STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION August 19, 2026 1:48 PM
v	No. 376370 Ionia Circuit Court
MATTHEW RYAN RADEMACHER, Defendant-Appellant.	LC No. 2021-018204-FC

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

KOROBKIN, J.

This interlocutory appeal presents a question of first impression: whether a witness's testimony from a *Ginther*[1] hearing is admissible at a new trial when the testifying witness becomes unavailable. Defendant, Matthew Ryan Rademacher, contests the trial court's order denying his motion in limine to admit the *Ginther*-hearing testimony of two expert witnesses, Dr. Werner Spitz and Dr. Francisco Diaz, at his upcoming new trial; defendant contends that it is admissible as the former testimony of unavailable witnesses under MRE 804(b)(1). We do not foreclose the possibility that *Ginther*-hearing testimony can be admissible at a new trial under the appropriate circumstances, but admissibility under MRE 804(b)(1) is a fact-specific inquiry. For the reasons stated in this opinion, and on the facts presented, we conclude that the trial court did not abuse its discretion by denying defendant's motion. We therefore affirm.

I. BACKGROUND AND FACTS

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), for the death of his girlfriend's two-year-old child while in defendant's care. The trial court sentenced defendant to serve life imprisonment without parole for the felony-murder conviction and 15 to 25 years' imprisonment for the child-abuse conviction. Defendant moved for a new trial on the basis that defense counsel rendered ineffective assistance by failing to investigate and attempt to secure suitable expert assistance in preparing and presenting

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

a defense. See *People v Ackley*, 497 Mich 381, 397-398; 870 NW2d 858 (2015). The prosecution's theory at trial was that defendant caused the fatal injury on the morning of the child's death and hinged heavily on the testimony of the medical examiner. The defense's theory was that the child died as the result of the cumulative effect of multiple earlier injuries, but this theory was unsupported by an expert witness at trial.

Defendant's witnesses at the *Ginther* hearing that followed included Dr. Spitz and Dr. Diaz, both of whom were qualified as experts in forensic pathology, and both of whose testimony supported the defense's theory. The prosecution chose not to cross-examine Dr. Spitz but did cross-examine Dr. Diaz. The trial court ultimately granted defendant a new trial.

About one year later, defendant filed a motion in limine to admit, at the new trial, the *Ginther*-hearing testimony of Dr. Spitz and Dr. Diaz. Defendant relied on MRE 804(b)(1), the "former testimony" exception to the rule against hearsay for a declarant who is "unavailable as a witness." First, defendant asserted that both experts were unavailable: Dr. Spitz had died, and Dr. Diaz was prohibited by his employer from testifying at trials in which children were the victims of the charged crime(s). Second, defendant argued that the prosecution had an opportunity and similar motive at the *Ginther* hearing to develop the experts' testimony through cross-examination. The prosecution conceded that Dr. Spitz was unavailable but did not agree that Dr. Diaz was unavailable. And regardless of their availability, the prosecution argued, these experts' testimony was inadmissible because the prosecution did not have an opportunity and similar motive, as required under MRE 804(b)(1)(B), to develop their testimony through cross-examination at the *Ginther* hearing.

The trial court denied defendant's motion. The court accepted the prosecution's concession that Dr. Spitz was unavailable, but the court found that it was premature to declare Dr. Diaz unavailable because none of the relevant events listed in MRE 804(a), to qualify a witness as unavailable, had occurred. Most pertinent here, Dr. Diaz had not persistently refused to testify despite a court order to do so, see MRE 804(a)(2), nor was he absent from trial despite defendant's due diligence to procure his attendance by process or other reasonable means, see MRE 804(a)(5). The trial court also found that the prosecution did not have "an opportunity and similar motive" to develop the experts' testimony as required by MRE 804(b)(1)(B). The court observed that the purpose of defendant's *Ginther* hearing was to show that defense counsel "was ineffective when he failed to present rebuttal expert testimony during the trial and that an expert existed who would have testified consistent with the defense's theory had trial counsel acted in a diligent and effective manner." Therefore, the court concluded, "the motive and testimony elicited by defense counsel at a *Ginther* hearing cannot be said to be similar in motive as testimony at a trial." The trial court also explained that expert "[t]estimony on the facts and circumstances specific to this case were limited on several occasions . . . during the *Ginther* hearing," and noted numerous instances in which the court had, in ruling on objections from the prosecution, limited the case-specific testimony that Dr. Spitz and Dr. Diaz could give.

Defendant now appeals.[2]

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision on a motion in limine. *People v Hawkins*, 349 Mich App 271, 275; 27 NW3d 641 (2023). "Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "An abuse of discretion occurs when a decision falls outside the range of reasonable and principled outcomes, and a trial court necessarily abuses its discretion when it makes an error of law." *People v Zitka*, 325 Mich App 38, 43–44; 922 NW2d 696 (2018) (cleaned up).

III. ANALYSIS

We conclude that the trial court did not abuse its discretion by denying defendant's motion in limine.

Hearsay—"a statement that[] the declarant does not make while testifying at the current trial or hearing[] and [that] a party offers in evidence to prove the truth of the matter asserted in the statement," MRE 801(c)—is generally inadmissible at trial under the rules of evidence. MRE 802. MRE 804(b) provides exceptions from that general prohibition that apply when the declarant is "unavailable as a witness" as that term is defined in MRE 804(a). One such exception, MRE 804(b)(1), is for former testimony. Under MRE 804(b)(1)(B), the rule against hearsay does not apply when a "declarant is unavailable as a witness," the declarant's statement "was given as a witness at a trial or hearing whether given during the current proceeding or a different one," and the testimony is "now offered against a party who had . . . an opportunity and similar motive to develop it by direct, or cross, or redirect examination."

Whether a party had a "similar motive" to develop testimony at a prior hearing is a "fact specific inquiry." *People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007). It "depends on the similarity of the issues for which the testimony was presented at each proceeding." *Id*. at 275. This Court has adopted the following nonexhaustive list of factors for a trial court to examine:

> (1) whether the party opposing the testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue; (2) the nature of the two proceedings—both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and

[2] This Court initially denied defendant's application for leave to appeal. *People v Rademacher*, unpublished order of the Court of Appeals, entered October 29, 2025 (Docket No. 376370). Defendant then sought leave to appeal from our Supreme Court, which, in lieu of granting leave, remanded the case to us for consideration as on leave granted. *People v Rademacher*, 31 NW3d 123 (Mich, 2026).

available but forgone opportunities). [*Id.* at 278 (quotation marks and citation omitted).]

In our case, the parties' disagreement on appeal principally concerns whether the prosecution had a similar motive to develop Dr. Spitz's and Dr. Diaz's testimony through cross-examination at defendant's *Ginther* hearing as it would have at defendant's trial.[3] We must therefore examine the similarity of the issues for which the testimony was presented at the *Ginther* hearing with the issues for which it would be presented at trial, keeping in mind the nonexhaustive list of factors adopted in *Farquharson* and that our inquiry is fact-specific. *Id*. at 275, 278.

As a general matter, there can be a "similarity of the issues" at a *Ginther* hearing and at a subsequent new trial, even though the issues are not identical. See *id*. at 275. The purpose and function of a *Ginther* hearing is to create a factual record for a defendant's ineffective-assistance-of-counsel claim, which if successful would lead to a new trial. See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). At the *Ginther* hearing, the issues are, broadly speaking: (1) whether counsel's performance was deficient—that is, did it fall below an objective standard of reasonableness; and (2) whether the deficiency was prejudicial to the defendant—that is, but for counsel's deficient performance, whether there is a reasonable probability that the outcome would have been different. See *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010); *People v Yeager*, 511 Mich 478, 487; 999 NW2d 490 (2023). It is not uncommon for some of the evidence relevant to this *Ginther* inquiry to overlap with the evidence that must be considered at a new trial. For instance, if the alleged deficiency by trial counsel was an objectively unreasonable failure to get testimony admitted that would have been favorable to the accused, then at the *Ginther* hearing the defendant might present that testimony in order to prove that it is, in fact, so favorable that its absence at the first trial likely had a prejudicial effect. Thus, there can be a "similarity of the issues," *Farquharson*, 274 Mich App at 275, insofar as the evidence presented at the *Ginther* hearing to show a reasonable probability of a different outcome may also be the evidence that will be presented at the new trial in an effort to actually achieve that different outcome.

Along the same lines, the "interests" and "stakes" involved at a *Ginther* hearing and those at a subsequent new trial are not identical, but as a general matter they tend to be similar and overlapping. See *id*. at 278. If a defendant is successful at a *Ginther* hearing, then the defendant's conviction is vacated, a new trial is required, and the prosecution would bear (again) the burden of proving the defendant's guilt beyond a reasonable doubt. The prosecution necessarily has a high interest in avoiding that outcome, just as the prosecution has a high interest in obtaining a

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[3] The parties do not dispute that Dr. Spitz is an unavailable witness given his death. See MRE 804(a)(4) (stating that a declarant is considered unavailable as a witness if he "cannot be present or testify at the trial . . . because of death"). There is disagreement, however, regarding whether Dr. Diaz is an unavailable witness. But in light of our conclusion, explained in this opinion, that the "similar motive" requirement of MRE 804(b)(1)(B) is not satisfied under the facts of this case, we need not resolve whether the trial court erred in concluding that it was premature to deem Dr. Diaz an unavailable witness. We therefore proceed under the assumption that Dr. Diaz was unavailable without deciding that question.

conviction were retrial to occur. Consequently, at the *Ginther* hearing, the prosecution may have "an interest of substantially similar intensity" to combat evidence offered by the defendant, *id*., so as not to be placed in the position of having to prove the defendant's guilt at a new trial. Again, for instance, if a defendant presents testimony at the *Ginther* hearing that counsel failed to secure at trial, the prosecution has an interest in discrediting that testimony to show that it would not have made a difference at trial. And the intensity of the prosecution's interest in doing so flows from the prosecution's significant interest in not having to retry the defendant. In other words, the stakes are comparable at both proceedings: if the defendant prevails at the *Ginther* hearing, the prosecution will be forced to try the case again. And, as discussed above, the same evidence may be in play, for similar (but not identical) reasons, at both proceedings.

It is true that "the applicable burden of proof," *id.*, is not the same at the two proceedings. But that is hardly dispositive, as this Court has affirmed the admission of preliminary-examination testimony at trial under MRE 804(b)(1) even though "the burden of proof was lower at the preliminary examination." *People v Garay*, 320 Mich App 29, 37-38; 903 NW2d 883 (2017), rev'd in part on other grounds 506 Mich 936 (2020). Indeed, it is much lower: the burden at a preliminary examination is only to show probable cause, in contrast to the burden at trial, proof beyond a reasonable doubt. And the stakes are also different; a probable cause finding leads only to a bindover for trial, whereas proof of guilt results in conviction and the potential for imprisonment. But they are similar enough that preliminary-examination testimony has frequently been held admissible at trial under MRE 804(b)(1). See *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998); *People v Adams*, 233 Mich App 652, 659; 592 NW2d 794 (1999).

We make these observations to emphasize that there may well be circumstances in which former testimony from a *Ginther* hearing would be admissible at a new trial under MRE 804(b)(1).[4] But the above analysis discusses the applicability of MRE 804(b)(1) to *Ginther* hearings only in the abstract. *Farquharson* instructs that we must make a fact-specific inquiry regarding whether the prosecution had a "similar motive" to develop the witnesses' testimony during the *Ginther* hearing in the particular case before us. *Farquharson*, 274 Mich App at 278. And, upon full review, under the facts of *this* case, we conclude that the trial court did not abuse its discretion in finding that the "similar motive" requirement was not met.

Three considerations drive our analysis. First, at the *Ginther* hearing, the trial court restricted the expert testimony in ways that, in turn, limited the prosecution's motive to develop the testimony through cross-examination. For example, defense counsel asked Dr. Spitz to

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[4] Although we were unable to locate a Michigan case in which this issue has arisen, we note that the Supreme Court of Pennsylvania held that testimony from that state's equivalent of a *Ginther* hearing was not precluded from being introduced at trial under that state's equivalent of MRE 804. *Commonwealth v Chmiel*, 558 Pa 478, 499-501; 738 A2d 406 (1999). "Decisions from other jurisdictions are not precedentially binding, but they may be considered for their persuasive value." *People v Lillis*, ___ Mich App ___, ___ n 3; ___ NW3d ___ (2026) (Docket No. 372637); slip op at 5 n 3. The circumstances of *Chmiel* were somewhat different, as it was the prosecution that sought to introduce the testimony, and the Court ultimately held that the testimony was inadmissible for other reasons not relevant here. See *Chmiel*, 558 Pa at 508-511.

"explain to the Court, after reviewing the documentation, if [he] ha[d] an opinion if this is a short-fall trauma, a medium, or a high . . . ." The prosecution objected that the question was outside the scope of a *Ginther* hearing, and the trial court sustained the objection, stating that "the manner and cause of death in this case . . . is outside the scope of what this hearing is about," and instructed the parties to limit their questions to whether defendant's trial counsel undertook adequate consultation with experts. See *Ackley*, 497 Mich at 397-398. At another point, defense counsel asked Dr. Spitz how much blood would typically be found in a subdural hematoma significant enough to cause a child's death, and Dr. Spitz answered, "Well, certainly a lot more than in this case." This elicited another objection from the prosecution on grounds that Dr. Spitz was getting into case-specific testimony. The trial court sustained this objection as well, indicating that Dr. Spitz's answer was not "within the confines of what the purpose of [the] hearing is." The prosecution did not cross-examine Dr. Spitz.

For purposes of the appeal presently before us, it is unnecessary for this Court to decide whether these limitations that the trial court placed on the scope of the *Ginther* hearing were, at the time, correct or otherwise within its discretion. Rather, we identify them because they demonstrate a corresponding limitation on the prosecution's motive to cross-examine. It is clear from our review of the record that given the limitations on the scope of the *Ginther* hearing imposed by the trial court, the scope of the expert testimony at that hearing was substantially more limited than what the scope of expert testimony would be at trial. Consequently, as part of our fact-specific inquiry, *Farquharson*, 274 Mich App at 278, this limitation on the scope of the *Ginther* hearing weighs significantly against a finding that the prosecution had a similar motive to develop the former testimony at the *Ginther* hearing as it would have at a new trial.

Our second consideration pertains to the limited information the prosecution had available to conduct a meaningful cross-examination of defendant's experts. Our court rules contain special requirements for disclosure of information about expert witnesses that may be called at trial, requirements that do not apply to lay witnesses. Specifically, MCR 6.201(A)(3) requires that a party, upon request, disclose "the curriculum vitae of any expert the party may call *at trial* and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." MCR 6.201(A)(3) (emphasis added). The court rules and our caselaw are silent on whether these or any similar disclosure requirements apply for experts that may be called to testify at a *Ginther* hearing. In any event, it appears that most of this information was not sought or disclosed prior to the *Ginther* hearing in this case.[5]

As with the trial court's rulings limiting the scope of the *Ginther* hearing, it is unnecessary for us to comment on whether MCR 6.201(A)(3)-type disclosures are required or advisable for *Ginther* hearings as they are for trials. Rather, the fact that the prosecution in this case did not have them necessarily affects our fact-specific inquiry, *Farquharson*, 274 Mich App at 278, regarding whether the prosecution had a similar motive to develop the former testimony at the *Ginther* hearing as they would have at a new trial. MCR 6.201(A)(3) reflects a reality about

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[5] The prosecution has represented to this Court that only Dr. Diaz's curriculum vitae was disclosed in advance. This was confirmed by defense counsel at oral argument.

experts that does not apply to lay witnesses: "Effective cross-examination of an expert witness requires advance preparation," and "effective rebuttal requires advance knowledge of the line of testimony of the other side." *Roe v Cherry-Burrell Corp*, 28 Mich App 42, 47; 184 NW2d 350 (1970) (quotation marks and citation omitted). Because the prosecution did not have that "advance knowledge" that it would have had at trial, its motive to develop the testimony of Dr. Spitz and Dr. Diaz through cross-examination was substantially reduced.

Our third consideration is likewise specific to expert witnesses and "what is at stake" when former testimony is admitted or excluded. *Farquharson*, 274 Mich App at 278. The rule against hearsay "is a concrete expression of the common-law preference for in-court oral testimony subject to cross-examination." *Shields v Reddo*, 432 Mich 761, 783; 443 NW2d 145 (1989). As explained by the legendary Judge Henry Friendly of the United States Court of Appeals for the Second Circuit:

> While the use of previous testimony is a well-established exception to this rule, it is an exception based on the necessity of using the prior testimony when the alternative is loss of that testimony entirely. When the ordinary witness is unavailable, his unique knowledge of the facts will be lost unless the use of his prior testimony is allowed. But the expert witness generally has no knowledge of the facts of the case. Instead, he is called upon to express a professional opinion upon the facts as they are presented to him, often expressing his opinions in the form of answers to hypothetical questions. Thus, even if one particular expert is unavailable, there is no need to use his previous testimony to prevent the loss of evidence, because there will usually be other experts available to give similar testimony orally. [*Carter-Wallace, Inc v Otte*, 474 F2d 529, 536 (CA 2, 1972) (citation omitted).]

To put things in terms of the *Farquharson* factors, the "stakes" of excluding the former testimony of a lay witness in a criminal case are particularly high, because the testimony is irreplaceable. An expert's testimony, by contrast, by its very nature ought to be subject to replication by some other qualified expert.[6] Indeed, if no other expert can provide the relevant testimony, one might call into question how reliable the testimony was in the first place. See MRE 702. Consequently, although there is no rule categorically excluding experts from MRE 804(b)'s former-testimony exception and we do not advocate for one,[7] Judge Friendly's observations are

[6] We do not foreclose the possibility that, in an unusual case, it could be shown that an expert's testimony was so unique or specialized that no other expert's testimony can be procured. See *Carter-Wallace*, 474 F2d at 536-537. There is no indication of that being the case here, however.

[7] We note that at least one jurisdiction, Louisiana, excludes experts entirely from the former-testimony exception under its rules of evidence. La Stat Ann-Code Evid Art 804(B)(1); *Southern Message Serv, Inc v Commercial Union Ins Co*; 647 So 2d 398, 403; 26,311-CA (La App 2 Cir 12/7/94) ("The former testimony of an unavailable expert witness is not admissible as an exception to the hearsay rule.").

relevant to our fact-specific inquiry, *Farquharson*, 274 Mich App at 278, and we find that they weigh against admission here.

IV. CONCLUSION

For the reasons stated, the trial court did not abuse its discretion by denying defendant's motion in limine to admit the *Ginther*-hearing testimony of his expert witnesses at his upcoming new trial. We agree with the trial court that, under the facts of this case, the prosecution did not have a similar motive to develop the former testimony by cross-examination as required by MRE 804(b)(1)(B).[8] Accordingly, the trial court's order is affirmed.

/s/ Daniel S. Korobkin
/s/ Mark T. Boonstra
/s/ Adrienne N. Young

[8] As previously noted, because we conclude that the trial court did not abuse its discretion by denying defendant's motion under MRE 804(b)(1), it is unnecessary for us to review the trial court's determination that it was premature to declare Dr. Diaz "unavailable" under MRE 804(a).

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YOUNG, J. (*concurring*).

I begin by saying that I agree with the majority, which affirms the trial court's exclusion of the *Ginther* hearing testimony in this case without closing the door to the admission of *Ginther* hearing testimony at a future trial. I write separately to emphasize some observations highlighted by counsel at oral argument and to encourage the Michigan Supreme Court to consider whether a different test may be warranted for determining when unavailable witness testimony may be admitted at trial.

First, appellate counsel noted, as the majority does, that the prosecutor objected to the scope of Dr. Spitz's testimony. That objection was sustained, thereby narrowing the scope of questioning and affecting this Court's "similar motive" analysis. Second, and as the majority also acknowledges, the prosecutor did not receive *but also did not request* advanced summaries of the expert testimony to prepare for the *Ginther* hearing. That, too, affected this Court's "similar motive" analysis. In other words, rather than treating foregone opportunities as a strike against the party opposing admission, they instead serve as evidence of a different motive at the hearings. That seems to be in keeping with our (limited) case law.

In *People v Farquharson*, 274 Mich App 268; 731 NW2d 797 (2007), our Court adopted the "fact-specific inquiry" from *United States v DiNapoli*, 8 F3d 909 (CA 2, 1993) to assess whether the individual opposing the admission of testimony had a "similar motive" to examine the witness-in-question at the earlier hearing. *Farquharson*, 274 Mich App at 278. In *DiNapoli*, 8 F3d at 914, the Second Circuit addressed foregone opportunities by the prosecutor:

> Though the availability of substantial ways of challenging testimony that were not pursued by an examiner is pertinent to the "similar motive" inquiry, especially when such techniques appear far more promising compared to the cross-examination undertaken, the unused methods are only one factor to be considered.

". . . both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive." *Id.* at 915. And again, when the foregone "techniques appear far more promising" than those employed, this is an observation that favors exclusion. *Id*. at 914.

By interpreting MRE 804 in this way, we have, as Judge Pratt of the Second Circuit predicted, given prosecutors a great deal of power. As this case demonstrates, the similar-motive assessment requires the circuit judge to identify the interest of the prosecutor and the "intensity" of that interest. *Id.* at 916 (Pratt, J., dissenting). Often, the best evidence of that intensity is, in Judge Pratt's words, "the prosecutor's post hoc, self-serving, un-cross-examined statements as to his own motives." *Id*. Consequently, as this case demonstrates and as Judge Pratt predicted, "whether [] testimony may be presented at trial by a defendant [is] entirely in the prosecutor's control, a result that seems at odds with the main objective of going to trial—permitting the jury, not the prosecutor, to determine what is the truth." *Id*. at 917. Nevertheless, this Court faithfully applied the test this Court adopted and, as the majority acknowledges, expert testimony is unique in ways that, regardless of a prosecutor's actions or intent, may favor exclusion.

I write separately to say, aside from everything stated above, there exists a different way of assessing whether the testimony of unavailable witnesses may be admitted. See, e.g., *Wahl v State*, 441 P3d 424, 428-429 (Alas, 2019) (highlighting the differences between the Second Circuit's approach and the Sixth Circuit's approach and adopting the latter). I leave it to our Supreme Court to consider that approach or any alternatives to it.

/s/ Adrienne N. Young