STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BAILEY,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 190227
Recorder's Court
LC No. 93-008238

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted his convictions by jury of second-degree murder, MCL 750.317; MSA 25.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of fifteen to forty years' imprisonment for murder and two years for felony-firearm. We affirm.

I

At approximately 3:10 a.m. on July 13, 1993, police officers responding to a radio call found Randall Bland's dead body lying near his running car. There were five bullet holes in the driver's side door of the car. Bland died from one gunshot wound.

At approximately 1:30 a.m. that morning, Bland and Darrell Owens had joined Carl Askew, defendant, codefendant Wayne Nino Brown and Gregory Mathews at Askew's home. While there, defendant and Bland became embroiled in a heated argument. At one point during the argument, defendant handed an unloaded pistol to codefendant, who one witness testified loaded the gun and offered it to Bland. When Bland refused the offer, defendant took the gun and left the house, only to return a few minutes later, apparently without the pistol. Bland and Owens departed after defendant reentered the home, and Askew went upstairs to use the telephone.

Mathews testified that after Bland left the house, codefendant wiped off the pistol while talking quietly with defendant. Although Mathews could not hear the details of the conversation, he did hear defendant urge codefendant not to "do it" near Askew's house and codefendant reply that he would

"wait and meet his car around the corner." According to Mathews, defendant and codefendant left upon seeing Bland and Owens walking toward the house. Codefendant was carrying the gun when they walked out of the house.

A day after the shooting, defendant walked into the police station and told officers that he had information about the murder but that he was not involved in committing the crime. Defendant told the police that codefendant gave him a handgun and requested that he dispose of it. Defendant eventually led the police to the house where the weapon was hidden. A ballistics expert opined that a bullet found at the crime scene was fired from the gun recovered by the police.

Over defendant's objection, the trial court admitted codefendant's confession as substantive evidence against defendant. Codefendant stated that defendant and Bland argued in a Burger King parking lot on the evening of the murder, and that Bland threatened to kill both defendant and codefendant. They resumed arguing when Bland joined defendant and codefendant at Askew's house later that night. Bland eventually departed, and defendant and codefendant left the house before he returned. Codefendant stated that although initially his idea, he and defendant decided to kill Bland. They saw Bland's car cross an alley and waited for him to park in his driveway. Defendant handed codefendant the pistol, and while defendant hid, codefendant shot Bland as he parked his car. Codefendant then fled the scene in defendant's car.

II

Defendant contends that the trial court erred in granting the prosecutor's motion in limine to introduce codefendant's confession as substantive evidence against defendant. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We will find 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. *Id.*

For a codefendant's statement to be admissible as substantive evidence against a defendant at trial, it must be admissible under the Michigan Rules of Evidence and not violate the defendant's constitutional right to confront the witnesses against him, US Const, Am VI, and Const 1963, art 1, § 20. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993); *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). In this case, the prosecutor offered codefendant's out of court statement to prove the truth of the matter asserted. Therefore, the statement is hearsay, and is inadmissible except as otherwise provided by the rules of evidence. MRE 801; MRE 802.

The trial court admitted codefendant's confession under MRE 804(b)(3) as a statement against penal interest. A hearsay statement is admissible under MRE 804(b)(3) when the declarant is unavailable and the statement "was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true." MRE 804(b)(3).

Defendant initially argues that codefendant's confession was not against his penal interest because he maintained that he feared for his life and thought that Bland would kill him. Contrary to defendant's assertion, however, the statements were clearly against codefendant's penal interest because he thoroughly implicated himself in the murder. Codefendant's admission that he decided to kill Bland, lay in wait at Bland's house and shot Bland when he drove up the driveway tended to subject him to criminal responsibility to the extent that a reasonable person would not have made the statements unless they were true. Therefore, the portion of codefendant's confession in which he implicates himself was admissible as substantive evidence against defendant. *Poole, supra* at 159.

Next, defendant contends that the portions of codefendant's confession implicating defendant were nevertheless inadmissible under MRE 804(b)(3) because the hearsay exception did not carry over to the non-self-inculpatory statements. The portions of a codefendant's statement that inculpate the defendant are admissible "only if the circumstances under which the statement was made vouch for its reliability." *Spinks, supra* at 491. Reliability is also the crucial factor in determining whether the admission of a codefendant's statement violates the defendant's right of confrontation. Admission of the hearsay evidence does not violate the Confrontation Clause if the declarant is unavailable and his statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception.[1] *Poole, supra* at 163; *People v Richardson,* 204 Mich App 71, 74; 514 NW2d 503 (1994). Courts must determine on a case by case basis whether the statement has the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause. *Poole, supra* at 163-164. A codefendant's statement is presumed unreliable. *Richardson, supra* at 75. To rebut the presumption, sufficient indicia of reliability must exist by virtue of the inherent trustworthiness of the statement; reliability may not be established by extrinsic, corroborative evidence. *Poole, supra* at 164.

In *Poole*, the Court set forth several factors to be considered in evaluating whether a declarant's statement against penal interest which inculpates the defendant bears sufficient indicia of reliability to be admissible.

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously and at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Poole, supra* at 165.]

These factors are not exclusive. Rather, in determining whether a statement is reliable, the court must consider both the totality of the circumstances surrounding the making of the statement and the content of the statement itself. *Id.*

After a review of the record, we find that the trial court did not abuse its discretion in admitting codefendant's entire statement under MRE 804(b)(3). Although codefendant made his statement to a police officer during a custodial interrogation, other factors favor admissibility. The trial court denied codefendant's motion to suppress his statement, finding that it was voluntarily made. In the statement, codefendant admitted to shooting Bland and limited defendant's role in the offense to planning the crime and providing the gun. Codefendant did not attempt to shift the blame to defendant but rather, at most, shared the blame. Although the fact that the statement was made during a police interrogation suggests that it may have been motivated by a desire to curry favor with the authorities, in this case codefendant's admission to being the shooter and planning the killing demonstrates that the statement is trustworthy because a reasonable person would not fully implicate himself in a crime unless he was telling the truth. Accordingly, we find that the trial court did not abuse its discretion in admitting codefendant's statement as substantive evidence against defendant because the circumstances surrounding the making of the statement and the statement itself demonstrate that it is reliable.

III

Next, defendant contends that the trial court abused its discretion in admitting witness Darrell Wendt's testimony from the preliminary examination. We disagree.

Under MRE 804(b)(1), a missing witness' testimony given at another hearing of the same or different proceeding is admissible if the witness is unavailable and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal case, a witness is unavailable if he is absent from the hearing and the proponent of his statement demonstrates that he exercised due diligence in producing the witness. MRE 804(a)(5). This Court will not set aside a trial court's determination of whether the prosecutor exercised due diligence unless it is clearly erroneous. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). The finding is clearly erroneous if, upon review, we are left with a definite and firm conviction that a mistake has been made. See *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

Upon careful review of the record, we conclude that the trial court did not clearly err in finding that the prosecution exercised due diligence in producing witness Wendt, who is defendant's brother. Contrary to defendant's assertion that the prosecutor waited too long before beginning the search, the record reveals that police officers undertook an extensive search for Wendt. A month before trial, police officers began searching for the witness and discovered that he had moved from the address provided in his statement to police. Officer Everett Monroe obtained a more recent address from the Department of Social Services for Wendt's live-in girlfriend, but was unable to contact Wendt at that address. Officers made numerous attempts to locate Wendt at the known addresses and also attempted to contact him through his girlfriend's mother. In addition, the officers checked numerous hospitals, jails and morgues. The record reveals that the prosecutor exercised due diligence in

producing the witness because the police did everything reasonable to locate Wendt. See *People v DeMeyers*, 183 Mich App 286, 291; 454 NW2d 202 (1990). Accordingly, the trial court did not abuse its discretion in admitting Wendt's prior testimony from the preliminary examination under MRE 804(b)(1) because Wendt was unavailable to testify at trial.

Defendant additionally argues that Wendt's testimony should have been excluded because it was not relevant and even if it was, the danger that it would confuse or mislead the jury outweighed its probative value. This issue is not preserved because defendant did not object to the evidence on these grounds. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, no manifest injustice will result from our failure to review these unpreserved challenges to the admission of evidence. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996).

IV

Defendant contends that the trial court erred in denying his motion for a directed verdict with respect to the charges of first-degree murder and felony-firearm. We disagree. In reviewing the denial of a motion for directed verdict, this Court views the evidence presented up to the time of the motion in a light most favorable to the prosecution, and determines whether a rational trier of fact could find the elements of the offense proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

For first-degree murder, the defendant must intend to kill and act with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). In order to convict a defendant as an aider and abettor, the prosecution must prove that (1) the defendant or some other person committed the crime, (2) the defendant encouraged or performed acts that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or acted with the knowledge that the principal intended its commission at the time he gave the aid and encouragement. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995)[2]. With regard to the felony-firearm charge, one who does not actually possess a firearm may be convicted of the offense as an aider and abettor if he aids and abets either the acquisition or the retention of the gun. *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996).

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find the elements of first-degree murder and felony-firearm proven beyond a reasonable doubt. In his confession, codefendant stated that although initially his idea, he and defendant decided to kill Bland. They saw Bland's car cross an alley and waited for him to park in his driveway. Defendant handed codefendant the pistol, and while defendant hid, codefendant shot Bland as he parked the car. From this evidence, a rational trier of fact could find beyond a reasonable doubt that defendant aided and abetted the commission of first-degree murder by providing codefendant with the murder weapon intending that he use it to kill Bland. *Usher*, *supra* at 232-233. The trier of fact could also find defendant guilty of felony-firearm because he gave the murder weapon to codefendant. *Eloby*, *supra* at 478. Accordingly, the trial court properly denied defendant's motion for a directed verdict. *Daniels*, *supra* at 665.

V

Finally, defendant contends that the trial court abused its discretion in sentencing him to a term that violated the principle of proportionality. We disagree. This Court reviews a sentencing decision for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 541; 505 NW2d 16 (1993).

A person convicted of second-degree murder may be sentenced to life or any term of years. MCL 750.317; MSA 28.549. In this case, the trial court elected to impose a sentence at the high end of the six to fifteen year guidelines' range calculated for defendant's offense. Because the sentence was within the guidelines' range, it is presumptively proportionate, *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), and defendant must demonstrate the existence of "unusual circumstances" which make the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

Upon review of the offense and the offender, we find that defendant has failed to rebut the presumption of proportionality. The instant offense was most severe because it involved the death of Randall Bland. The trial court's failure to consider defendant's lack of a prior record is not an unusual circumstance for purposes of rebutting the presumption of proportionality. *Piotrowski, supra* at 532-533. Likewise, the trial court's refusal to follow the probation department's recommendation is not an unusual circumstance because the ultimate sentencing decision is within the trial court's discretion. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). The sentence imposed by the trial court is proportionate to the seriousness of the offense and the offender and was a proper exercise of discretion.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] Although this Court has suggested that the penal interest exception is not "firmly rooted," no Michigan court has conclusively determined that the exception is sufficiently established to satisfy the Confrontation Clause. *Richardson, supra* at 77. We need not consider this issue in the instant case because codefendant's statement is reliable and therefore admissible under the alternate method.

[2] By contrast, an accessory after the fact is one who, "after obtaining knowledge of the principal's guilt after completion of the crime, . . . renders assistance in order to hinder the detection, arrest, trial, or punishment of the principal." *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992).