

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVONTAE SANFORD,

Defendant-Appellant.

UNPUBLISHED
September 26, 2013

No. 291293
Wayne Circuit Court
LC No. 07-015018-01

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant, a juvenile prosecuted as an adult, entered a midtrial guilty plea to four counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. In exchange for defendant's plea, the prosecution dismissed four original charges of first-degree murder, MCL 750.316, and an additional charge of assault with intent to commit murder, MCL 750.83. The trial court sentenced defendant to concurrent prison terms of 37 to 90 years for each second-degree murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. After defendant was sentenced, he filed a motion to withdraw his guilty plea based on a claim of actual innocence because another person, Vincent Smothers, had confessed to the same homicides. The trial court denied his motion. Defendant thereafter filed an application for delayed leave to appeal and a contemporaneous motion to remand. This Court granted defendant's delayed application for leave to appeal and, while retaining jurisdiction, also granted his motion to remand for an evidentiary hearing on his claim of actual innocence. Following the evidentiary hearing, the trial court again denied defendant's motion to withdraw his guilty plea. We vacate the trial court's order denying defendant's motion to withdraw and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS.

Defendant's convictions arise from the September 17, 2007, shooting deaths of four persons at a drug house on Runyon Street in Detroit. A fifth person was shot, but survived. A young child was also in the house, but was not hurt. While police officers canvassed the neighborhood looking for information, defendant, who was then 14 years of age, approached an officer and said that he had information about the shooting. Defendant was questioned at the Detroit Police Homicide Division during the early morning hours of September 18, and again on the morning of September 19. Defendant originally denied any involvement in the homicides,

but he eventually stated that he and three other persons fired their weapons into the house, entered the house, and stole drugs and money. Defendant's statement was consistent with other information discovered by the police during their police investigation, but also conflicted with some details. Defendant stated that at least three guns were fired during the offense, a .45 caliber handgun, an AK-47 rifle, and a "mini-14" (larger than a handgun, but smaller than an AK-47), and that gunshots were fired both inside and outside the house, but all bullets and casings recovered from the scene were fired from either an AK-47 or a .45 caliber weapon. Defendant admitted that one of the intruders spoke to a woman who took refuge in a back bedroom, which was consistent with the report of the adult survivor, Valerie Glover. Defendant gave the nicknames of his co-perpetrators as "Tone," "Tone-Tone," and "Carrie," but no other person was charged.

Defendant waived his right to a jury trial. At defendant's bench trial, after the prosecution presented its evidence, defendant and the prosecutor reached a plea agreement. The prosecutor agreed to dismiss the original charges of first-degree murder and assault with intent to commit murder in exchange for defendant's guilty plea to four counts of second-degree murder and felony-firearm, and an agreement that defendant would be sentenced within the sentencing guidelines range for second-degree murder.

Defendant later learned that Vincent Smothers, a suspect in numerous murder-for-hire homicides, had been arrested and confessed to several homicides, including the Runyon Street homicides. Smothers informed Detroit Police Sergeant Gerald Williams that he and Ernest "Nemo" Davis were responsible for the Runyon Street homicides. Smothers told the officers that his wife had concealed an AK-47 rifle and a .45 caliber handgun in a house on Promenade Street, where Davis's cousin lived. The .45 weapon was recovered and determined to be one of the guns used at the Runyon Street shooting. Williams did not extensively question Smothers about the details of that shooting.

After this Court granted defendant's motion to remand, the trial court conducted an evidentiary hearing on defendant's motion to withdraw his guilty plea based on his claim of actual innocence. During the remand proceedings, defendant filed numerous motions, including a motion for discovery of Smothers's other criminal matters, a motion to introduce expert testimony on the subjects of false confessions and police interrogation techniques, and motions to produce Smothers as a witness or to admit Smothers's hearsay statements made to a defense investigator or to Smothers's criminal attorney. The trial court denied each of these motions and eventually denied defendant's motion to withdraw his guilty plea.

II. WITHDRAWAL OF DEFENDANT'S GUILTY PLEA

Defendant argues that the trial court erroneously applied a clear and convincing evidence standard when reviewing his claim of actual innocence. We review a trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion, but review the trial court's factual findings for clear error. *People v Cole*, 491 Mich 324, 329; 817 NW2d 497 (2012); *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997). Questions of law governing the trial court's decision are reviewed de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

There is no absolute right to withdraw an accepted guilty plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). To establish grounds for withdrawing a guilty plea, the defendant must establish either a procedural error or a fair and just reason for withdrawal of the plea. *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). A claim of innocence, supported by the record, constitutes a potential basis for withdrawing a guilty plea. See *People v Haynes (After Remand)*, 221 Mich App 551, 558-563; 562 NW2d 241 (1997).

Defendant acknowledges that Michigan case law has not recognized a specific standard for reviewing a claim to overturn a guilty plea based on actual innocence, and argues that a clear and convincing evidence standard is unfairly stringent. Defendant argues that a defendant who directly challenges a plea-based conviction should be held to a lower standard than a defendant who collaterally attacks a criminal judgment. According to defendant, the trial court should set aside a guilty plea on a showing of newly discovered substantial evidence of his actual innocence.

The problem with the trial court's approach is that it looks to a burden of proof where there is no need to prove anything. It is not incumbent upon a defendant to prove his actual innocence when seeking to withdraw his guilty plea on that basis. Rather, as noted above, such a motion is committed to the trial court's discretion. The question thus becomes whether the trial court has abused that discretion by denying the motion to withdraw despite being presented with evidence of actual innocence. That is, how much evidence of actual innocence must there be before denying the motion to withdraw constitutes an abuse of discretion? This question was aptly answered in *People v Shanes*, 155 Mich App 423, 428; 399 NW2d 73 (1986):

In the instant case, defendant did not move to withdraw the plea until after sentencing. The same liberality in passing upon such motions [when made before sentencing] is not to be accorded where the defendant has already been informed of the length of the prison term. Were we to hold otherwise, any defendant unhappy with his sentence could gain another "shot" simply by asserting he had lied when he had previously confessed criminal intent. In the absence of any compelling evidence of innocence, we find no abuse of discretion in denying defendant's request to withdraw his guilty plea.

If a defendant presents "compelling evidence" of actual innocence, it is an abuse of discretion for the trial court to ignore that evidence and deny the motion to withdraw the plea. Thus, at this stage, it is not necessary for a defendant to prove his innocence, but neither should he be allowed to withdraw his plea based upon the presentation of any evidence of innocence.

This approach should address the trial court's legitimate concern that there be significant evidence of actual innocence before allowing a plea to be withdrawn after sentencing, while at the same time not imposing upon the defendant a burden to prove innocence at this stage. As for the case at bar, because, for reasons discussed below, we are remanding the matter to the trial court to again consider defendant's motion to withdraw his plea, we decline to determine on this record whether there was, in fact, compelling evidence of innocence and, thus, whether the trial court abused its discretion in denying the motion. Rather, on remand, the trial court shall assess the evidence of actual innocence and exercise its discretion in determining whether that evidence

is sufficiently compelling that it would be an abuse of that discretion to not allow defendant to withdraw his plea.

III. EXCLUSION OF TESTIMONY

Defendant argues that the trial court erroneously excluded the testimony of Smothers, defense investigator Linda Borus, and Smothers's criminal attorney, Gabi Silver. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012). The trial court's legal decisions concerning the application of evidentiary rules are reviewed de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

During these proceedings, defendant attempted to call Smothers as a witness three times. The first and second attempts failed because Smothers exercised his Fifth Amendment privilege against self-incrimination. Defendant's third attempt to produce Smothers as a witness was not accompanied by an offer of proof explaining why Smothers was now willing to testify, or how he would testify. Considering that Smothers had twice previously exercised his Fifth Amendment privilege against self-incrimination to avoid testifying and that defendant failed to provide an offer of proof or verification that Smothers was now willing to waive his Fifth Amendment privilege, the trial court did not abuse its discretion in denying defendant's motion to produce Smothers as a witness.¹

Defendant also attempted to call a defense investigator, Linda Borus, to testify regarding statements that Smothers made to her, in which he admitted that he, and not defendant, committed the Runyon Street homicides. Defendant argues that Smothers's statements to Borus were admissible under MRE 804(b)(3), the hearsay exception for statements against the declarant's penal interest when the declarant is unavailable. The trial court conducted an evidentiary hearing to determine the admissibility of Smothers's statements to Borus. Defendant has not provided a transcript of that hearing, despite a request by this Court. Because defendant has failed to provide this necessary transcript, appellate review of this issue is waived. *People v Dunigan*, 299 Mich App 579, 587; 831 NW2d 243 (2013).

We agree with defendant, however, that the trial court abused its discretion by not allowing Smothers's counsel, Gabi Silvers, to testify regarding Smothers's statements to her pursuant to Smothers's waiver of the attorney-client privilege. Defendant sought to admit Smothers's statements to Silver under MRE 804(b)(7), the catch-all hearsay exception where the declarant is unavailable. The trial court declined to admit Smothers's statements to Silver in the interests of fairness because the prosecutor would not be able to cross-examine Smothers concerning the statements. However, the hearsay restrictions in MRE 804 apply only where the

¹ The parties indicated at oral argument that Smothers is now willing to testify. He is, of course, free to do so at the hearing on remand if he so chooses without a grant of immunity. In that case, the hearsay questions become moot because the declarant will no longer be unavailable to testify.

declarant is unavailable. Thus, the rules of evidence contemplate that hearsay statements may be admissible even though the opposing party will not have the opportunity to cross-examine the declarant. MRE 804(b)(7) provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The prosecutor's fairness argument is somewhat disingenuous because the prosecutor could avoid any perceived disadvantage by petitioning for use immunity under MCL 767.6. The prosecutor accuses defendant of wanting to present Smothers's statements through Silver in order to "garble" the truth and allow one side to present what may be false evidence while depriving the other side of any means of detecting the imposition. However, the prosecutor's own unwillingness to request use immunity for Smothers's testimony, despite the prosecution's position that Smothers was not involved in the Runyon Street homicides, is the barrier to cross-examination of Smothers.

The prosecutor also argues that Smothers's statements to Silver do not satisfy the trustworthiness requirement of MRE 804(b)(7) because Smothers's statements are not consistent with other evidence pertaining to the Runyon Street shootings. However, Smothers had nothing to gain by falsely telling his own counsel, subject to the attorney-client privilege, that he was responsible for the Runyon Street homicides. Smothers's admissions to Silver about the Runyon Street homicides were partly corroborated by his statement to Williams. It was in Smothers's best interests to accurately report his criminal involvement to Silver, to enable her to properly evaluate the charges against him and plan a defense. The inconsistencies between Smothers's police statement and other evidence are not materially greater than the inconsistencies in defendant's confession. Accordingly, the trial court abused its discretion in barring Silver's testimony.

The error in excluding Silver's testimony was not harmless. An evidentiary error is not harmless if it impairs the defendant's right to present a defense. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 538; 775 NW2d 857 (2009). The reliability of Smothers's confession to the Runyon Street homicides was the most significant evidence in defendant's actual innocence proceeding. The trial court was not convinced that Smothers's statements to Williams were sufficiently clear and convincing to establish that Smothers, not defendant, was the perpetrator. But neither Williams nor any other officer thoroughly questioned Smothers about the Runyon Street homicides. There is a high likelihood that Silver's testimony would have provided more details of Smothers's purported involvement in the Runyon Street homicides

to enable the trial court to better judge the reliability and accuracy of Smothers's confession. The exclusion of this testimony impaired defendant's right to present substantial evidence in support of his claim of innocence. Accordingly, on remand, defendant shall be afforded the opportunity to supplement the evidentiary record by presenting Silver's testimony regarding Smothers's statements to her, conditioned on Smothers's waiver of the attorney-client privilege.

IV. ADMISSIBILITY OF EXPERT TESTIMONY

Defendant next argues that the trial court erred by refusing to allow him to present expert testimony on false confessions and police interrogation tactics that are designed to induce false confessions.

Expert testimony is governed by MRE 702, which provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012), our Supreme Court, quoting *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152; 119 S Ct 1167; 143 L Ed 2d 238 (1999), stated:

A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable. The overarching goal is "to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Because there are many different kinds of experts and expertise, this inquiry is, by necessity, a flexible one, and a court determining the admissibility of expert testimony may consider reliability factors pertinent to the particular type of expert testimony offered and its connection to the particular facts of the case."

In *Kowalski*, the defendant in a double-homicide case filed a notice of intent to call two expert witnesses, Dr. Leo, a social psychologist, to testify about police interrogation techniques and false confessions, and Dr. Wendt, a clinical and forensic psychologist to testify about his psychological evaluation of the defendant's mental state during police interrogation. Dr. Wendt would have testified that the circumstances of the defendant's confession were consistent with literature on false confessions. *Id.* at 111-112. Following an evidentiary hearing, the trial court found that Dr. Leo's testimony was not sufficiently reliable under MRE 702 because Dr. Leo's opinion was not based on a comparison between true and false confessions, and because Dr. Leo did not take into account reasons other than police interrogation techniques that might cause a person to falsely confess. Dr. Leo also failed to identify factors that contributed to false confessions but not true confessions. *Id.* at 115-116.

In addressing the admissibility of Dr. Leo's proposed testimony, our Supreme Court began its analysis by addressing "the threshold inquiry—whether the proposed expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue[.]'" *Id.* at 121, quoting MRE 702. The Court stated:

Interpreting the nearly identical language in the federal counterpart to MRE 702, the United States Supreme Court explained that helping the trier of fact to "understand the evidence or to determine a fact in issue" presents a question of relevance because "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Similarly, if the average juror does not need the aid of expert interpretation to understand a fact at issue, then the proffered testimony is not admissible because "it merely deals with a proposition that is not beyond the ken of common knowledge." These considerations of relevancy and the need for expertise are independent of the other requirements of MRE 702. Thus, even proposed expert testimony that is offered by a qualified expert and based on reliable scientific data and methods may be properly excluded if it is not relevant to the facts of the case or is offered for a proposition that does not require the aid of expert interpretation." [*Kowalski*, 492 Mich at 121-122 (footnote citations omitted).]

Analyzing the question whether expert testimony "regarding the phenomenon of false confessions is beyond the factfinder's 'ken of common knowledge,'" the Court considered precedents in which expert testimony was admitted "to explain other human behavior that is contrary to the average person's commonsense assumptions," such as why victims of child sexual abuse would delay reporting abuse, or why a victim of domestic violence might repress or minimize the abuse. *Id.* at 122-124, quoting *People v Peterson*, 450 Mich 349, 363; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995). The Supreme Court held:

[W]e have no disagreement with the premise that issues involving credibility and the weight of the evidence are within the province of the jury. However, the Court of Appeals' analysis wrongly focused on the jury's role, which is not part of the MRE 702 analysis, rather than on what knowledge the common person possesses and whether the aid of specialized knowledge can help a juror understand a fact at issue. Like the behavior of the child sexual abuse and domestic violence victims in *Peterson* and *Christel*, a purported false confession . . . constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely. The exclusion of such expert testimony when it meets all the requirements of our evidentiary rules could, in some instances, hinder the jury in its task because without the enlightenment of expert opinion the jury's ultimate determination may not be arrived at intelligently. [*Kowalski*, 492 Mich at 126-127.]

The Court further stated this Court and the circuit court had erred in presuming "that the average juror possessed the knowledge to evaluate factors that might lead to a false confession." *Id.* at 128-129. However, the Court also concluded that the trial court correctly determined that Leo's

expert opinion was unreliable because his determination of false confessions was not based on objective factors. *Id.* at 133-134.

In this case, the trial court excluded defendant's proposed expert testimony from Dr. Solomon Fulero on the subject of false confessions, and from Ira Todd, a Detroit Police investigator, on how police interrogation techniques could induce a false confession. The court concluded that expert testimony was not necessary because it is common knowledge that any statement could be true or false. That common knowledge is accompanied by the general assumption that false statements are usually made to gain advantage, not to subject oneself to criminal retribution. As the Supreme Court observed in *Kowalski*, conventional wisdom holds that an innocent person will not imperil his freedom by falsely confessing to criminal conduct. Against this backdrop, we believe that explanation for why a juvenile suspect would falsely confess, and how police interrogation methods might induce a false confession, would be helpful to aid the trier of fact in evaluating defendant's actual innocence claim. Although defendant's motion to withdraw his guilty plea was to be decided by the court, and not a jury, we believe that defendant was entitled to the opportunity to avail himself of expert information relevant to the truthfulness and reliability of defendant's confession. The trial court's comment that defendant was convicted on the basis of his guilty plea, and not his confession, fails to reflect that a defendant's confession could be an impetus to plead guilty; the persuasiveness of a confession diminishes the likelihood of an acquittal, which may cause the defendant to choose the safer option of pleading guilty to a lesser offense rather than risk conviction of first-degree murder. Accordingly, the trial court's surface rejection of this expert testimony was an abuse of discretion.

To be admissible, however, it is still necessary that expert testimony satisfy the remaining requirements of MRE 702, namely: "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The trial court did not determine whether defendant's proposed expert testimony satisfied these additional requirements. Accordingly, on remand, the trial court shall determine whether the proposed testimony of Dr. Fulero and Ira Todd satisfies the remaining requirements of MRE 702. If their testimony satisfies these requirements, the trial court shall allow defendant to present their expert testimony and the court shall reconsider defendant's motion to withdraw his guilty plea, taking into account the expanded record.²

V. DISCOVERY OF SMOTHERS'S OTHER CRIMINAL CASE FILES

Defendant next argues that the trial court erred by not allowing discovery of Smothers's other criminal case files. We review a trial court's discovery decisions in a criminal case for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994).

² If the experts meet the remaining requirements of MRE 702, the trial court is still free, of course, to exercise its discretion in determining the extent of any testimony to be offered by the expert.

Criminal defendants do not have a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). But a criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988). However, “[t]he prosecutor’s office is not required to undertake discovery on behalf of a defendant.” *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991). A defendant also has a due process right to obtain evidence in the prosecutor’s possession if the evidence “is favorable to the accused and material to guilt or punishment.” *Stanaway*, 446 Mich at 666, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). “Material has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant’s guilt.” *Stanaway*, 446 Mich at 666, citing *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

Defendant argues that evidence of Smothers’s other criminal acts would be admissible under MRE 404(b)(1), which provides:

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.

“MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity.” *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). “Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

Smothers’s case files in his other criminal matters were relevant and material to the issue of defendant’s guilt or innocence. Defendant’s claim of innocence rested on his ability to establish the reliability and credibility of Smothers’s confession to the Runyon Street homicides. Smothers’s credibility was a major issue in the hearing, and Smothers’s similar acts were highly relevant to his credibility. The prosecutor advanced the theory that Smothers’s confession was not credible because the shooters’ indiscriminate firing into the house before entering was contrary to Smothers’s “professionalism” in avoiding harm to bystanders. The trial court agreed with this theory and relied on it in its decision denying defendant’s motion. Defendant also argued in the trial court that the circumstances of Smothers’s other cases were relevant to proving that defendant could not have been Smothers’s accomplice, because Smothers never used a teenage accomplice. The trial court rejected this argument because the prosecutor never advanced the theory that defendant was Smothers’s accomplice. Nonetheless, the trial court found that if Smothers was guilty of the Runyon Street homicides, that did not prove defendant’s innocence because Smothers did not foreclose the possibility that defendant was present with him and Davis.

The value of evidence of Smothers's other criminal case files is demonstrated by the fact that the trial court relied in part on its determination that the circumstances of the Runyon Street shooting were inconsistent with Smothers's own proclaimed modus operandi, and the possibility that defendant may have acted as Smothers's accomplice, to reject defendant's actual innocence claim. If defendant had been allowed access to Smothers's other case files, he might have been able to use them to disprove the contention that Smothers was not as protective of women, children, and bystanders as he professed, or to negate any inference that he may have assisted Smothers in committing the Runyon Street homicides.

Although it is premature to determine whether the production of Smothers's other criminal files would lead to evidence that would be admissible under MRE 404(b), there is no obvious basis for concluding that the evidence would not be admissible. The evidence was not sought for the purpose of proving Smothers's propensity for deadly violence, but rather for the proper purpose of proving Smothers's pattern and practice to determine whether the circumstances surrounding the Runyon Street homicides were consistent with Smothers's past crimes, which would be relevant to the reliability and credibility of Smothers's claim of responsibility for the Runyon Street shooting. Accordingly, on remand, the trial court shall allow defendant to conduct discovery concerning Smothers's other homicide cases, and to present admissible evidence revealed by that discovery, which the trial court shall then consider as part of its reconsideration of defendant's motion to withdraw his guilty plea.

VI. IMMUNITY

Defendant lastly argues that the trial court erred by declining to compel the prosecutor to grant Smothers immunity to enable him to testify. We disagree, because the trial court lacks the authority to grant immunity to a witness without a motion by the prosecutor. MCL 767.6 governs immunity orders for witnesses. MCL 767.6(2) provides that "[u]pon written motion by the prosecuting attorney or a duly authorized representative of the state, . . . the judge may enter a written order granting immunity to the witness." The statute makes no provision for a defendant's motion for immunity, or for the trial court to sua sponte grant immunity. Thus, a "prosecutor has no duty to grant a witness immunity so that [a] witness can testify for a defendant, and a defendant cannot compel a grant of immunity." *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995).

VII. CONCLUSION

In light of the foregoing analysis, we vacate the trial court's order denying defendant's motion to withdraw his guilty plea and remand for further proceedings regarding the admissibility of Dr. Fulero's and Ira Todd's proposed expert testimony on false confessions and police interrogation techniques (section IV), and for reconsideration of defendant's motion to withdraw his guilty plea after affording defendant an opportunity (1) to present attorney Gabi Silver's testimony regarding Smothers's statements to her concerning the Runyon Street homicides (section III), (2) to present expert testimony that satisfies the remaining requirements of MRE 702 (section IV), (3) to obtain discovery of Smothers's other homicide case files and to present admissible evidence revealed by that discovery (section V), and (4) allow Smothers the opportunity to testify if he does not exercise his rights under the Fifth Amendment. All proceedings on remand shall be conducted by the original trial court judge.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ David H. Sawyer

/s/ Christopher M. Murray