

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

Kathleen Jansen, Presiding Judge
Cynthia Diane Stephens and Michael J. Riordan, Judges

People of the State of Michigan,

Plaintiff/Appellant

Docket No. 146296

vs.

Vita Duncan,

Defendant/Appellee.

BRIEF ON APPEAL – APPELLEE VITA DUNCAN

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTION INVOLVED

Is a witness “unavailable” under MRE 804(a), where the witness did not know the difference between a truth and a lie, could not take an oath to testify, and suffered from no physical or mental infirmity or lack of memory?

The trial court answered “No.”

The court of appeals answered “No.”

The appellant answers “Yes.”

The appellee answers “No.”

COUNTER-STATEMENT OF FACTS

This is an interlocutory appeal that was commenced by the prosecutor in the middle of a criminal trial. The jury trial began in September of 2012, but has since been halted by order of this Court staying the case, pending the outcome of this mid-trial appeal.

The issue presented by this appeal is whether the prosecutor can read to the jury at trial the former testimony of R.S., a child witness, testimony she gave at the preliminary examinations held in each of the defendants’ cases. The prosecutor sought to read that preliminary examination testimony because R.S. was found incompetent to testify by the trial judge, as a result of her inability to understand the oath.

At trial, the trial judge, the Hon. Matthew S. Switalski, Macomb County Circuit Court, questioned R.S. preliminarily:

Q: Okay. Let me ask you this: Do you know the difference between a truth and a lie?

A: No.

Q: Okay. Do you know what a promise means?

A: Yes.

Q: What does it mean?

A: I don't know.

* * * *

Q: Okay. If I said I was ten years old, would that be true?

A: No.

Q: Why not?

A: Because you're not that old.

Q: Am I older or younger?

A: I don't know.

Q: Tell me something that is not right. Make up a story for me.

A: I don't know.

Q: Okay. Tell me something that is right. Tell me something you know is true.

A: I don't know.

* * * *

Q: All right. If I ask you to tell me something that's true, can you do that?

A: No.

Q: Do you know what the truth is?

A: No.

Q: No? Okay. Do you know what a lie is?

A: No.

Q: All right. Do you -- we talked about this a little bit before. Do you know what a promise is?

A: No.

Q: What color are your fingernails?

A: Pink.

Q: What if I told you I thought they were purple, what would you say about that?

A: I don't know.

(53a-54a, 55a, 57a-58a)

The trial court found that R.S. could not pass the threshold to testify as a witness, because she did not know the difference between the truth and a lie and because she could not promise to tell the truth. (59a-60a) The prosecutor then asked that the witness be declared “unavailable” under MRE 804(a)(3) because of her lack of memory.¹ (*Id.*, p. 12) The trial court ruled that RS was not “unavailable” because of lack of memory, or “unavailable” under any other definition of “unavailable” in MRE 804(a). (61a-62a)

In a written opinion, Judge Switalski reiterated that the inability of the witness to meet the threshold of competency did not fall within one of the definitions of “unavailable” in MRE 804(a). (102a-105a) He found that “[h]er failure to be able to take the equivalent of the oath . . . did not trigger any of the scenarios in 804(a), where unavailability is defined.” (103a) The judge stated: “It seemed like an obvious call, especially if you have no vested interest in the result.” (104a)

The judge made it clear that his decision not to allow the witness to testify was not based on any physical or mental infirmity of the witness – he found the witness “perfectly healthy” and “with no mental incapacity.” (104a)

¹ MRE 804(a)(3) provides that a witness is unavailable if the witness “has a lack of memory of the subject matter of the declarant’s statement.”

Now, in its brief before this Court, the prosecution is arguing that the incompetence of R.S. made her unavailable not because of lack of memory, but because the inability to take the oath demonstrates that a witness suffers from an “existing physical or mental illness or infirmity.”² (Appellant’s Brief on Appeal, p 16)

ARGUMENT

The trial judge did not abuse his discretion in finding that a witness was not “unavailable” under MRE 804(a), where the witness did not know the difference between a truth and a lie, could not take an oath to testify, and suffered from no physical or mental infirmity or lack of memory.

1. Standard of Review

The standard of review for the evidentiary rulings of trial courts is an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). The reviewing court “finds an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.” *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992), citing to *People v Milton*, 186 Mich App. 574, 575-576; 465 NW2d 371 (1990).

The prosecution raised, for the first time at oral argument in the court of appeals, and again in its brief before this Court, that perhaps the correct standard of review in this case is “de novo,” if the appeal requires an examination of the meaning of a rule of evidence. The court of appeals, in its opinion in this case, found the de novo standard of review did not apply. (*People v Duncan*, Nos. 313637 & 313638, slip opinion, p. 4, 114a) The court of appeals application of the discretionary standard of review was

² MRE 804(a)(4) provides that a witness is unavailable when the witness “is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity”

correct – this case does not involve the examination of the meaning of a rule of evidence.

The language of the rule of evidence applied by the trial court is clear and plain.

2. **A witness who was incapable of testifying because she did not know the difference between a truth and a lie, and because she could not take an oath to testify, was not a witness who was “unavailable” under MRE 804(a).**

MRE 804(a) provides in relevant part:

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant –

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) has a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance

Judge Switalski was correct when he held that none of the five definitions of “unavailable” in MRE 804(a) concern a witness who cannot tell the difference between the truth and a lie, or a witness who does not know what it means to promise, and hence cannot promise to testify truthfully. A witness who cannot tell the difference between the truth and a lie, and who does not know what it means to promise, is incompetent under MRE 601 because the witness does not demonstrate a “sense of obligation to testify truthfully.” MRE 603 requires that “every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”

Judge Switalski found that R.S., who testified twice that she did not know what it meant to “promise,” could not testify because of “[h]er failure to be able to take the equivalent of the oath.”³ (103a)

The court of appeals held in this case that a witness who was not competent to testify, where the incompetence is not due to a lack of memory or a mental or physical infirmity, is not “unavailable” within the meaning of MRE 804(a).⁴ That holding is a correct application of a Rule of Evidence that is clear and plain.

a. The witness was not unavailable because of “a lack of memory”

The prosecution, in the trial court, raised only one argument as to why R.S. was “unavailable” under MRE 804(a). The prosecution argued that R.S. was unavailable under MRE 804(a)(3), which provides that a witness is unavailable where the witness “has a lack of memory of the subject matter of the declarant’s statement.”⁵ (60a) As Judge Switalski ruled, the inability to take an oath, and the failure to know the difference between the truth and a lie, are not the functional equivalents of “lack of memory.” Judge Switalski did not abuse his discretion in finding that the witness’s inability to take the oath had nothing to do with a memory failure, and thus the witness was not unavailable under MRE 804(a)(3).

³ The prosecutor in the court below, and in this appeal, does not challenge Judge Switalski’s finding that the witness is incapable of testifying.

⁴ *People v Ostrander*, 2012 WL 2913483 (Court of Appeals, July 17, 2012), *lv den*, 493 Mich 919; 823 NW2d 586 (2012), is another unpublished opinion of the court of appeals that unequivocally held that a witness who could not testify because she was afraid of the defendant, was not an “unavailable” witness under the definitions of “unavailable” in MRE 804(a). (1b-6b)

⁵ The prosecution never argued in the trial court that the witness’s inability to testify was from any physical or mental illness or infirmity under MRE 804(a)(4).

The prosecution, throughout this case, has relied heavily on *People v Edgar*, 113 Mich App 528; 317 NW2d 675 (1982). The court of appeals, in its opinion in this case, found that *Edgar*, unlike this case, was a case where the witness's inability to testify was due to "memory failure." (*People v Duncan, id.* 115a-116a) The court of appeals interpretation of *Edgar* in this case was correct. In *Edgar*, the court found that a witness who exhibited a "memory failure" was "unavailable":

[The witness] exhibited an inability or reluctance to answer the questions. Whether her sudden *memory failure* was due to a fear of the defendant or an honest lack of recall does not affect the fact that she was unavailable as a witness during trial.

People v Edgar, 113 Mich App at 535-536. (emphasis added)

Although there is language in the *Edgar* opinion that the trial court had found the witness "incompetent," it is not the incompetence of the witness that opened the door to the use of her preliminary examination transcript, it was her "memory failure" which caused her "incompetence." There is nothing in the *Edgar* decision to suggest that the witness had an inability to take an oath. *Edgar* does not stand for the proposition that a witness who cannot take an oath to testify exhibits a "memory failure" that makes the witness unavailable.⁶

⁶ Other cases cited within *Edgar* are of no help to the prosecution either, as none address the situation presented in the instant case. *People v Cobb*, 108 Mich App 573, 575-576; 310 NW2d 798 (1981), was a case where the judge found the witness *competent* and there was no objection to competency by trial counsel. Similarly, *People v Coddington*, 188 Mich App 584, 588-589; 470 NW2d 478 (1991), involved an issue where the child witness was found *competent* to testify, but as testimony progressed, demonstrated a reluctance to testify. In *People v Terry*, 80 Mich App 299, 305-306; 263 NW2d 352 (1977), the witness was *allowed to testify*, and the court held that a prosecutor could use the preliminary examination transcript to *impeach* the complainant when the testifying witness was reluctant to disclose details of the allegations.

b. The witness was not unavailable because of a “physical or mental illness or infirmity.”

The prosecution never argued in the court below that the witness who could not take an oath suffered from a physical or mental infirmity that made the witness “unavailable” under MRE 804(a)(4). That issue is not properly before the Court because of the failure of the prosecutor to preserve that issue in the trial court. Nonetheless, the prosecutor has made that argument to the court of appeals and to this Court.

The question of whether R.S. suffered from any physical or mental infirmity, and hence was unavailable under MRE 804(a)(4), was disposed of by Judge Switalski when he held that the witness suffered from no physical or mental infirmity of the witness – he found the witness “perfectly healthy” and “with no mental incapacity.” (104a) “She’s not dead, she’s not physically or mentally ill and she’s not infirm.” (103a) This holding was not challenged on appeal by the prosecutor, and was not an abuse of discretion.

Despite no argument that the trial judge erred in finding that the witness, R.S., was perfectly healthy and had no mental incapacity, the prosecutor in this appeal relies on cases which found that a witness’s incompetence was based on mental or physical infirmity.

The prosecution relies on *People v Karelse*, 143 Mich App 712, 715; 373 NW2d 200 (1985), *rev’d on other grds*, 428 Mich 872; 437 NW 2d 555 (1987), for its argument that an incompetent witness is “unavailable.” As the court of appeals noted in its slip opinion in this case, *Karelse* found that the witness who was unavailable was unavailable due to her “lack of mental capacity,” which in the case of *Karelse* was mental retardation. (*People v Duncan, id.*, slip opinion p 6, 116a)

The prosecutor throughout this appeal has also relied on an unpublished decision, *People v Bradley*, 1999 WL 33437808 (Michigan Court of Appeals, 1999). (120a-122a) The court of appeals did not consider the opinion in *Bradley*, since unpublished decisions are not authority that can be relied on by the court. Neither should this court base its decision on *Bradley*. *Bradley* is a “physical or mental infirmity” case under MRE 804(a)(4), whereas the instant case involves no physical or mental infirmity. *Bradley* does not involve any issue of use of a transcript *against* a defendant – in *Bradley*, it was the *defendant* who sought to introduce a video-taped deposition of a child that was exculpatory. The court of appeals found that the defendant’s conviction should be reversed because he was precluded from using the exculpatory evidence.

- 3. A careful reading of cases from other jurisdictions discloses that there is no “overwhelming weight of authority” that an incompetent witness is “unavailable” under MRE 804(a), or under its equivalent in other states; to the contrary, courts which have examined this precise issue have held that an incompetent witness is *not* “unavailable” under MRE 804(a) or its equivalent.**

There are cases from at least two other jurisdictions that have expressly held that a witness who cannot take an oath is *not* “unavailable” under a provision similar to MRE 804(a)

In *State v Ryan*, 103 Wash 2d 165, 171-173; 691 P2d 197 (1984), the Washington Supreme Court, en banc, held unequivocally that incompetency is not the functional equivalent of unavailability under Washington Evidence Rule 804(a)⁷:

⁷ Washington Evidence Rule 804(a) reads: “**RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.** (a) **Definition of Unavailability.** ‘Unavailability as a witness’ includes situations in which the declarant: (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or (2) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or (3) Testifies to a lack of

The State's equation of unavailability and incompetency is faulty in several respects . . . incompetency and unavailability serve separate purposes, and mean different things.

103 Wash 2d at 171.

In *State v Dwyer*, 143 Wis 2d 448, 462-463; 422 NW2d 121 (Wisc App, 1988), the Wisconsin Court of Appeals found that an incompetent child witness did not meet the definition of an "unavailable" witness under the applicable Wisconsin statute, and reversed a criminal conviction. That statute, Wisc Stat Ann, 908.04, *Hearsay Exceptions; Declarant Unavailable; Definitions of Unavailability*, defines "unavailable" with the same definitions as MRE 804(a).⁸ The court unequivocally found:

A.F. was not unavailable as set forth in the criteria established above [sec 908.04].

memory of the subject matter of the declarant's statement; or (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. (6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

⁸ The statute reads: "**908.04. Hearsay exceptions; declarant unavailable; definition of unavailability.** (1) 'Unavailability as a witness' includes situations in which the declarant: (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or (c) Testifies to a lack of memory of the subject matter of the declarant's statement; or (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means. (2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying."

The Wisconsin Court of Appeals reversal of the criminal conviction of the defendant in *Dwyer* was affirmed by the Supreme Court in *State v Dwyer*, 149 Wis 2d 850; 440 NW2d 344 (1989).

A subsequent Wisconsin case, *State v Hanna*, 163 Wis 2d 193, 204; 471 NW2d 238 (Wisc App, 1991), followed *Dwyer* and reaffirmed that an incompetent witness is not “unavailable” under Wisc Stat Ann 908.04.

In contrast, only a twenty-two-year-old case decision of a trial court in the Virgin Islands stands for the proposition that a witness who does not know the difference between the truth and a lie, cannot take an oath, and is not physically and mentally infirm, meets the definition of “unavailable” under FRE 804(a).

In *Gov't of the Virgin Islands v Riley*, 754 F Supp 61, 64 (D Virg Is, 1991), the trial court held that an incompetent witness is an “unavailable” witness under FRE 804(a). *Riley* has not been followed by any federal court – trial or appellate. The only authority that the Virgin Islands trial court cited for its conclusion was *Haggins v Warden*, 715 F2d 1050 (CA 6 1983), a Sixth Circuit case that contained no holding interpreting FRE 804(a).

Haggins v Warden was a habeas corpus case where the Sixth Circuit reviewed a state court conviction for determination of whether any federal rights were violated. There was no issue presented to the court as to what constituted an unavailable witness, and the court did not hold that an incompetent witness was “unavailable” under FRE 804(a). Rather, the case found that a state court properly admitted hearsay statements of a complainant under the “excited utterance” doctrine. The case never addressed any challenge to whether a witness was “unavailable,” never discussed the meaning of FRE

804(a), and simply mentioned in passing dicta that the witness was unavailable under that rule because she was incompetent (without citation to any authority).⁹ The case is hardly any authority for a proposition that an incompetent witness is “unavailable” under FRE 804(a).

In one other case cited by the prosecutor, *State v Townsend*, 635 So2d 949, 959 (Fla, 1994), the Supreme Court of Florida applied law similar to MRE 804(a), but the court found that a witness was unavailable for the purpose of admitting a prior hearsay statement, due to the fact that the witness had “then existing physical or mental illness or infirmity,” which is not present here.

Most of the other cases relied on by the prosecutor do not even involve an interpretation of MRE 804(a), or any similar provision of state or federal law, but are decided on other legal grounds. Most of the cases cited by the prosecutor examined whether hearsay statements of a young complaining witness are admissible under either a “tender years” exception to the hearsay rule, a “catch-all” provision of the hearsay rule, or as an excited utterance. *See*, MRE 803A, MRE 803(24), and MRE 803(2). Under those provisions, unavailability is not a prerequisite to admission of hearsay, so a finding of the court of the unavailability of the witness was not necessary.¹⁰

All of the cases cited by the prosecutor are twenty to thirty years old, and were decided using the test of admissibility of hearsay in criminal cases articulated by *Ohio v*

⁹ Since the federal appeals court was considering a state court ruling, it would have been the state court rule of evidence that would have been controlling on any issue of unavailability, so the federal court’s citation to a federal rule of evidence goes beyond dicta and approaches mere musing by the court.

¹⁰ MRE 804(b)(7) repeats the catch-all hearsay exception, so it is applicable to unavailable witnesses as well as available witnesses, but the catch-all provision under MRE 803(24) does not require a finding of unavailability.

Roberts, 448 US 56, 66; 100 SCt 2531; 65 LEd2d 597 (1980), a test for admissibility that was expressly overruled by the United States Supreme Court in *Crawford v Washington*, 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004).¹¹

Reliance on the out of state cases cited by the prosecutor is neither required, nor a wise path for this court.

In *State v Doe*, 105 Wash 2d 889, 894; 719 P2d 554 (1986), when the court announced that an incompetent witness was unavailable, it was doing so not in the context of the use of former testimony under a rule similar to MRE 804(a), but in the context of a Washington statute¹² allowing hearsay statements of minors under a so-called “tender-years” exception. The ruling of the court in *Doe* was an interpretation of a Washington statute that is similar to MRE 803A, not an interpretation of a Washington statute similar to MRE 804(a). None of the cases relied on by *Doe* held that an incompetent witness is an unavailable witness under the functional equivalent of MRE 804(a); the cases relied on by *Doe* addressed specific statutes that found witnesses disqualified from testifying *because of age*.¹³ Michigan has no such statute.¹⁴ *Doe* is inapplicable to this case.

¹¹ Many of the cases from other jurisdictions relied on by the prosecutor also relied on *Haggins v Warden*, which, as discussed above, contained no holding that an incompetent witness was unavailable under FRE 804(a).

¹² RCW 9A.44.120

¹³ Most of the cases relied on by *Doe* relate to a witness disqualified from testifying because of age, not because of a finding of inability to take an oath, or in inability to understand the difference between the truth and a lie. In *State v Bounds*, 71 Or App 744, 750; 694 P2d 566 (1985), the parties had stipulated that the witness could not testify *because of her age*. Oregon apparently had a statute that disqualified a witness based on age. The court in *Bounds* held it was not error for the court to have permitted a grandmother to testify as to what the child told her, under the catch-all provision of the hearsay rules. The court did find that an unavailable witness included a witness who “is incompetent to testify *because of age*.” (emphasis added) In *Lancaster v People*, 200

Doe, a Washington Supreme Court case, also must be read in conjunction with *State v Ryan*, the Washington Supreme Court case discussed above, which specifically found that, under the Washington evidence rule that is the equivalent of MRE 804(a), an incompetent witness is not an unavailable witness.

The prosecutor argues that the Florida Supreme Court case, *State v Townsend*, discussed above, cites to “dozens” of cases where supposedly other jurisdictions found that an incompetent witness was “unavailable.”¹⁵ In fact, there are only nine cases cited by *Townsend*, and none of those nine cases addressed the question whether an incompetent witness was “unavailable” under any evidence rule similar to MRE 804(a).¹⁶

Colo 448; 615 P2d 720 (1980), the Supreme Court of Colorado found a witness unavailable, not under a similar provision to MRE 804(a), but under a Colorado statute, CRS 1973, § 13-90-106, that also provides that a witness can be declared unavailable based simply on his or her age. In *People v Orduno*, 80 Cal App 3d 738, 742; 145 Cal Rptr 806 (1978), a 35-year-old case, the California Court of Appeals found that the admission of spontaneous declarations of a three-year-old was not error where she was incompetent to testify “because of her age.” Cases relied on by some of the cases cited by *Doe* are also suspect, none more suspect than a case relied on by *Bounds, State ex rel Gladden v Commonwealth*, 201 Or 163, 168; 269 P2d 491 (1954), a 59-year-old case in which the court stated the issue presented as: “The sole question for determination in this proceeding is whether the circuit court for Multnomah county [sic] had jurisdiction to compel the personal attendance of Phillip Wallace, a convict in the Oregon State Penitentiary as a witness for and upon the trial of defendant George LeDuke.” The court, in dicta, discussed cases where the witness is unavailable, and mentioned “age, preventing the attendance of the witness . . .” *Id.* Nowhere did the court ever interpret a rule of evidence that was the functional equivalent of MRE 804(a).

¹⁴ The closest that Michigan came to having a statute governing child witnesses was MCL 600.2163, which provided: “Whenever a child under the age of 10 years is produced as a witness, the court shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify.” The statute was repealed by P.A. 1998, No. 321, § 1, August 3, 1998.

¹⁵ See footnote 1 in the prosecutor’s brief for citation to those cases.

¹⁶ *Gregory v North Carolina*, 900 F2d 705, 707 (CA 4, 1990), was not decided on the basis of the interpretation of any evidence rule; the court held it was error to admit hearsay under *Ohio v Roberts*. In *United States v Dorian*, 803 F2d 1439 (CA 8, 1986), the court was deciding whether hearsay was properly admitted under FRE 803(24), the

The prosecution cites to *State v Barela*, 779 P2d 1140, 1144-1145 (Utah, 1989), a Utah Court of Appeals case.¹⁷ The holding of that case does not support the prosecutor's argument. In *Barela* the court held that a witness who suffered from cerebral palsy was *not* "unavailable" under a comparable Utah rule of evidence, because although the witness demonstrated some confusion and resistance, the high threshold or *either lack of memory or a physical or mental infirmity* that made a witness unavailable was not shown. The use of prior testimony of the witness against the defendant was error, and the defendant's conviction was reversed. *Barela* does not stand for the proposition that an incompetent witness is an unavailable witness.

catch-all provision of the hearsay rule, which requires no showing of unavailability. *Ellison v Sachs*, 769 F2d 955 (CA 4, 1985), upheld the setting aside of the defendant's conviction because it was obtained based on inadmissible hearsay; there was no issue presented to the court as to whether an incompetent witness was "unavailable" under a functional equivalent of MRE 804(a). *Haggins v Warden and Gov't of Virgin Is v Riley* were relied on by the court, and are discussed above. *People v Bowers*, 801 P2d 511 (Colo, 1990), was a Colorado Supreme Court case that affirmed the reversal of a conviction based on the admission of hearsay statements of a complainant under the catch-all provision of hearsay rules; the court never interpreted what "unavailable" meant under the functional equivalent of MRE 804(a), but did find that it was error to have found the witness incompetent, an issue not present in this appeal. In *People v Hart*, 214 Ill App 3d 512; 158 Ill Dec 103; 573 NE2d 1288 (1991) (a case that has been abrogated, as noted by the prosecutor in his brief), the court found that it was not error to allow hearsay statements of a complainant to be received under the excited utterance or spontaneous declaration exception to the hearsay rule; the court never analyzed what an "unavailable" witness is. In *State v Lanam*, 459 NW2d 656, 659 (Minn 1990), the Supreme Court of Minnesota found that the witness was unavailable, not under any evidence rule, but "for purposes of confrontation clause analysis"; the court cited to no evidence rule, but found the statements admissible pursuant to a Minnesota statute. In *State v Deanes*, 323 NC 508; 374 SE2d 249 (1988), the court found that it was not error to admit statements of a child witness under the catch-all provision of the rules of evidence; the court did not analyze "unavailability" under the functional equivalent of MRE 804(a). All of the cases relied on by *Townsend* analyzed the admissibility of the hearsay statements of the witness under the *Ohio v Roberts* analysis, an analysis no longer applicable since *Crawford v Washington*.

¹⁷ The prosecution in this case cites to *Barela* in its brief, but incorrectly states that it is an Oregon case.

- 4. MRE is not a “flexible” rule of evidence that permits engrafting definitions of “unavailable” not contained within the definitions of the rule; it is not this court’s job to rewrite the rule in the course of an appeal considering whether a judge abused his discretion in applying the clear and plain language of the rule.**

This court has frequently stated that the court is not in the business of “rewriting” laws that are clear and plain. In addressing the meaning of a rule of evidence, this Court has said: “we address such a question in the same manner as the examination of the meaning of a court rule or a statute” *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). “The principles of statutory interpretation apply to the interpretation of court rules. Where the language is clear and unambiguous, judicial construction is not permitted.” *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007) (footnotes omitted), citing to *Hinkle v. Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

Here, it is clear and plain that a witness who is unable to take the oath is not included within the definition of a witness who is unavailable under MRE 804(a). “. . . [J]udges are better advised to read it like it is – and give effect to the plain words” *Jones v Bouza*, 381 Mich 299, 302; 160 NW2d 881 (1968). “It is the duty of the judiciary to interpret, not write, the law.” *Township of Casco v Secretary of State*, 472 Mich 566, 591; 701 NW2d 102 (2005) (Young, J., concurring and dissenting; footnote omitted).

This court should resist the efforts of the prosecutor to “rewrite” MRE 804(a), and include a definition of “unavailable” that is not contained within the rule.

The prosecutor, in arguing that rewriting MRE 804(a) is permissible, relies on *People v Meredith*, 459 Mich 62; 586 NW2d 538 (1998), for the proposition that MRE 804(a) is subject to expansion, since this Court held in *Meredith* that a witness who claimed the Fifth Amendment was “unavailable” under MRE 804(a), and since the Fifth Amendment is not mentioned in 804(a). Although the Fifth Amendment is not mentioned expressly in 804(a), 804(a)(1) specifically provides that a witness is unavailable when the witness “is exempted by ruling of the court on the ground of privilege.” Claiming the Fifth Amendment is a claim of privilege, as is noted by a case relied on by *Meredith*, *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). *Meredith* does not stand for the proposition that MRE 804(a) can be expanded beyond its categories, rather, *Meredith* stands only for the proposition that a claim of the Fifth Amendment by a witness is a sufficient claim of privilege under MRE 804(a)(1).¹⁸

People v Adams, 233 Mich App 652; 592 NW2d 794 (1999), is also relied on by the prosecutor for his conclusion that MRE 804(a) can be rewritten. In *Adams*, a witness appeared pursuant to a subpoena, began testifying, then left the courthouse and did not return to finish her testimony. The court held, in what it said was a case of first impression, that the witness was “unavailable” under MRE 804(a), and relied on *Meredith*. A close reading of the case reveals that the court was not engrafting a new definition of “unavailable” onto 804(a), but was merely interpreting the existing definitions. In a footnote, the court expressly states that “because the complainant

¹⁸ *Meredith* also uses the now defunct standard for admitting hearsay at a criminal trial, whether the hearsay has adequate “indicia of reliability” which can be inferred where the evidence “falls within a firmly rooted hearsay exception.” This standard, articulated by *Ohio v Roberts* was expressly overruled by the United States Supreme Court in *Crawford v Washington*.

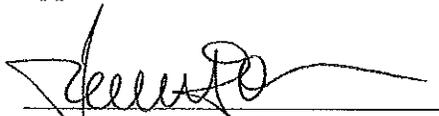
initially appeared at the courthouse on the day of trial pursuant to a subpoena, her departure constituted refusal to *testify* ‘despite an *order of the court* to do so’ (emphasis added), MRE 804(a)(2).” *Adams*, 233 Mich App at 659, fn 6.

In the trial court, the prosecution argued that an incompetent witness fell within the definition of a witness who lacked memory; on appeal, the prosecution has argued that an incompetent witness fits within the definition of a witness suffering from a physical or mental infirmity. However, here, *the trial court has specifically found that the witness's inability to take the oath was not the result of a lack of memory or a mental or physical infirmity*, a finding that the prosecution did not challenge in the trial court, or on appeal.

There is nothing on the record of this case from which the court can conclude that the trial court abused its discretion in the application of the plain language of MRE 804(a).

RELIEF REQUESTED

The defendant, Vita Duncan, asks this court to affirm the judgment of the court of appeals.



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