was a rifle with a broken down barrel or a modified .22 caliber rifle. Gray believed that both weapons were subsequently returned.

Gray testified that about a week after the murder, she, Wescott, Brockless, and defendant were sitting around drinking when defendant confessed to the breaking and entering and the murder. Gray testified as follows:

[H]is statement was that when he asked for more money, the gentleman would not give him any more money and refused to give him any more money and he turned around and walked away from him and he popped him in the back of the head.

Gray further stated that on the night of the murder, in the early morning hours, Brockless came to her home, asking to take a shower and spend the night, and she refused his request. Brockless then left the residence.

Dana Averill, a detective sergeant for the state police at the time of the murder, testified that he responded to the crime scene and talked to Mrs. Tellas. Mrs. Tellas told Averill that the intruder was about 5' 10" to 6" tall, had a medium build, weighed about 150 pounds, was a white

male, wore dark clothing, and was probably in his early twenties. She could give no facial details as the intruder was masked. However, she described the intruder as having dark hair, and when asked how she knew this in light of the mask, Mrs. Tellas responded that possibly the mask or covering only covered the intruder's mouth and nose area as opposed to a full pullover mask. As part of Averill's investigation, he interviewed defendant several times. Defendant told Averill that on the night of the murder, he was at Councilor's house and hanging out with Brockless and Councilor, where he hurt his ankle during horseplay, and he left the house at around 11:30 p.m. Defendant stated that in the early morning following the crime, between 4:00 and 6:00 a.m., he went to the hospital with his mother to have his ankle treated.

Averill further testified that he interviewed Councilor's mother, who was present at the Councilor home on the night of the crime, and she indicated that defendant had left the home for a period of time and returned. When Averill confronted defendant with this information, defendant changed his story by saying "oh yeah, that's right." He now remembered leaving the Councilor house at around 10:00 p.m. to get something to eat at his home, and then defendant returned to the Councilor home. Averill stated that, as to the casing found at the crime scene, there was no definite opinion with respect to the particular type of weapon used. Averill indicated that they had no weapon to compare the casing to; however, a .22 caliber weapon was definitely used in the crime.

Averill interviewed some of the persons at the Dell residence and ruled them out as suspects at the time. Two of the persons at the Dell residence, though, fit the general description of the perpetrator as described by Mrs. Tellas. A photographic lineup was presented to Mrs. Tellas, which lineup included defendant, but she could not identify the intruder. Averill testified that defendant was always cooperative during the investigation and always denied any involvement in the crime.

The next witness to testify was Christopher Brady, who lived in the general area of the crime scene and who knew defendant, Brockless, and Councilor. In January 1990, a few days before the murder, defendant and Councilor visited Brady and showed him a .22 caliber rifle with the butt sawed off. Brady further testified that he believed that defendant told him at one time that he had done yard work at the Tellas' home; however, Brady acknowledged that he made a statement to police early in the investigation that he did not believe any of the suspects did work at the Tellas' home.

Carla Brady, who was Christopher Brady's wife, testified that she knew defendant, Brockless, and Councilor at the time of the crime, and she confirmed the testimony of her husband that defendant and Councilor visited them just prior to the murder and displayed a short-end .22 caliber rifle. She believed that defendant was carrying the gun.

Jeff Wallis, a detective sergeant for the state police who investigated the crime, testified that he photographed a ditch with frozen water in it, and it appeared that someone had stepped onto the frozen water and broken through the ice. This ditch was in the same general area over which the police dog had tracked a scent. Wallis confirmed the testimony of Detective Averill that defendant had stated that he left the Councilor home around 11:30 p.m. and that Brockless left around 10:30 p.m. on the night of the crime, and that the story later changed that defendant left around 10:00 p.m. to get something to eat at home and then subsequently returned. Defendant told Wallis that he hurt his ankle during horseplay while at Councilor's home, and

that his mother took him to the hospital around 4:00 a.m. on January 27th because the injury was quite painful.

Wallis testified that he confronted defendant about displaying a .22 caliber rifle to the Bradys, and defendant denied that the incident ever occurred. Wallis also confirmed that a .22 caliber shell casing had been recovered from the Tellas' residence.

Sheryl Hough testified that she knew defendant, Brockless, and Councilor at the time of the crime, and that a few days after the murder, she was riding around in defendant's car with the both of them. Brockless made statements indicating that he had knowledge of the murder and that defendant wound up shooting a man, and defendant nodded in agreement to Brockless' statements. Defendant commented "about the stupid asses cutting the wrong wire," which Hough took as a reference to Brockless and Councilor. Hough admitted that defendant himself never asserted that he killed anyone, and that she used drugs, would lie to the police depending on the circumstances, and that she, Brockless, and Councilor were drinking when the incriminating statements were made.

David Mitchell, who was brought over to the courtroom from the county jail and who acknowledged an extensive criminal history (19 years in the penal system), testified that he agreed to testify in return for a recommendation, not a guarantee, by the prosecutor that no additional prison time be added to a 2 to 7 ½ year sentence for a recent charge of absconding on bond. He conceded that he was looking for a better deal than that given in return for his testimony. Mitchell testified that he had been in a holding cell with defendant in the county jail, and that defendant mentioned the circumstances of his case to which Mitchell responded that he also had previously been involved in an armed robbery. This apparently made defendant comfortable enough to confide in Mitchell, and defendant proceeded to admit to the break-in and shooting of Mr. Tellas. Mitchell's account of defendant's description of what occurred closely paralleled Mrs. Tellas' account of the crime. Additionally, Mitchell testified that defendant did not implicate anyone else but himself. Mitchell stated that he had no knowledge of the crime other than what was conveyed to him by defendant.

Next to testify was Brockless. In return for his "truthful" testimony at defendant's trial, the prosecutor agreed to accept a plea to breaking and entering with a sentence recommendation of 5 to 10 years' imprisonment. Brockless first indicated that he had a son by defendant's sister, that he was now 32 years old, and that he was about 5'10" and weighed 180 lbs. He weighed about the same at the time of the murder, and his hair was blond. Going back to the night of the crime, Brockless testified that he, defendant, and Councilor, while at Councilor's home drinking beer and playing games, talked about burglarizing the Tellas' home. Defendant made the suggestion as to what home to burglarize, and defendant suggested the use of a firearm. Both Brockless and Councilor thought it was stupid to bring a gun and tried to talk defendant out of it. Defendant subsequently left, and Brockless left sometime later. When defendant left Councilor's home, he had no ankle or leg injury. Brockless later met up with defendant at defendant's home, and they both walked back to Councilor's home. The three of them then proceeded to walk over to the Tellas' house, and defendant was carrying a .22 caliber rifle with the butt cut off. Once there, they peered in through the windows and noticed the elderly couple, and defendant indicated that it would be easy to just go in and rob them. Defendant cut a phone line, and at that point, Brockless decided he was not going to go through with it because he was

worried about the fact that people were home and defendant had a gun. Brockless and Councilor walked over to a tree line away from the house.

Brockless could see defendant on the back porch of the Tellas' home; he did not see the gun at that point, nor did he see defendant with a mask on, but Brockless recalled that defendant showed him a mask while walking down to the house, although he was not one-hundred percent certain. Brockless and Councilor started walking toward the road, and as defendant pulled the door open at the rear of the house, there was a loud banging noise, and Brockless and Councilor ran away. At the time, Brockless did not know that anyone was shot. They went to Councilor's home, where Councilor entered his home through his bedroom window, and Brockless then eventually proceeded to the Wescotts' home, but they would not let him stay there. He ended up sleeping in a car at the Bradys' residence.

A week or so later, Brockless talked with defendant, and defendant confessed to killing that "old guy." Defendant indicated that it was an accident, and that the "lady" had handed Mr. Tellas a gun. Defendant then ran from the home and threw the gun in the woods. Brockless acknowledged that he lied to police from the beginning about his own involvement because he was scared and did not want to go to prison. He also stated that he had mentioned the events of that night to various persons over the years.

On cross-examination, Brockless testified that he had been arrested and charged with first-degree felony murder for the death of Mr. Tellas and later accepted the plea offer. Cross-examination focused on the plea agreement, and how much it benefited Brockless to testify against defendant, and it focused on the numerous lies and half-truths that Brockless made to the police over the years.

Daniel Blade, who met and befriended defendant in Grand Rapids years after the murder, testified that while they were playing cards and drinking, defendant admitted "he had killed a gentleman and he put a slug in the guy's head." Defendant told Blade that he shot an elderly man twice in the head with a .22 caliber, sawed-off rifle after entering his house and demanding money from the man and his wife. Defendant indicated that the shooting occurred in the South Haven area. Blade was unaware of the murder until told by defendant, and Blade had never known Brockless.

On cross-examination, Blade conceded that defendant suggested that he alone was not involved in the crime and defendant used the word "we" when describing the crime. Blade was confident though that defendant suggested that it was defendant himself who did the shooting. Blade acknowledged that he was a professional confidential informant who worked with many police agencies on numerous cases. On redirect, Blade testified that he only received money for traveling expenses from the state police related to the defendant's case.

Kenneth Daniel, a commander for the state police cold case team, testified that the .22 caliber rifle used in the shooting was never recovered. A .22 rifle with a scope, given to police by the occupants of one of the homes on the route tracked by the police dog,⁴ was examined and

⁴ The record is unclear whether this was the Smith, Monacelli, or Dell residence.

determined not to be the murder weapon. Daniel testified that in numerous statements, Brockless consistently identified defendant as wielding a weapon during the break-in and shooting Mr. Tellas. Daniel also testified that during the course of the investigation, no one had claimed to have heard a confession to the crime from Councilor.

The prosecutor rested, and defendant moved for a directed verdict, which was denied. Defendant then took the stand on his own behalf. We find it unnecessary to go into great detail regarding his testimony because it essentially reflected a total denial of any involvement in the crime. Defendant testified that, while he was at Councilor's home on the night of the murder, there was no discussion whatsoever about committing any breaking and entering. He asserted that when he left Councilor's home between 10:30 p.m. and 11:00 p.m., he went straight home, drank a beer with his now deceased father while watching television, fell asleep, and subsequently awoke in pain and went to the hospital with his mother for his ankle injury, which he sustained during horseplay with Councilor and Brockless.⁵ Defendant suggested that Brockless or possibly Councilor may have been shooter, and that the parade of witnesses put on the stand by the prosecutor were all lying, for various reasons, when they testified as to incriminating statements made by defendant or matters involving a .22 caliber rifle. Defendant denied having a .22 caliber, sawed-off rifle, although he admitted that many guns passed through his hands in 1989-1990. Defendant flatly denied killing Mr. Tellas and denied ever being at the Tellas' home. He testified that he and Councilor were both 6'1", and Brockless more closely fit the description given by Mrs. Tellas. Defendant testified that he was currently about 175 lbs., and, when the prosecutor asked whether he would dispute a record showing that defendant weighed 155 lbs. in 1990, defendant did dispute the assertion.

Defendant's testimony was followed by two character witnesses who very briefly opined that defendant was an honest person.

II. ANALYSIS

A. Admission of Catherine Tellas' Deposition Transcript

As noted in the recitation of facts, the jury was read the deposition transcript of Catherine Tellas. Defendant argues that the testimony constitutes inadmissible hearsay. The district court had permitted the testimony at the preliminary examination pursuant to MRE 804(b)(1) – former testimony of unavailable declarant, (b)(5) – deposition testimony of unavailable declarant, and (b)(7) – guarantees of trustworthiness of statement by unavailable declarant. The circuit court permitted the testimony under MRE 804(b)(7). There is no dispute that Mrs. Tellas was unavailable to testify at trial because of death. MRE 804(a)(4). Defendant maintains on appeal that he was denied his due process right to confront witnesses against him, where counsel present at the deposition did not have a similar motive to develop testimony, in that, at trial, defendant denied involvement in the crime and pointed to Councilor and Brockless as possible suspects, whereas in the deposition, there was no motive to develop testimony that might clearly define

⁵ On cross-examination, defendant stated that he went home briefly to eat, returned to Councilor's home for a few seconds, and the returned to his own home.

and distinguish the physical characteristics of defendant, Councilor, and Brockless. Defendant argues that, for this reason, the deposition testimony was not admissible under any of the hearsay exceptions applicable where a declarant is unavailable.⁶

A trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). If the decision to admit evidence involves a preliminary question of law, this Court reviews the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 801(c) provides that hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Because the prosecution clearly sought to introduce the testimony to prove the truth of the assertions made by Mrs. Tellas, the evidence constituted hearsay. The question becomes whether a hearsay exception applies. Additionally, the issue implicates the Confrontation Clauses of the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Washington*, 468 Mich 667, 671; 664 NW2d 203 (2003). Our Supreme Court in *Washington*, *id.* at 671-672, stated:

The admission of [the] statement as substantive evidence does not violate the Confrontation Clause if the prosecution can establish that [the declarant] was unavailable as a witness and that his statement bore adequate indicia of reliability. Alternatively, the Confrontation Clause is not violated if the statement fell within a firmly rooted hearsay exception. [Citation omitted.]

MRE 804 contains hearsay exceptions for where a declarant is unavailable. Although various provisions of MRE 804 were cited below by the district and circuit courts, along with being addressed in the appellate briefs, we find it sufficient to examine only the catchall exception of MRE 804(b)(7), which supports admission of the evidence.

We opine that the deposition testimony had a guarantee of trustworthiness or indicia of reliability equivalent to other hearsay exceptions. Mrs. Tellas' testimony was spontaneous and generally consistent, there was no motive to fabricate and no basis to be biased, the testimony was voluntarily given, and she spoke from personal knowledge. See *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000). The testimony was offered as evidence of material facts, it was more probative on the point of what actually occurred during the crime than any other evidence that the prosecutor could procure through reasonable efforts, and the interests of justice are served by admission of the testimony. MRE 804(b)(7). Therefore, defendant's confrontation rights were not offended. See *Lee*, *supra* at 170-181.

The central premise of defendant's argument is that the questioning at the deposition did not explore, nor was there a motive to explore, the physical characteristics of the perpetrator, keeping in mind the physical characteristics of defendant, Councilor, and Brockless when

⁶ Defendant does not specifically address MRE 804(b)(5).

developing specific questions to ask Mrs. Tellas. Defendant asserts, therefore, that the hearsay exceptions cannot be utilized.

While it is arguable that more precise questions could have been asked of Mrs. Tellas if counsel was aware of the physical characteristics of defendant, Councilor, and Brockless, there was clearly a motive to develop testimony concerning the physical characteristics of the perpetrator as described by Mrs. Tellas. With testimony regarding the physical description of the suspect and his attributes as derived from the deposition, counsel at trial had the tools to show that Councilor or Brockless, and not defendant, fit the description, if indeed the evidence so reflected. The deposition transcript reflects that the attorney representing the unknown defendant's interests and the prosecutor examined Mrs. Tellas about the offender's characteristics. Moreover, the attorney questioned Mrs. Tellas concerning her sensory abilities and the ability to see the perpetrator under the conditions. We find no error in the admission of the evidence.

Additionally, assuming that the evidence was improper, we find any error harmless; defendant was not prejudiced. See MCL 769.26; *Lukity, supra* at 495. As indicated above, Mrs. Tellas was only able to give a vague, general description of the perpetrator, and she was unable to see his face because of the mask. Further, she testified that she was not wearing her glasses, that it was dark, and that it was difficult to see. We question whether Mrs. Tellas' testimony held any significant weight with the jury with respect to identifying defendant as the assailant. The other events and circumstances of the crime, as testified to by Mrs. Tellas, had no bearing on defendant's trial defense because he claimed that he was not present at the crime scene. Taking this into consideration, along with the strong evidence of defendant's guilt, including numerous incriminating statements made by defendant, we find a lack of prejudice that would necessitate a new trial.

B. Ineffective Assistance of Counsel

Defendant presents three separate instances where trial counsel was allegedly ineffective. Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the

proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, defense counsel is not obligated to make meritless or futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Our review is limited to the record because no *Ginther*⁷ hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Brockless testified that he was originally charged with felony murder for Mr. Tellas’ death. But in return for his testimony against defendant, Brockless entered a plea agreement whereby he plead guilty to breaking and entering with a sentence recommendation of five to ten years’ imprisonment. The guilty plea was entered by Brockless a week before defendant’s trial. The prosecutor elicited from Brockless that, as part of the agreement, he was to provide truthful testimony at trial. And if the testimony was not truthful, the agreement would be void.

Defendant argues that the prosecutor improperly vouched for Brockless’ credibility, and that trial counsel was ineffective for failing to object. We disagree.

A prosecutor cannot vouch for the credibility of witnesses to the effect that he or she has some special knowledge concerning the witness’ truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Testimony regarding a plea agreement containing a promise of truthfulness does not, in itself, constitute grounds for reversal. *Id.* Such testimony does not insinuate governmental possession of information not heard by the jury, and the prosecutor cannot be taken to have expressed a personal opinion on the witness’ truthfulness. *Id.* Here, the prosecutor merely referenced the plea agreement and Brockless’ promise to testify truthfully. There was no express or implicit suggestion by the prosecutor that he had information unknown to the jury establishing that Brockless was testifying truthfully. The prosecutor did not express a personal opinion or send a message to the jury with respect to Brockless’ veracity.

Defendant apparently argues that, because a plea had been entered before defendant’s trial, the prosecutor had already decided the anticipated testimony would be the truth, and this belief was implicitly conveyed to the jury based on the chronology of events. We disagree. First, Brockless testified that if he did not testify truthfully the deal would be off, thus suggesting that the entered guilty plea was contingent and subject to being vacated or rescinded.⁸ Second, we have no record or transcript of the court proceedings in which the guilty plea was entered, and we are limited to the existing record. *Williams, supra* at 414. And finally, assuming that the entered plea could not be revisited if defendant failed to testify or testify truthfully, however unlikely, we simply do not believe that the impression was conveyed to the jury that the prosecutor had some inside knowledge that Brockless was testifying truthfully. Because counsel

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁸ Apparently, Brockless had yet to be sentenced under the plea.

is not required to raise a meritless or futile objection, defendant was not deprived of effective counsel. *Milstead, supra* at 401.

The last two instances of alleged ineffective assistance relate to the introduction of evidence indicating that defendant had committed prior breaking and enterings (B&Es) and had a conviction for felon in possession of a firearm. Before trial, defendant filed a motion in limine to exclude any references to B&Es committed by defendant. The prosecutor agreed that such evidence should be excluded, and that he had no intention of eliciting this information. The prosecutor, however, also stated that it may inadvertently come out through the testimony of witnesses, as indicated by the preliminary examination, where the witnesses are describing their relationship with defendant. The prosecutor informed the trial court that he had admonished witnesses not to reference prior B&Es involving defendant. An order granting the motion in limine to exclude such testimony was entered.

Unfortunately, at trial, Brockless indicated twice that he and defendant had committed prior B&Es. The questions posed by the prosecutor did not reflect an attempt to elicit the evidence.

Q. Was there any discussion at all about that, about the fact that there were people home?

A. Yeah, yeah, I guess it did come up after we got up there, you know, it was like there is people there. We never did B&Es with people home, you know, no guns.

The second instance was essentially the same as above, where the prosecutor asked a proper question, and Brockless made a brief reference to B&Es.

Defendant argues on appeal that trial counsel was ineffective for failing to object or request a mistrial. Defendant maintains that the evidence was improper character evidence in violation of MRE 404(b).

Before ruling on this issue, we shall briefly touch on the circumstances regarding the felon in possession testimony. During defendant's testimony, defense counsel deliberately and directly elicited testimony that defendant had been convicted in 1995 of felon in possession. The record reflects that counsel was attempting to show the jury that defendant was willing to acknowledge that he had not led the "most pristine life." On cross-examination, the prosecutor seized on the testimony and had defendant reiterate that he had been previously convicted for felon in possession. On appeal, defendant argues that counsel was ineffective for raising the matter, where the evidence was inadmissible under MRE 609, which only allows impeachment by prior convictions for crimes containing elements of dishonesty, false statement, or theft.

We find it unnecessary to determine whether the evidence of the B&Es and the felon in possession conviction constituted improper character evidence. Arguably, defense counsel's actions and inactions fell below an objective standard of reasonableness, assuming the evidence

to be improper, and were not a matter of sound trial strategy.⁹ We find that defendant has failed to establish prejudice and has not shown the existence of a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Carbin, supra* at 600.

With respect to the B&Es, there was proper testimony admitted showing that defendant, Brockless, and Councilor were planning to break into the Tellas' home. Two brief references to those same individuals committing other B&Es hardly seems noteworthy; a mistrial would not have been warranted. Taking this into consideration, along with the strong evidence of guilt, we find no prejudice. With respect to the felon in possession conviction, if it reflected to the jury that defendant possessed and had knowledge of weapons, it was not harmful, in that defendant himself testified that he had possessed many firearms around the time of the murder. The reflection that defendant was a felon gives us more concern, but we still opine, that in light of the overall testimony and strong evidence of guilt, defendant has failed to show prejudice.

Affirmed.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey

⁹ Because we are limited to the existing record and cannot determine the extent and nature of defendant's prior criminal history (minimally there were two convictions considering the felon in possession conviction), and because defendant chose to testify, we cannot say with certainty that the prosecutor could not have introduced a prior conviction under MRE 609, which if a possibility, defense counsel's decision to introduce a conviction first could indeed constitute sound trial strategy.