

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE JONES,

Defendant-Appellant.

UNPUBLISHED

July 25, 2006

No. 259969

Muskegon Circuit Court

LC No. 04-049733-FH

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3). He appeals as of right. We affirm.

This case arose from the invasion of the victims' residence in Bailey, Michigan. They had recently won approximately \$100,000 at a casino and had placed the money in a safe in their master bedroom. After learning about the victims' winnings and that they were on vacation, defendant, Eric Bol, and Melissa Burger decided to rob the residence. In the late evening of July 4, 2003, they stole the safe and numerous other items. When the victims returned home, they discovered a partially smoked cigar in the master bedroom. DNA found on the cigar matched defendant's DNA. At trial, Burger's testimony additionally implicated defendant as a perpetrator of the home invasion.

On appeal, defendant claims that his Sixth Amendment right of confrontation was violated when the trial court permitted the prosecutor to read one victim's preliminary examination testimony into evidence. Specifically, defendant argues that her testimony bore no "indicia of reliability" because he had no chance to cross-examine her on the federal investigation relating to her escrow business. At trial, defendant challenged the admission of the preliminary examination testimony, but his arguments were premised on MRE 804, not the Sixth Amendment. Because an objection on one ground is insufficient to preserve an appellate issue on a different ground, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), the issue is unpreserved. We review the unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Having reviewed the trial court's order allowing the preliminary examination testimony and the pertinent case law, we conclude that the trial court did not commit plain error.

A witness' preliminary examination testimony constitutes a testimonial statement. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The right to confrontation does not preclude admission of a testimonial statement if the declarant is unavailable at trial, and the defendant had a prior opportunity to cross-examine the declarant. *Id.* Additionally, MRE 804(b)(1) requires that the party against whom the testimony is offered must have had not only a prior opportunity for cross-examination but also a "similar motive" to develop testimony through the cross-examination. See *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Here, the preliminary examination testimony was properly admitted. The victim was an unavailable witness having pleaded her Fifth Amendment rights. *Id.* at 66. Moreover, the fraud allegations unrelated to this case that arose against the victim after the preliminary examination did not alter defendant's motive to attack her credibility to show he was not guilty at both the preliminary examination and at trial. There was no plain error in the admission of the preliminary examination testimony. *Carines, supra.*

Furthermore, even if the trial court committed plain error in admitting the preliminary examination testimony, reversal would not be required because the error did not affect defendant's substantial rights. *Carines, supra.* First, the cigar, which implicated defendant through DNA, appeared in pictures taken of the master bedroom on July 5, 2003, and the other victim testified he saw the cigar in the master bedroom the day the victims returned to Michigan. Thus, the preliminary examination testimony was not necessary to establish the presence of the cigar in the master bedroom. Second, Burger testified that she, Bol, and defendant made plans to rob the house, and they did so on July 4, 2003. Accordingly, there was direct evidence, independent of the cigar and any other evidence offered by the absent victim, that defendant committed the home invasion. Under these circumstances, we cannot conclude that the introduction of the preliminary examination testimony affected the outcome of defendant's trial. *Id.*

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray