

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
November 2, 2006

No. 265851
Wayne Circuit Court
LC No. 96-002162

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

The prosecution appeals by leave granted from an order precluding it from introducing the testimony of a now-deceased witness from defendant's first trial at defendant's retrial. We affirm.

Defendant was convicted in 1996 of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of armed robbery, MCL 750.529, one count of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two concurrent terms of life in prison for the two first-degree murder convictions, and 20 to 30 years' imprisonment for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant's convictions arose from the shooting deaths of Kevin Tate and Anthony Nathaniel, and the nonfatal shooting of a third person, the now-deceased witness, Gail Thomas, during the February 17, 1996, robbery of a drug house in Detroit. The key witness at trial was Thomas, who implicated defendant in the shootings. In a prior appeal, this Court affirmed defendant's convictions and sentences in an unpublished opinion per curiam, issued November 24, 1998 (Docket No. 200579), lv den 460 Mich 874 (1999).

In 2000, defendant filed a post-appeal motion for relief from judgment. The motion was based on allegedly newly discovered evidence provided by Santo Taylor, whom defendant had met in prison in 1999. At an evidentiary hearing, Taylor testified that he had first-hand

knowledge of, and witnessed, certain events on the night in question, that someone other than defendant committed the killings, and that Thomas was involved in the offense. Defendant was ultimately granted a new trial on the basis of Taylor's newly discovered testimony.¹

During the interim, Gail Thomas died in 2003. In September 2005, the prosecutor filed a notice of intent to use Thomas's testimony from defendant's first trial at defendant's retrial. Defendant objected, arguing that Thomas's former testimony was not admissible under MRE 804(b)(1) and that admission of the testimony would violate his right of confrontation under US Const, Am VI, and Const 1963, art I, § 20, because he did not have the opportunity to cross-examine Thomas concerning the newly discovered evidence on which his new trial was premised. The trial court agreed with defendant and held that Thomas's former testimony could not be admitted at a second trial. This Court granted the prosecutor's application for leave to appeal to consider the admissibility of Thomas's testimony.

On appeal, the prosecutor argues that defendant had a full opportunity to cross-examine Thomas at his first trial and that her testimony was fully developed; therefore, admission of her testimony at defendant's second trial does not violate either the hearsay exception for former testimony, MRE 804(b)(1), or the Confrontation Clause. We turn to the evidentiary issue first.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A reviewing court may not substitute its judgment for that of the trial court regarding admissibility; there is no abuse of discretion where the evidentiary question is a close one. *Smith, supra*.

Foundational facts must be proven by a preponderance of the evidence. *In re Brock*, 193 Mich App 652, 669; 485 NW2d 110 (1992), rev'd on other grounds 442 Mich 101 (1993). A trial court's decision concerning whether an appropriate foundation was laid for admissibility is reviewed for abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004).

MRE 804(b)(1) states:

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or,

¹ Although this Court had reversed the trial court's decision and remanded for reconsideration of defendant's motion for a new trial by a different judge, see *People v Williams*, unpublished opinion per curiam, issued December 9, 2003 (Docket No. 244652), our Supreme Court subsequently reversed this Court's decision and remanded the case for a new trial, see 471 Mich 928 (2004).

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. [Emphasis added.]

In this case, there is no dispute that Thomas is unavailable, that she previously testified under oath against defendant, and that defendant had an opportunity to, and did, cross-examine her. The only question is whether defendant had a “similar motive to develop” Thomas’s testimony in the first trial as he would in the second trial, after Taylor came forward with new evidence implicating Thomas in the crime.

In relevant part, the text of MRE 804(b)(1) is identical to FRE 804(b)(1). Therefore, federal decisions interpreting FRE 804(b)(1) are instructive in interpreting MRE 804(b)(1). *People v Katt*, 468 Mich 272, 280; 662 NW2d 12 (2003).

In *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986), this Court addressed the “similar motive” requirement of MRE 804(b)(1). The Court agreed with McCormick on Evidence “that the issue for which the former testimony was elicited and the issue for which the party wishes the former testimony admitted must be substantially similar before the former testimony may be admitted.” In *Vera*, the defendant wished to introduce his deceased wife’s testimony from a bond hearing at his trial. *Id.* at 413-414. This Court upheld the trial court’s decision denying the motion, finding that, because the wife’s statements were made at a hearing on the issue of the amount of the defendant’s bond, and not at a hearing to determine the defendant’s guilt or innocence, the prosecutor did not have a motive to cross-examine the defendant’s wife concerning whether defendant acted with an intent to kill. *Id.* at 413-416.

The *Vera* Court quoted McCormick, Evidence (3d ed), § 257, pp 767-768, which states:

It is often said that the issue in the two suits must be the same. But certainly the policy mentioned does not require that all the issues (any more than all the parties) in the two proceedings must be the same, but at most that the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second. Additional issues or differences in regard to issues upon which the former testimony is not offered are of no consequence. Moreover, insistence upon precise identity of issues, which might have some appropriateness if the question were one of res judicata or estoppel by judgment, are out of place with respect to former testimony where the question is not of binding anyone, but merely of the salvaging, for what it may be worth, of the testimony of a witness not now available in person. Accordingly, modern opinions qualify the requirement by demanding only ‘substantial’ identity of issues. [*Vera, supra* at 415.]

Similarly, in *United States v Wingate*, 520 F2d 309, 311-312, 316 (CA 2, 1975), which is cited by *Vera*, the trial court denied the defendant’s request to introduce the suppression hearing testimony of an alleged coconspirator, in which he denied any participation in the offense. The court agreed with the prosecutor that the testimony should be excluded because the coconspirator was not available for cross-examination at trial and, at the hearing, the prosecutor did not have an opportunity to cross-examine the witness concerning the defendant’s participation in the crime. *Id.* at 316.

In *United States v DiNapoli*, 8 F3d 909, 910-911 (CA 2, 1993) (en banc), the trial court denied the defendant's motion to introduce grand jury testimony of some codefendants in which they denied the facts of the crime. The appellate court agreed, but refined the criteria to be used in determining whether a similar motive exists. *Id.* at 910-915.

The court stated that, to have a similar motive to develop the testimony, "the questioner must not only be on the same side, of the same issue at both proceedings but must also have a substantially similar degree of interest in prevailing on that issue." *Id.* at 912.

Whether the degree of interest in prevailing on an issue is substantially similar at two proceedings will sometimes be affected by the nature of the proceedings. *Where both proceedings are trials and the same matter is seriously disputed at both trials, it will normally be the case that the side opposing the version of a witness at the first trial had a motive to develop that witness's testimony similar to the motive at the second trial.* The opponent, whether shouldering a burden of proof or only resisting the adversary's effort to sustain its burden of proof, usually cannot tell how much weight the witness's version will have with the fact-finder in the total mix of all the evidence. Lacking such knowledge, the opponent at the first trial normally has a motive to dispute the version so long as it can be said that disbelief of the witness's version is of some significance to the opponent's side of the case; the motive at the second trial is normally similar. [*Id.* at 912-913.]

Conversely, in a grand jury setting, the prosecutor's motivation is merely to get an indictment and, even if he disbelieves a witness, he may not have a motive to show that the testimony is false while, at trial, where the issue is the defendant's guilt or innocence, the prosecutor would clearly have a motive to prove that the testimony is false. *Id.* at 913. The prosecutor may also have a powerful motive to keep his witnesses and investigatory techniques secret, which he would not have at trial. *Id.*

The Court was not "persuaded by the Government's contention that the absence of similar motive is conclusively demonstrated by the availability at the grand jury of some cross-examination opportunities that were forgone." *Id.* at 914.

In virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding. In almost every criminal case, for example, the Government could probably point to some aspect of cross-examination of an exonerating witness that could have been employed at a prior trial and surely at a prior grand jury proceeding. Though the availability of substantial ways of challenging testimony that were not pursued by an examiner is pertinent to the "similar motive" inquiry, especially when such techniques appear far more promising compared to the cross-examination undertaken, the unused methods are only one factor to be considered. [*Id.*]

The court declined to adopt any broad rules, such as that the prosecutor's motives in a grand jury are always dissimilar from those at trial. *Id.* at 913-914. Instead, "the inquiry into similar motive must be fact specific." *Id.* at 914. The court commented that "[t]he proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party

resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.” *Id.* at 914-915. “The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.” *Id.* at 915.

In the present case, the issue upon which the prosecutor seeks to introduce Thomas’s former testimony is the same as it was in the first trial, i.e., to show that defendant committed these crimes. Defendant clearly had the same motive to discredit Thomas’s testimony in the first trial as he would at the second trial, i.e., to show that a reasonable doubt existed concerning his guilt, and had a substantially similar degree of interest in prevailing on that issue. The two trials will also have a common factual core, i.e., the armed robbery, the killings of Tate and Nathaniel, and Thomas’s shooting.

Although the nature of the two proceedings are the same, the core issues are the same, the burden of proof is the same, and what is at stake is the same, there is one significant difference concerning defense counsel’s cross-examination of Thomas. See *id.* At the first trial, defendant had no reason to cross-examine Thomas concerning her possible involvement in the crime, because Taylor had not yet come forward. Thus, this is not a case where an opportunity for cross-examination was available and forgone. See *id.* Rather, it is a case where an opportunity for cross-examination was never available.

We recognize that differences in cross-examination are relevant to “a lesser extent” than other factors and, although “relevant,” are “not conclusive.” See *id.* Nonetheless, we believe that the question whether defendant had a similar motive to develop Thomas’s testimony at the first trial as he would have in the second trial is a close one. Accordingly, we conclude that the trial court did not abuse its discretion in declining to admit Thomas’s former testimony at defendant’s second trial under MRE 804(b)(1). See *Smith, supra*. Because this case can be decided on nonconstitutional grounds, we need not reach the constitutional issue whether the confrontation clause would also be violated. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey