

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE FREDERICK MASHATT,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2007

No. 270012

Wayne Circuit Court

LC No. 06-000299-01

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82, and sentenced as a fourth habitual offender, MCL 769.12, to probation. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court erred in allowing the prosecutor to introduce the victim's preliminary examination testimony at trial. In general, we review a trial court's evidentiary rulings for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preliminary questions of law affecting the admissibility of the evidence are reviewed de novo. *Id.*

Under MRE 804(b)(1), former testimony is not excluded by the hearsay rule if the declarant is unavailable as a witness and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." In a criminal case, the "unavailability of a witness" includes situations where the declarant is absent from the hearing and the proponent of the evidence shows due diligence. MRE 804(a)(5). The evidentiary rule protects the right of confrontation provided under the Sixth Amendment of the United States Constitution and Const 1963, art 1, § 20. *People v Meredith*, 459 Mich 62, 67-70; 586 NW2d 538 (1998), *People v Bean*, 457 Mich 677, 682-684; 580 NW2d 390 (1998). The United States Supreme Court's decision in *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), does not compel a different result, but only requires a prior opportunity for cross-examination of the unavailable declarant.

Addressing first defendant's claim that the prosecutor did not exercise due diligence to produce the victim for trial, the test is whether the prosecution made a diligent good-faith effort in its attempt to locate the victim to testify at trial. *Bean, supra* at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent

good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *Id.* Although we review the trial court’s decision for a clear abuse of discretion, findings of fact underlying the decision are reviewed for clear error. *Id.*; *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

Detective Whitley’s testimony that he spoke with the director of the Second Chance Rescue Mission, which was the victim’s last known residence and place of employment, that he investigated information that he acquired about the victim possibly being homeless by checking homeless shelters and other locations, including the jail, hospitals, and morgue, and that he used computerized resources to try to find the victim, supports a finding that reasonable, good-faith efforts were made to secure the victim’s presence at trial. Although defense counsel pointed out other avenues that Detective Whitley did not investigate, the trial court did not clearly abuse its discretion in finding due diligence.

We also reject defendant’s claim that he did not have an opportunity and similar motive at the preliminary examination to develop the victim’s testimony. Whether a similar motive exists depends on whether the “the issue for which the former testimony was elicited and the issue for which the party wishes the former testimony admitted are substantially similar.” *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986). In general, cross-examination guarantees a defendant a reasonable opportunity to test the truth of a witness’s testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). It provides an opportunity for a defendant to present facts on which an inference of bias, prejudice, or lack of credibility of a witness could be made. *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985); see also *People v Layher*, 464 Mich 756, 762-765; 631 NW2d 281 (2001).

The prosecutor offered the victim’s preliminary examination testimony at trial for the same issue for which it was presented at the preliminary examination, namely, to establish that defendant committed the charged assault with the necessary intent. Further, defendant had a reasonable opportunity and similar motive to explore the credibility of the victim’s testimony. We find no indication that the magistrate at the preliminary examination limited defense counsel’s ability to cross-examine the victim regarding his credibility. To the contrary, the magistrate allowed cross-examination of the victim’s motive as it related to his credibility. The magistrate’s earlier ruling, precluding defense counsel’s cross-examination of the victim about whether he was jealous of defendant’s relationship with the mission’s director, does not establish that defense counsel was denied an opportunity to develop the testimony.

The right to cross-examination does not include the right to cross-examine a witness on irrelevant issues. *Adamski, supra* at 138. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. The proponent of evidence has the burden to establish a proper foundation for its admissibility. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989).

Although motive can be relevant evidence, in general, a motive is simply “that which incites or stimulates a person to do an act.” *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997), quoting Black’s Law Dictionary (rev 5th ed). It is “the moving power that impels to action for a definite result.” *Id.* Defense counsel’s mere offer at the preliminary examination that his cross-examination goes to “motive” was inadequate to establish the

relevancy of the evidence. Further, defendant's trial counsel failed to offer at trial a relevant purpose of any other questions about the victim's "motive" or alleged jealousy that could not be explored because of the magistrate's ruling at the preliminary examination to limit "motive" evidence to credibility matters. In view thereof and the opportunity afforded to defense counsel at the preliminary examination to test the truth of the victim's testimony, the trial court did not abuse its discretion in allowing the victim's preliminary examination testimony. The evidence was admissible under MRE 804(b)(1).

Affirmed.

/s/ Alton T. Davis  
/s/ Joel P. Hoekstra  
/s/ Pat M. Donofrio