S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2007
v BOBBY EMMITT KENNEDY, Defendant-Appellant.	No. 271020 Kent Circuit Court LC No. 03-011966-FC

Before: Whitbeck, C.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant Bobby Kennedy appeals by delayed leave granted his jury conviction of first-degree premeditated murder,[1] being a felon in possession of a firearm (felon in possession),[2] and carrying a firearm during commission of a felony (felony firearm).[3] The trial court sentenced Bobby Kennedy, as an habitual offender fourth,[4] to 2 years' imprisonment (less 610-days' jail credit) for felony firearm, followed by concurrent sentences of life imprisonment without the possibility of parole for murder and two to five years' imprisonment for felon in possession. This case arises out of the June 1997 shooting death of 19-year-old Timmy Thomas. We affirm.

I. Basic Facts And Procedural History

In December 2003, police arrested Bobby Kennedy, and a one-man grand jury indicted him for Thomas's murder. The prosecution theory of the case was that Bobby Kennedy shot Thomas execution-style because Bobby Kennedy believed that Thomas had stolen some drugs from him and because Thomas had subsequently threatened Bobby Kennedy in front of other people. Several witnesses testified that Bobby Kennedy told people before the shooting that he was going to kill Thomas and that, after the shooting, he bragged that he had done it. According to the prosecution, Bobby Kennedy established a false alibi after the murder with the help of

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[1] MCL 750.316(1)(a).

[2] MCL 750.224f.

[3] MCL 750.227b.

[4] MCL 769.12.

several witnesses. The witnesses testified that they lied by telling police that Bobby Kennedy was with them on the morning of the murder. The prosecutor also contended that Bobby Kennedy paid for lawyers for the witnesses when they got in trouble during the years between the time of the shooting and the time that the grand jury indicted Bobby Kennedy. The prosecutor posited that Bobby Kennedy used the lawyers he paid for to keep the witnesses quiet and monitor what they said to police.

Anthony McLiechey testified that on the morning of June 24, 1997, he drove Bobby Kennedy to the location where the shooting took place, that he saw Bobby Kennedy shoot Thomas, and that he disposed of the gun in a garbage can after the shooting. After the murder, McLiechey drove Bobby Kennedy to Tanea McKinney's apartment. Tanea McKinney testified that Bobby Kennedy and McLiechey came to her apartment sometime around 6:00 or 6:30 a.m. on the morning of June 24, 1997. Tanea McKinney stated that she overheard Bobby Kennedy tell her boyfriend, John Holman, "I got him." Bobby Kennedy then changed his clothes, and Tanea McKinney helped him put his old clothes in a bag to take out to the trash. McLiechey, Bobby Kennedy, Tanea McKinney, and Holman, then all went to breakfast.

When police questioned Tanea McKinney a couple days after the murder, she told them that Bobby Kennedy came to her house at 3:00 a.m. on the morning of June 24, 1997, and was there until they went to breakfast. But during the 2003 grand jury hearing, Tanea McKinney confessed to lying about Bobby Kennedy's whereabouts on the morning of the murder. She explained that she eventually decided to tell the truth during the grand jury proceedings because she did not want to be subject to more jail time for lying.[5]

During his 2003 grand jury testimony, McLiechey repeatedly denied knowing anything about the murder. But McLiechey was later recalled during the grand jury hearing, and he finally admitted that he was involved in the murder as the driver of the vehicle that carried Bobby Kennedy to and from the scene of the shooting. At that time, McLiechey denied that Bobby Kennedy ever threatened him or tried to pay him off. At trial in 2005, McLiechey explained that he eventually decided to tell the truth during the grand jury proceedings because Tanea McKinney had finally confessed to lying to the police. McLiechey testified that Bobby Kennedy began threatening him after he testified before the grand jury.

II. Sixth Amendment Right To Counsel

A. Standard Of Review

Bobby Kennedy argues that he was denied his right to counsel of choice when the trial court granted the prosecutor's motion to disqualify Bobby Kennedy's attorney, N.C. Deday LaRene, on the ground that the prosecutor intended to call LaRene as a witness at trial. The prosecution argued that LaRene's testimony was necessary to show that Bobby Kennedy "took care" of witnesses by hiring lawyers for them and paying their legal fees in order to prevent them from testifying to the truth of Bobby Kennedy's role in Thomas's murder.

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[5] Tanea McKinney was serving a 20-to-50-year sentence on a drug possession conviction.

"We review for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice."[6] An erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal.[7]

B. Relevant Facts

Sometime prior to the 2003 grand jury hearing, police interviewed McLiechey pursuant to an investigative subpoena related to the Thomas murder. An attorney named Louise E. Herrick initially represented McLiechey during the investigative subpoena proceedings. On Herrick's direction, McLiechey refused to testify at the time of the investigative subpoena.

McLiechey stated that Bobby Kennedy's wife, Charlevette Kennedy, hired Herrick to represent him. McLeichey explained that upon receiving the investigative subpoena, he contacted Charlevette Kennedy because he wanted her to tell "them" that he did not know anything. But McLiechey and Charlevette Kennedy ended up discussing whether he should have legal counsel during questioning for the interview. According to McLiechey, Charlevette said that she was going to have a lawyer come see him. McLiechey stated, "Herrick said that she was paid by—she said somebody named Dee—Deday asked him something about—asked her to represent me through Charlevette, something—something like that." McLiechey stated that when he asked Herrick about money, "she said that Charlevette gave her some money." McLiechey denied knowing why Bobby Kennedy would pay a lawyer to represent him.

Louise Herrick confirmed that she represented McLiechey during the investigative subpoena proceedings. Herrick testified that she agreed to represent McLiechey after her fiancé, who was also an attorney, told her that attorney Deday LaRene was looking for an attorney to represent McLiechey. Herrick explained that all she knew was that the case involved an investigative subpoena. Herrick testified that a woman named "Charlevette" paid for Herrick's legal fees by depositing funds in Herrick's checking account. According to Herrick, LaRene denied knowing the identity of the woman who had paid Herrick's fee. Herrick simply assumed the woman was McLiechey's friend or girlfriend. Herrick denied knowing Bobby Kennedy and stated that she had no knowledge of LaRene's relationship with Bobby Kennedy or Bobby Kennedy's relationship with "Charlevette" until the relationships were exposed during the investigative subpoena hearing. Once the relationships were exposed, the judge presiding over the hearing removed Herrick from the case.

At the time he was served with the investigative subpoena, McLiechey was incarcerated and his calls were being monitored and recorded. Detective Philip Betz testified that McLiechey had a "large number of phone calls" with Charlevette Kennedy. Detective Betz explained that there was

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[6] *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003), quoting *People v Fett*, 257 Mich App 76, 88; 666 NW2d 676 (2003).

[7] *United States v Gonzalez-Lopez*, ___ US ___; 126 S Ct 2557, 2564; 165 L Ed 2d 409 (2006).

> a lot of conversation regarding attorneys, and who had gotten an attorney, and also conversations on the phone where it was clear that another attorney in Detroit, a DeDay LaRene, was working on the same case, kind of behind the scenes, so to speak, passing advice on, through Charlovette to this attorney, Ellie Herrick, and then back again.

Tanea McKinney testified that while she was in jail on her drug possession conviction a lawyer named Glenda Allen, whom she assumed her family hired, came to visit her. According to Allen, a woman claiming to be Tanea McKinney's sister asked Allen to go check on McKinney in jail. Allen claimed that she did not know Tanea McKinney was a witness in Bobby Kennedy's grand jury proceedings until she went to visit her. Allen denied that Bobby Kennedy asked her to go see Tanea McKinney. However, Glenda Allen admitted that she knew Bobby Kennedy "through . . . dealing with some other clients in the past[,]" including John Holman. Allen explained that she had represented Holman in a drug case and that an unknown woman had paid her legal fees. Allen stated that Bobby Kennedy came into her office once or twice to check on the status of Holman's case. Allen thought Bobby Kennedy was just a concerned friend. Allen was not aware at that time that Holman was a witness in the Thomas case. At some point, Allen's partner, Helen Nieuwenhuis, took over Holman's case.

Helen Nieuwenhuis confirmed that she took over Holman's case from Allen. Nieuwenhuis testified that she knew that Holman was being questioned in the Thomas murder because she knew the Thomas family. She testified that she also knew that Bobby Kennedy was a suspect in the murder. Nieuwenhuis testified that when she saw Bobby Kennedy coming to the office to see Allen, she warned Allen not to divulge to Bobby Kennedy any information about Holman. Nieuwenhuis testified that she never spoke to Bobby Kennedy. Nieuwenhuis testified that, at the time Allen took the retainer, Nieuwenhuis was under the impression that the money came from Holman's father. Nieuwenhuis had no information that Bobby Kennedy paid her or Allen any money.

C. Applicable Law

The Sixth Amendment to the United States Constitution and Const 1963, art 1, § 20 guarantee a defendant's right to counsel in all criminal prosecutions.[8] The Sixth Amendment right to counsel attaches to criminal prosecutions at the time judicial process is initiated, and extends to every critical stage of the proceeding.[9] The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel.[10] However, the right is not absolute, and a court must balance the defendant's right to choice of counsel against factors such as the public's interest in the efficient and fair administration of justice, avoidance of

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[8] See also *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998).

[9] *Iowa v Tovar*, 541 US 77, 81, 87; 124 S Ct 1379, 1383, 1387; 158 L Ed 2d 209 (2004); *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

[10] *Gonzalez-Lopez*, *supra* at 2561; *Akins*, *supra* at 557.

conflicts of interest, and adherence to ethical standards.[11] For example, a defendant may not insist on an attorney's representation when that attorney has a previous or ongoing relationship with an opposing party.[12]

Further, MRPC 3.7(a), which provides the ethical rule regarding lawyers as witnesses, states as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services rendered in the case; or
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> (3) disqualification of the lawyer would work substantial hardship on the client.

The comment to MRPC 3.7 provides as follows:

> Combining the roles of advocate and witness can . . . involve a conflict of interest between the lawyer and client.
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> . . . A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Moreover, this Court has noted that

> the purpose of the rule is to prevent any problems that would arise from a lawyer's having to argue the credibility and the effect of his or her own testimony, to prevent prejudice to the opposing party that might arise therefrom, and to prevent prejudice to the client if the lawyer is called as an adverse witness, not to permit the opposing party to seek disqualification as a tactical device to gain an advantage.[13]

D. Analysis

LaRene argued that he was not a necessary witness, noting that several other witnesses could be called to testify regarding the referral arrangements. However, the record demonstrates

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[11] *Gonzalez-Lopez*, *supra* at 2565-2566; *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988); *Akins*, *supra* at 557.

[12] *Wheat*, *supra* at 159.

[13] *People v Tesen*, ___ Mich App ___; ___ NW2d ___ (2007), slip op at 6.

that LaRene was likely to be a necessary witness to show that Bobby Kennedy used his money to control and influence McLiechey and other witnesses.

Part of the prosecutor's case was that LaRene was a conduit for Kennedy's control over key witnesses by the procurement and payment of legal services for that witness. The record indicated that LaRene was involved in recruiting counsel to represent potential witnesses in Bobby Kennedy's trial. His involvement made him a potentially necessary witness to Bobby Kennedy's overall scheme to manipulate or silence witnesses, and created a conflict of interest that precluded LaRene from representing Bobby Kennedy. Information regarding the fee and referral arrangement for the hiring of an attorney for a witness, when and how the referral attorney was contacted, as well as who sought the arrangement was not available by any other means than LaRene. Although Herrick and Allen were available to testify regarding the referral and the payment of the fees at *their* end of the arrangements, only LaRene could testify regarding the transactions from *his* perspective, which the testimony revealed may have differed from Herrick's and Allen's recollections. LaRene's testimony was likely to be a critical and integral part of the case necessary to illuminate his relationship with Bobby Kennedy and the witnesses.

LaRene argued that presenting his testimony would not constitute an ethical violation because he would be testifying to the uncontested fact that he assisted in securing counsel for the witnesses.[14] However, LaRene's mere statement that his testimony would be uncontested did not make it so. Notably, the prosecution sent interrogatories to LaRene to determine whether a stipulation was possible in lieu of his testimony; however, LaRene refused to answer numerous questions, including basic background questions regarding his relationship with Kennedy. Thus, it was not unreasonable for the trial court to conclude that LaRene testimony would touch on contested matters. Further, although LaRene implied that Bobby Kennedy was willing to waive any conflict of interest raised by LaRene serving as witness and advocate, the trial court was not bound to accept the waiver.[15]

LaRene argued that any of his conversations with Bobby Kennedy regarding his motivations for securing counsel for the witnesses would be privileged. However, LaRene could have testified regarding the unprivileged communications between him and Bobby Kennedy regarding the specifics of the financial arrangements made for the witnesses' attorneys.[16] To the extent that the prosecutor attempted to delve into privileged matters, Kennedy would have been entitled to object and seek the trial court's ruling as to the propriety of a specific inquiry.

Additionally, we simply find no merit to Bobby Kennedy's claim that LaRene's disqualification would have worked a substantial hardship on Bobby Kennedy's defense.[17] Bobby Kennedy was entitled to have as his counsel an attorney with whom he had an

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[14] See MRPC 3.7(a)(1).

[15] *Wheat*, *supra* at 160-163.

[16] See *Yates v Keane*, 184 Mich App 80, 83; 457 NW2d 693 (1990); *US Fire Ins Co v Citizens Ins Co*, 156 Mich App 588, 592-593; 402 NW2d 11 (1986).

[17] See MRPC 3.7(a)(3).

established, trusting relationship. However, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."[18] "'Courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right.'"[19] "The court has . . . an 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'"[20]

LaRene's testimony would have created an impermissible conflict for LaRene between his role as an advocate for Bobby Kennedy and his role as witness. And the record is devoid of evidence that the prosecution sought to disqualify LaRene to gain a tactical advantage.[21] Thus, balancing the interests of Bobby Kennedy's right to choose his own counsel with the public's interest in the efficient and fair administration of justice, avoidance of conflicts of interest, and adherence to ethical standards, we conclude that that trial court did not error in disqualifying LaRene from serving as defense counsel.

The fact that, ultimately, the prosecution did not call LaRene to testify at trial does not invalidate the trial court's ruling to disqualify him. As the United States Supreme Court explained in *Wheat v United States*:

> Unfortunately for all concerned, a [trial] court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.[22]

At the time the trial court granted the prosecution's motion to disqualify, the court was convinced that Mr. LaRene was likely to be a necessary witness. Accordingly, we conclude that the trial court's decision to disqualify LaRene on the ground that he was a potentially necessary witness at trial fell within the principled range of outcomes.[23]

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[18] *Wheat*, *supra* at 159.

[19] *Id.* at 158 n 2, quoting *In re Grand Jury Subpoena Served Upon Doe*, 781 F2d 238, 250-251 (CA 2).

[20] *Gonzalez-Lopez*, *supra* at 2566, quoting *Wheat*, *supra* at 160.

[21] *Tesen*, *supra*.

[22] *Wheat*, *supra* at 162-163.

[23] See *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

III. Prosecutorial Misconduct

A. Standard Of Review

Bobby Kennedy argues that he was denied his right to a fair trial when the prosecutor obsessed on the fact that Bobby Kennedy had paid for the witnesses' attorneys. We review prosecutorial misconduct issues case by case under a de novo standard.[24] We must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether a defendant was denied a fair and impartial trial.[25]

B. Relevant Facts

The prosecutor began her closing argument with the following statement:

> This whole case, from back in 1997 all the way up until today, to this minute, has really been about control and manipulation. By him. By defendant. First he tried to control and manipulate the victim.
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> * * *
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> [Bobby Kennedy] couldn't control [Thomas.] He couldn't manipulate him. So he killed him.
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> And he's done that with everyone and everything in the entire course of this investigation and trial. How did he control and manipulate the witnesses? Well, from the beginning, he used them, right? They were all his friends. . . . [H]e really controlled and manipulated 'em at first by implicating them, by drawing them in to the crime.

The prosecutor continued,

> And as the years went on, people started to catch cases, right? People started to get their own legal troubles, and so now he had to control them, manipulate them, keep them in check with the original story, the first story. How? Legal help. Hire attorneys. Keep them quiet. Tell them to take the Fifth. And pay them out of his own pocket, or out of this hotshot attorney in Detroit's pocket. Why? Can you think of one legitimate reason why a person, who is not afraid of what these people would say, who didn't have something to hide, who didn't need to control these people, would ever pay thousands of dollars to keep them quiet? There isn't any.

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[24] *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

[25] *Id.* at 454.

C. Applicable Law And Analysis

The prosecutor's role and responsibility differs from that of other attorneys: his duty is to seek justice, not merely to convict.[26] "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused."[27] The propriety of a prosecutor's remarks depends on all the facts of the case.[28] A court must read the prosecutorial comments as a whole and evaluate them in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.[29]

Evidence that Bobby Kennedy had attempted to influence the testimony of prosecution witnesses was proper and relevant. A defendant's threat against a witness is relevant and generally admissible to demonstrate the defendant's consciousness of guilt.[30] Similarly, evidence of a defendant's efforts to influence, coerce, or bribe witnesses against him is admissible to demonstrate a consciousness of guilt.[31] Therefore, the fact that Bobby Kennedy paid for counsel to represent people who would be potential witnesses at his murder trial was highly relevant to demonstrate his consciousness of guilt.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence" as they relate to the theory of the case.[32] The prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he or she state the inferences in the blandest possible terms.[33] "A prosecutor's good faith effort to admit evidence does not constitute misconduct."[34]

Part of the prosecutor's case was that Bobby Kennedy acted to intimidate, interfere with, and threaten witnesses, and evidence showed that LaRene was involved in retaining attorneys for witnesses. The prosecutor was free to make reasonable inferences about this evidence. Bobby Kennedy failed to show that the prosecutor's statements were not related to the evidence or that his statements served to mislead the jury. Indeed, defense counsel never objected to the prosecutor's comments at trial, choosing instead to respond to the comments by arguing the existence of different inferences. Further, the trial court's jury instruction that the prosecutor's

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[26] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

[27] *Id.* at 63-64.

[28] *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

[29] *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

[30] *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

[31] *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *United States v Blackwell*, 459 F3d 739, 768 (CA 6, 2006).

[32] *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

[33] *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *Dobek*, *supra* at 66.

[34] *Dobek*, *supra* at 70.

closing argument was not evidence cured any possible prejudice. The prosecutor did not engage in misconduct by highlighting the fact that Bobby Kennedy paid for counsel to represent witnesses. Accordingly, we conclude that the prosecutor's comments during closing argument did not deny Bobby Kennedy a fair trial.

IV. Other Bad Acts Evidence

A. Standard Of Review

Bobby Kennedy argues that the trial court abused its discretion in admitting testimony from several witnesses stating that he was involved in dealing drugs. We review for an abuse of discretion the trial court's decision to admit other acts evidence.[35] Even when properly preserved, the defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred.[36] Reversal is not required unless, viewing the evidence in the light most favorable to the prosecutor,[37] it affirmatively appears that it is more probable than not that the error was outcome determinative.[38]

B. Relevant Facts

Several witnesses testified during trial regarding Bobby Kennedy's alleged involvement in selling drugs. John McKinney, Tanea McKinney's brother and a friend of both Thomas and Bobby Kennedy, testified that both Thomas and Bobby Kennedy sold drugs. Tanea McKinney testified that Bobby Kennedy was probably out on the street selling drugs when he first saw Thomas on the morning of the shooting. Tanea McKinney confirmed that Bobby Kennedy would leave guns, drugs, or "illegal stuff" in her apartment "from time to time." She confirmed that Bobby Kennedy was involved in selling crack.

Alisha Coleman, a friend of Bobby Kennedy's, testified that Bobby Kennedy sold drugs. During her testimony, the prosecutor asked Coleman, "[P]rior to [Thomas's] death, did the defendant ever mention anything about having a run-in with somebody?" Coleman responded, "Just saying that someone stole some drugs from him." Levar Elliott, another friend of Bobby Kennedy's, testified that in 1996 Bobby Kennedy pulled a gun on him "because [Elliott] was out selling drugs, and [he] snatched one of [Bobby Kennedy's] sales[.]" Elliott clarified that statement by confirming that he took some money from one of Bobby Kennedy's drug clients.

Larry Creighton, a private investigator, testified that he interviewed Bobby Kennedy as a potential witness during his investigation of a drug raid case in October 2000. Bobby Kennedy admitted to Creighton that he was present during the drug raid. Indeed, Bobby Kennedy

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[35] *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[36] *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

[37] *People v Knox*, 469 Mich 502, 511 n 3; 674 NW2d 366 (2004).

[38] *Knapp*, *supra* at 378.

described himself "as the biggest heroin dealer in Grand Rapids." Creighton testified that Bobby Kennedy told him that he sold $5,000 to $10,000 worth of drugs a day.

C. Applicable Law And Analysis

MRE 404(b)(1) governs the admissibility of other bad acts evidence and provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice.[39] A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense.[40] The prosecutor bears the burden of establishing relevance.[41] The proffered evidence would be unfairly prejudicial if it presents a danger that the jury would give undue or preemptive weight to marginally probative evidence.[42] Use of bad acts as evidence of character is excluded, except as MRE 404(b) allows, to avoid the danger of conviction based on a defendant's history of misconduct.[43]

Evidence of Bobby Kennedy's prior involvement in the sale of drugs was admissible under MRE 404(b). As the prosecutor explained, Bobby Kennedy's involvement in drug dealing was relevant to show motive, one of the enumerated exceptions under MRE 404(b), when the prosecution's theory of the case was that Bobby Kennedy killed Thomas for revenge arising out Thomas's alleged theft of drugs from Bobby Kennedy. For this same reason, introduction of this probative evidence was not unfairly prejudicial. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the admission of evidence related to Bobby Kennedy's prior involvement in drug dealing.

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[39] *Knox*, *supra* at 509.

[40] *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

[41] *Knox*, *supra* at 509.

[42] *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

[43] *Johnigan*, *supra* at 465.

V. Hearsay Evidence

A. Standard Of Review

Bobby Kennedy argues that the trial court abused its discretion in refusing to admit a deceased witness's statement that was contained in police investigation notes. The decision whether to admit evidence is within the discretion of the trial court, and is a decision that we will not disturb on appeal absent an abuse of discretion.[44] "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."[45] We will not assess the weight and value of the evidence when reviewing a trial court's decision to admit evidence; we will only determine whether the jury properly considered the evidence.[46] The trial court best determines the prejudicial effect of evidence by contemporaneously assessing the presentation, credibility, and effect of the testimony.[47]

B. Relevant Facts

During trial, defense counsel moved under MRE 804 for the admission of police notes from the interview of Johnny Brown, who was a witness to the Thomas murder. Brown was unavailable to testify at trial because he had passed away before trial. Defense counsel argued that his statements were "critical to [the] defense, because he was an eyewitness, and he made observations that are clearly more consistent with what the other eyewitnesses in the neighborhood saw, and more inconsistent with what either jailhouse snitches or any of the . . . prosecution witnesses say they saw." After acknowledging that MRE 804 required a showing of trustworthiness, defense counsel pointed out that, at the time of the murder, Brown was a 47-year-old security guard who witnessed the murder while on his way home from work. Defense counsel noted that Brown was interviewed the same day as the murder and related his "honest recollection" to a "trained detective investigating a homicide," and pointed out that the interview notes were "preserved as part of the case file." The trial court denied admission of the statement, concluding that the statement did not have the necessary guarantees of trustworthiness to make it admissible under the rules of evidence.

C. Applicable Law And Analysis

MRE 804(a)(4) recognizes that a witness is considered "unavailable" when the witness is unable to testify because of death. When a witness is "unavailable," MRE 804(b)(7) further provides for the admission of the witness's out of court statement if the statement is: 1) trustworthy, 2) evidence of a material fact, and 3) more probative than any other evidence that can be procured through reasonable efforts. Further, admission of the statement into evidence must best serve the general purposes of the rules of evidence and the interests of justice.

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[44] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[45] *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005).

[46] *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

[47] *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

In determining whether a statement is trustworthy, the court should consider the "totality of the circumstances" and look to factors such as:

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant is unavailable; (5) the voluntariness of the statements, i.e. whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made; and (8) the timeframe within which the statements were made.[48]

Here, Brown was unavailable to testify because he died before trial. However, an unspecified police officer's notes from an interview with Brown do not have the necessary guarantees of trustworthiness to be admissible at trial. Brown's statements were made several hours after the shooting incident took place, his recollection was inconsistent with that of other witnesses who were present to testify at trial, and the record was lacking evidence regarding Brown's reliability. There was no evidence regarding the accuracy of the police officer's notes, and as the trial court pointed out, "it's not uncommon for a police officer to write something down differently or incorrectly from what is stated." Accordingly, we conclude that the trial court did not abuse its discretion in denying Kennedy's motion to admit unverified and, thus, untrustworthy, evidence from an unavailable witness.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

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[48] *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000) (internal citations omitted).