

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD DARWIN WINSTON,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2011

No. 295140

Wayne Circuit Court

LC No. 09-010799-FC

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of second-degree murder,<sup>1</sup> two counts of assault with the intent to murder,<sup>2</sup> and one count of possession of a firearm during the commission of a felony.<sup>3</sup> He was sentenced to serve two concurrent sentences of 320 months to 50 years for each of the counts of second-degree murder, and a consecutive sentence of two years for the count of felony-firearm. He now appeals and we affirm.

Defendant-Winston's conviction arises out of his commission of a gang-related shooting that left two people dead and two others seriously injured from multiple gunshot wounds. Several neighbors identified two individuals, defendant and Mark Moore, as they ran from the scene. A few minutes later, other witnesses placed Moore and defendant at a local drug house; both were wearing dark clothes and hoodies. Moore had an AR 15 assault rifle and defendant had a 10 millimeter Glock handgun. Several weeks later, defendant admitted to Spivey that he and Moore had murdered Fields. Soon after, Moore turned himself in. Defendant was apprehended in Arizona.

One of the neighbors who witnessed the defendants running from the scene was Juanita Steward. She was Moore's aunt, and her son was defendant's best friend. Defendant had wanted

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<sup>1</sup> MCL 750.317.

<sup>2</sup> MCL 750.83.

<sup>3</sup> MCL 750.227b.

to run into Steward's house, but she told him to keep running. At first, she did not want to give the police any information; she was afraid that the defendants would harm her. The police learned that she had valuable information about the murders and issued an investigative subpoena. At the interview, she was very nervous about whether Moore or defendant would find out that she had identified them as the killers.

Because she was unavailable to testify, the prosecution moved to introduce the statement under oath that Steward had given to the police. She was unavailable because she had been murdered before the trial. The prosecution alleged that Steward had been murdered by Moore and defendant to keep her from testifying against them at trial. At an evidentiary hearing, Terrance, Steward's son, testified that he had received warnings from defendant regarding his mother. Defendant also asked Terrance what his mother had seen and whether she had talked to police. Steward's brother and her friend also testified that Steward had received threats from Moore and Defendant. The trial court granted the prosecution's motion over the objection of Defendant's counsel. Defendant now appeals as of right.

Defendant claims that he was denied his Sixth Amendment right when the prosecution was allowed to submit the statements that Steward had reluctantly given to police before she was ultimately murdered. This Court is only required to review issues that are properly raised and preserved.<sup>4</sup> An issue is properly raised and preserved if it is addressed by the trial court.<sup>5</sup> To preserve most issues, a party must object below.<sup>6</sup> Here, the prosecution made a motion to include Juanita Steward's statement under oath as evidence; defendant objected. The trial court held an evidentiary hearing and determined that Steward's statement under oath was admissible under MRE 804(b)(6). The issue was properly raised and preserved.

This Court reviews preliminary questions of law regarding admissibility of evidence de novo, while the decisions of the trial court regarding the admission of the evidence are reviewed for an abuse of discretion.<sup>7</sup> Generally, the appellate court defers to the trial court's judgment unless the trial court's decision results in an outcome outside of the range of principled outcomes.<sup>8</sup>

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<sup>4</sup> *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995); *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008).

<sup>5</sup> *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007), lv den 480 Mich 1003 (2007).

<sup>6</sup> *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006).

<sup>7</sup> *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

<sup>8</sup> *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, hearsay is not admissible as evidence.<sup>9</sup> A defendant has a constitutional right to confront the witnesses who testify against him.<sup>10</sup> The Confrontation Clause prevents the admission of ex parte testimonial statements like Steward’s statement under oath to the police pursuant to an investigative subpoena because the defendant does not have the opportunity to cross-examine the witness making those statements.<sup>11</sup> But this right is forfeited if the defendant engages in wrongdoing that prevents the witness from being available.<sup>12</sup> Under MRE 804, hearsay can be admissible if the witness is unavailable because of one of a few specified reasons. Section (b)(6) allows hearsay to be used if the “statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”

To determine whether a defendant engaged in or encouraged the wrongdoing that prevented a witness from testifying, the court reviews the facts.<sup>13</sup> Here, the prosecution alleges defendant procured the unavailability of Steward by having her murdered. Defendant argues that because the prosecution cannot show who actually killed Juanita Steward, the prosecution cannot establish that defendant and Moore were the ones who made Juanita unavailable to testify at the trial. Recently, the Supreme Court established that for the hearsay exception to apply, the prosecution must show that “defendant intended to prevent a witness from testifying.”<sup>14</sup> This intent element is crucial; it is not enough for a defendant to make a witness unavailable. *Id.*

Here, there is ample evidence that defendant was concerned about what Steward had seen and what she had said to police. Her son, Terrance, had been in contact with defendant and Moore. On several different occasions, defendant asked him if his mother had seen anything or said anything to the police. Terrance found out that threatening phone calls had been made to his grandmother’s house saying that Steward would not make it to trial. Terrance also heard from his child’s mother’s cousin that Moore and defendant suspected Steward of “snitching.”

Tomeka Shaw, Steward’s friend, also testified that Steward was receiving threats saying that Steward would not make it to trial. Shaw testified that Steward had told her that Steward knew that Moore and defendant were the murderers. Shaw knew that Steward was being threatened about talking to police. Steward received one of the calls while she and Shaw were

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<sup>9</sup> MRE 802.

<sup>10</sup> US Const, Am VI (Confrontation Clause); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

<sup>11</sup> *Crawford v Washington*, 541 US 36, 50-51; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

<sup>12</sup> *United States v Cromer*, 389 F3d 662, 679 (CA 6, 2004); *People v Jones*, 270 Mich App 208, 213-214, 714 NW2d 362 (2006); see also *Reynolds v United States*, 98 US 145, 158; 25 L Ed 244 (1879).

<sup>13</sup> *Reynolds*, 98 US at 159.

<sup>14</sup> *Giles v California*, 554 US \_\_\_; 128 S Ct 2678, 2684; 171 L Ed 2d 488 (2008).

outside police headquarters. They had gone there because Steward wanted to visit a friend who was a detective. Steward had put her phone on speaker. Shaw heard Moore tell Steward that he was on his way and that he was going to kill Steward. He said that Steward would not make it to trial. Shaw testified that Steward started carrying a gun. Steward had told Shaw that Terrance had warned her that Moore was going to kill her. Terrance knew this because defendant had told him that Moore was going to kill her and that defendant could not do anything about it. *Id.*

Steward's brother, David Steward, also talked to Steward about the threatening phone calls. David had also witnessed defendant and Moore running from the crime scene. Steward had told David about the threats that she had been getting, that the threats always came from defendant and Moore, and that Steward was afraid of both of them. David testified that defendant and Moore were afraid that Steward would talk to the police or testify at trial.

Steward herself was afraid to talk to police because she thought that defendant and Moore would harm her. In her statement to the police, she said that she would only sign her statement if "the prosecutor agrees I won't be seen by Mark, Edward and Mario. I don't want them to know it's me because I'm afraid they'll kill me and my family." She was saying that she didn't want defendant and Moore to know that she was the one who had identified them; the only reason that defendant and Moore would have to kill her would be to prevent her from testifying at trial.

The standard for showing whether a court has abused its discretion by inappropriately allowing the admission of evidence is whether an objective person would find that there was no excuse for the admission of that evidence.<sup>15</sup> Here, the court did not abuse its discretion. An ordinarily objective person could find, from the facts, that defendant was involved in preventing Steward from testifying at trial. He knew that Steward was a witness. He knew that Moore was planning on killing her. He had called Steward's son to tell him that Steward would not make it to trial. While the facts do not show exactly how defendant was involved, or who actually killed Steward, it is not necessary to prove with that level of specificity. The statute states that the exception applies if the defendant encouraged the wrongdoing that prevented the witness from testifying. Moreover, there is enough evidence to show that defendant, at the very least, did encourage the wrongdoing that prevented the witness from testifying. Therefore, we conclude that the trial court properly exercised its discretion.

Affirmed.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell

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<sup>15</sup> *People v Bauder*, 269 Mich App 174; 712 NW2d 506 (2005).