

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK BURTON,

Defendant-Appellant.

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UNPUBLISHED

April 30, 2002

No. 228026

Wayne Circuit Court

LC No. 99-008219

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life without parole for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

In this case, the prosecution presented Clayton Williams as an eyewitness to the shooting. Williams testified during the preliminary examination that he saw defendant shoot and kill the victim. However, before the trial began Williams stated that he lied during the preliminary examination and that he wanted to change his testimony. After consulting his attorney, Williams invoked his Fifth Amendment rights to remain silent and the trial court allowed the prosecution to present his preliminary examination testimony to the jury.

I. Trial Court's Conduct

Defendant argues that the trial court's warning that Williams would expose himself to perjury charges by changing his testimony was improper intimidation. We disagree. Because defendant failed to object to the trial court's comments, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In reviewing claims of judicial abuse, this Court examines the record as a whole and evaluates the alleged wrongful acts in context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); see also *People v Callington*, 123 Mich App 301, 305; 333 NW2d 260 (1983).

A party's Fourteenth Amendment right to due process is violated when a trial court intimidates a witness into not testifying. *Webb v Texas*, 409 US 95, 97-98; 93 S Ct 351; 34 L Ed 2d 330 (1972). After carefully reviewing the record in this case, we conclude that the trial court's comments to Williams were permissible. Unlike *Webb, supra*, the trial court's comments were not directed to silence Williams. Indeed, the trial court informed Williams of the penalties for perjury only after Williams admitted that he was going to recant the testimony he had previously given under oath at the preliminary examination.<sup>1</sup> Conversely, in *Webb, supra* at 95-98, the trial court's admonitions were based on its own assumption that the witness would lie without any indication that he was planning to recant prior sworn testimony. We also find that the trial court's guarantee of "what's going to happen" if it found that Williams had committed perjury did not rise to the level of the trial court's threats in *Webb*.<sup>2</sup>

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<sup>1</sup> We agree with the court in *Hence v Smith*, 37 F Supp 2d 970, 980 (ED Mich, 1999):

A trial court does not violate a defendant's Sixth and Fourteenth Amendment rights when it informed a witness who wishes to recant his or her earlier testimony against a defendant of the penalties of perjury and the desirability of consulting with counsel, even if this leads to the witness declining to testify and invoking his or her Fifth Amendment right against self-incrimination after discussing the matter with counsel.

<sup>2</sup> In *Webb, supra* at 96, the trial court stated that it would:

personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood (sic) is that you would get convicted of perjury and that it would be stacked onto what you have already got . . . . If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole . . . .

Whereas the following colloquy occurred in the instant case:

*The Court.* You intend to change your testimony?

*Williams.* Yes, I do.

\* \* \*

*The Court.* Did you lie at the Preliminary Examination?

*Williams.* Yes

\* \* \*

*The Court.* And is it your representations to the Court that that was false testimony?

Attorney Strauch: I need to consult with my client at this time, your Honor.

(Discussion off the record attorney/client)

(continued...)

Moreover, Williams had the benefit of appointed counsel who interceded and advised Williams to invoke the Fifth Amendment. We also note that Williams did not decide to change his testimony until after being placed in a holding cell with defendant. Based on these facts, we are satisfied that the trial court's remarks were designed to protect the integrity of the trial process and Williams' interests in light of the strong possibility that he would give perjured testimony. The trial court was under "a duty to ensure the proper administration of justice," and did not violate defendant's right of confrontation. *People v Jackson*, 114 Mich App 649, 661-662; 319 NW2d 613 (1982); rev'd on other grounds 421 Mich 39; 365 NW2d 56 (1984).

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(...continued)

*Williams.* Ma'am, I hereby invoke the Fifth Amendment.

*The Court.* You understand that you are facing up to 15 years incarceration?  
You do understand that?

*Williams.* No, ma'am.

*The Court.* Well, that's the penalty for perjury. You understand that now?

\* \* \*

*The Court* What we're going to do, counselor, you may have now had an opportunity to discuss with your client, but I wanted to make sure he was informed that the maximum penalty he could receive is up to 15 years incarceration.

What's going to happen – let me tell you what's going to happen.

The Court is going to use the transcript from the Preliminary Examination. We'll have it in front of us at the time you testify here in open court.

If the Court determined that you, in fact, have committed perjury, I can guarantee you what's going to happen, Mr. Williams.

\* \* \*

*The Court:* Wait a minute. Hold it. Let me correct that. The penalty for perjury is [MCL] 750.22.

If perjury was committed on the trial of a capital crime, the imprisonment in the state prison is life.

## II. Right of Confrontation

Defendant next alleges that his right of confrontation was denied when he was removed from the courtroom during the trial court's inquiry into Williams' intent to recant. We disagree. Because defendant failed to object to his exclusion from the proceedings, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.

“The Confrontation Clause<sup>3</sup>] guarantees a criminal defendant the right to be present at all stages of his trial and to a face-to-face meeting with the witnesses against him.” *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). Nonetheless, these rights are not absolute and must be construed according to the necessities of the trial and the adversarial process. *Id.* The exclusion of a defendant from trial does not amount to reversible error unless there is a reasonable probability of prejudice. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977); *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995).

After reviewing the record, we find that defendant's absence during the trial court's questioning of Williams' intent to recant his preliminary examination testimony did not prejudice defendant. Indeed, defendant has failed to demonstrate how his absence from these hearings, where no substantive evidence was received and the only matter discussed was whether Williams intended to testify, amounted to prejudice. We further note that defense counsel was present during these proceedings.

It also appears that defendant's removal was necessary to ensure that Williams would be allowed to speak with candor. The trial court noted that Williams and defendant were related, that defendant was larger in stature than Williams, and that both Williams and defendant were placed in the same jail cell prior to the beginning of the trial. See *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998).

## III. Admission of Evidence

Defendant further maintains that the trial court erred when it allowed the prosecution to admit Williams' preliminary examination testimony after he did in fact invoke the Fifth Amendment and refused to testify. Specifically, defendant argues that Williams was not truly “unavailable” to testify. Defendant also suggests that his right to confrontation and due process was violated because the prosecution knowingly presented false testimony. We disagree. The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). To the extent the decision involves a question of law, this Court will review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A witness is considered “unavailable” when he asserts his Fifth Amendment right to justify not testifying at trial. MRE 804(a)(1); *People v Meredith*, 459 Mich 62, 65-66; 586

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<sup>3</sup> US Const, Am VI; Const 1963, art 1, § 20.

NW2d 538 (1998). However, a witness is not considered unavailable if the proponent of the witness' statement wrongfully prevented that witness from testifying. MRE 804(a)(5).

In the instant case, the prosecution presented Williams to testify but Williams asserted his Fifth Amendment right. There is nothing in the record to suggest that the prosecution encouraged Williams to refuse to testify. Indeed, the day before he invoked his Fifth Amendment privilege, Williams informed the prosecution that he would be testifying consistent with his preliminary examination testimony. Furthermore, we do not find that the trial court's actions or statements to Williams were improper. Therefore, we conclude that Williams was unavailable to testify pursuant to MCR 804(a)(1).

When a declarant is unavailable as a witness, testimony given by that declarant in another hearing may be admitted as evidence "if 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." MRE 804(b)(1); see also *People v Adams*, 233 Mich App 652, 656-657; 592 NW2d 794 (1999). In the present case, the record indicates that defendant had the opportunity and a similar motive to cross-examine Williams during the preliminary examination. During the preliminary examination Williams testified that defendant shot the victim following an earlier dispute. Through his subsequent cross examination of Williams, defendant was able to attack his credibility and point out inconsistencies in Williams' testimony. Accordingly, Williams' preliminary examination testimony was properly admitted.

Further, we do not find that this testimony violated defendant's constitutional right to confront Williams. US Const, Am VI; Const 1963, art 1, § 20; *Adams, supra* at 659. The Confrontation Clause allows the preliminary examination testimony of an unavailable witness to be used at trial only upon a showing that the testimony bears satisfactory indicia of reliability. *Meredith, supra* at 68. "[T]he reliability requirement is satisfied 'without more' if the proposed testimony falls within a firmly rooted exception to the hearsay rule." *Id.* at 69 (emphasis added); see also *Adams, supra* at 659-660. It is well settled that MRE 804(b)(1) is a firmly rooted exception to the hearsay rule. *Meredith, supra* at 70-71. Thus, because Williams' preliminary testimony fell within MRE 804(b)(1) there was sufficient indicia of reliability and defendant's right of confrontation was satisfied.

Moreover, we disagree with defendant's contention that the prosecution knowingly presented false testimony to the jury. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). However, absent proof that the prosecution knew that the trial testimony was false, reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

A careful review of the record in this case does not demonstrate that the prosecution knew that Williams' preliminary examination testimony was false. While Williams stated that he lied during the preliminary examination, this was after being placed in a jail cell with defendant despite an express request to the contrary from Williams. Indeed, the day before Williams attempted to recant his testimony, he informed the prosecution that he intended to testify truthfully and in a manner consistent with his preliminary examination testimony. We note that Williams' preliminary examination testimony was corroborated by evidence obtained from the police and was consistent with his statements prior to the start of trial. Therefore, it was

not unreasonable for the prosecution to assume that Williams' preliminary examination testimony was truthful. Further, despite the prosecution's questioning, Williams never indicated what portion, if any, of his preliminary exam testimony was false. See *Meredith, supra* at 68-69.

#### IV. Sufficiency of the Evidence

Defendant further contends that the evidence was insufficient to establish premeditation and deliberation. We disagree. In reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional, premeditated, and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the surrounding circumstances, but such inferences must be supported by the record and cannot be merely speculative. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors evidencing premeditation are: (1) the prior relationship between the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing, including the weapon used and the location of the wounds; and (4) the defendant's conduct after the victim's death. *Id.* at 300.

Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence to establish that defendant killed the victim with premeditation and deliberation. There was testimony presented that the victim and defendant had an argument a few days before the victim's death. Furthermore, the numerous entrance wounds on both sides of the victim's body demonstrated that defendant had more than a few seconds to take a “second look.” Moreover, defendant's attempt to elude police after the shooting could indicate a “consciousness of guilt.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). To the extent Williams' and defendant's testimony conflict, this Court will not interfere with the function of the jury to listen to testimony, weigh the evidence and credibility of the witnesses, and decide questions of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, mod 441

Mich 1201 (1992).<sup>4</sup> Accordingly, a rational trier of fact could conclude beyond a reasonable doubt that defendant's actions were premeditated and deliberate.

Affirmed.

/s/ Peter D. O'Connell

/s/ Jessica R. Cooper

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<sup>4</sup> We note that the trial court instructed the jury that Williams' testimony was to be treated the same as any other testimony.