

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN DOUGLAS PATRICK ZIKE,

Defendant-Appellant.

UNPUBLISHED

February 21, 2006

No. 257587

Ottawa Circuit Court

LC No. 03-026929-FC

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for armed robbery, MCL 750.529, kidnapping, MCL 750.349, and carjacking, MCL 750.529a. We affirm.

In an effort to avoid jail time for a drunk driving offense, an acquaintance of defendant tape-recorded a conversation with defendant in which defendant admitted to and gave a detailed account of committing the armed robbery at issue here. Before giving the tape to the police, defendant's acquaintance deleted five to ten minutes of the conversation that did not pertain to the crime.

Defendant argues that the introduction of his acquaintance's preliminary examination testimony at trial violated his right of confrontation. Specifically, defendant argues that because the tape-recorded conversation was not played at the preliminary examination, he did not have a similar motive to develop the testimony. We disagree. We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, we review de novo preliminary questions of law such as decisions regarding the admission of evidence, e.g., whether a rule of evidence precludes admissibility of the evidence. *Id.* It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The preliminary examination testimony of an unavailable witness is admissible at trial if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998); MRE 804(b)(1). Whether a party had a similar motive to develop the witness's testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

The prosecution elicited the testimony of defendant's acquaintance at the preliminary examination to establish that defendant committed the armed robbery. The preliminary examination testimony was introduced at trial for the same purpose. Although the tape-recorded conversation was not played at the preliminary examination, most of the preliminary examination testimony of defendant's acquaintance centered on the tape: why he made the tape and the conversation that was recorded on the tape. Defendant had a motive to cross-examine his acquaintance on the making and contents of the tape-recorded conversation. Indeed, defendant's acquaintance was cross-examined at the preliminary examination on the four areas about which defendant argues he would have inquired at trial. The trial court did not abuse its discretion in admitting the preliminary examination testimony of defendant's acquaintance.

Defendant also argues that the introduction of the tape-recorded conversation violated the rule of completeness because his acquaintance deleted the first five to ten minutes of the conversation. We disagree. Defendant failed to preserve this issue. We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The rule of completeness, codified in MRE 106, only applies if a defendant sought, and was denied, permission to have a complete statement introduced. *People v McGuffy*, 251 Mich App 155, 161; 649 NW2d 801 (2002). It does not have any bearing on the admissibility of the evidence introduced by the prosecution. *Id.* Because defendant never sought to exclude the tape-recorded conversation on the ground that it was not a complete recording of the conversation with his acquaintance, the trial court did not err in admitting the tape-recorded conversation.

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Karen M. Fort Hood