STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BERNARD PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 181208
Recorder's Court
LC No. 93-010504

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant was charged with alternative counts of first-degree felony-murder and premeditated murder. MCL 750.316; MSA 28.548. Following a jury trial, he was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553 (as a lesser offense to first-degree premeditated murder), and found not guilty of felony-murder. Following his conviction, defendant pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082, and was sentenced to a term of 15 to 22½ years' imprisonment. He appeals as of right. We affirm.

Defendant was tried jointly with a codefendant, Melvin Finley, but before separate juries. For his first claim on appeal, defendant argues that the trial court erred in admitting codefendant Finley's police statement as substantive evidence against him. We agree, but find the error harmless.

In order for Finley's statement to be admissible as substantive evidence against defendant, the statement must be admissible under the Michigan Rules of Evidence, and admission of the statement cannot violate defendant's rights under the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993).

Finley's statement, although hearsay, was admitted by the trial court as a statement against penal interest under MRE 804(b)(3). Although portions of Finley's statement are clearly against his penal interest, under MRE 804(b)(3), those portions that inculpate defendant, but which do not directly inculpate Finley, are admissible only if the circumstances under which the statement was made vouch for its reliability. *Poole*, *supra* at 161; *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Similarly, unless Finley's statement bears sufficient indicia of reliability,

admission of the statement violates defendant's constitutional right of confrontation. *Poole, supra* at 162. The requisite indicia of reliability must exist by virtue of the inherent trustworthiness of the statement itself and may not be established by extrinsic, corroborative evidence. *Id.* at 164.

Here, Finley's statement lacks an indicia of reliability. First, the statement was made to a law enforcement officer, in a custodial setting, at the officer's prompting. Second, it was made more than four months after the events referenced, thus allowing ample opportunity for reflection and fabrication. Third, in the statement, Finley admitted complicity in breaking and entering, but he attempted to minimize his role in the more serious matter of the killing of the victim. In fact, Finley's statement blamed defendant for the killing, while claiming that Finley tried to prevent defendant from killing the deceased. Fourth, the officer who obtained Finley's statement admitted that she told Finley before the statement was made that defendant had implicated Finley in the offense and that first-degree murder carried a penalty of life imprisonment. This information provided Finley with a motive to lie or distort the truth, not only to minimize his own culpability upon being informed of the seriousness of the matter, but also to exact revenge on defendant.

The above factors all favor a finding that the statement lacked indicia of reliability, and thus should not have been admitted. See *Poole, supra* at165. The only factor advanced on appeal in support of a finding of reliability is that the statement as a whole was against Finley's penal interest. However, reliability may not be inferred from the blanket categorization of a statement as being against penal interest. *People v Watkins*, 438 Mich 627, 653-655; 475 NW2d 727 (1991); *Spinks, supra* at 488. In light of the totality of circumstances surrounding the making of the statement and its contents, we conclude that Finley's hearsay statement lacks sufficient indicia of reliability to satisfy Confrontation Clause concerns and, therefore, was admitted in violation of defendant's right of confrontation. *Poole*, *supra*.

Nonetheless, admission of the statement may be considered harmless error if the record indicates beyond any reasonable doubt that the statement did not affect the jury's verdict. *Spinks, supra* at 493.

Here, codefendant Finley's statement and defendant's testimony at trial described two entirely different, irreconcilable series of events. Finley claimed that defendant, after illegally breaking into the victim's residence in order to perpetrate a larceny, deliberately killed the victim in order to prevent him from identifying defendant. In his statement to the police, Finley denied the occurrence of any sexual activity. Defendant, on the other hand, claimed that he was invited into the victim's residence and subsequently attacked the victim in self-defense with a cane only after the victim began making unwanted homosexual advances towards him. Defendant claimed that it was Finley who subsequently stabbed and killed the victim with a knife. At the close of proofs, defendant's request for a lesser offense instruction on voluntary manslaughter was granted, premised on defendant's theory, supported only by his testimony, that the victim's sexual advances caused him to act out with a "hot temper."

Finley's police statement, if believed, clearly established defendant's guilt of both first-degree felony-murder and premeditated murder. However, the jury acquitted defendant of both of those charges and instead found him guilty only of voluntary manslaughter. Had the jury believed Finley's

statement, it could not have logically found defendant guilty of only voluntary manslaughter while acquitting him of first-degree felony-murder or premeditated murder. Conversely, only defendant's contradictory testimony supported a guilty verdict of voluntary manslaughter. Thus, the verdicts reflect that the jury rejected codefendant Finley's statement and instead believed the testimony of defendant. We conclude, therefore, that the erroneous admission of codefendant Finley's statement did not affect the jury's verdicts and, thus, constituted harmless error.

Defendant next argues that he was denied a fair trial because of several instructional errors. Jury instructions are reviewed as a whole rather than extracted piecemeal in an effort to establish error. *People v Dumas*, 454 Mich 390, 396; __ NW2d __ (1997); *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Even if somewhat imperfect, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Dumas, supra*; *Wolford, supra*.

Defendant first argues that the trial court erred by failing to give a preliminary jury instruction on diminished capacity. MCL 768.29a(1); MSA 28.1052(1)(1); *People v Mangiapane*, 85 Mich App 379, 394-395; 271 NW2d 240 (1978). Because defendant did not preserve this issue by raising it in the trial court, relief may be granted only if the alleged error was outcome determinative. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Here, the issue of diminished capacity was presented in the context of defendant's claim that he lacked the capacity to premeditate murder. Similarly, defendant contended that he lacked the capacity to form the intent to rob, and thus could not be convicted of felony-murder. At the conclusion of proofs, the trial court instructed the jury on diminished capacity in accordance with CJI2d 6.3. The jury thereafter acquitted defendant of the two greater charged crimes and convicted him instead of only voluntary manslaughter, a crime that does not require any premeditated or specific intent. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Vicuna*, 141 Mich App 486, 494; 367 NW2d 887 (1985). Under these circumstances, defendant has failed to establish that the absence of a preliminary instruction on diminished capacity affected the outcome of the case. Accordingly, relief is not warranted.

Defendant next argues that the trial court erred in denying his request for a cautionary instruction on accomplice testimony, see CJI2d 5.6, with respect to codefendant Finley's statement. It is questionable whether CJI2d 5.6 is applicable where, as here, only the extra-judicial statement of the alleged accomplice was presented, not the accomplice's testimony. Assuming, however, that defendant was entitled to a modified instruction advising the jury to consider Finley's extra-judicial statement with greater caution, we find that any error in failing to give such an instruction was harmless beyond a reasonable doubt. As set forth above, it is evident from the jury's verdicts that the jury did not rely on Finley's statement. See *People v Tucker*, 181 Mich App 246, 256; 448 NW2d 811 (1989).

Defendant also argues that the trial court erred in failing to instruct the jury that he was entitled to use deadly force to repel a sexual assault. However, because defendant did not request such an instruction at trial, appellate relief is precluded absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Heflin*, 434 Mich 482, 513; 456 NW2d 10 (1990). The right to use deadly force to repel a sexual assault exists only when the victim is confronted with force that the person reasonably believes could result in imminent death or serious bodily harm.

Heflin, supra at 512-513. Because the trial court instructed the jury that defendant was entitled to use deadly force if he honestly and reasonably feared death or serious physical injury, we find that manifest injustice has not been shown.

Defendant also argues that he is entitled to a new trial because of cumulative error. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). However, because it is evident that the alleged errors did not affect the jury's verdicts, we conclude that reversal is not warranted on the basis of cumulative error. *Id.*

Defendant next argues that his habitual offender plea should be reversed because the trial court failed to personally advise him of the maximum possible prison sentence for that offense. MCR 6.302(B)(2). Defendant did not preserve this issue by raising it in an appropriate motion in the trial court. MCR 6.311(C). Even if the issue were preserved, however, relief would not be warranted because such information was imparted by defense counsel on the record at the plea proceeding. *Guilty Plea Cases*, 395 Mich 96, 114-115; 235 NW2d 132 (1975).

Finally, defendant argues that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant was convicted of killing another person. The record indicates that the victim was stabbed approximately thirteen times and also struck repeatedly with a blunt force object. Defendant has prior convictions for armed robbery and felony-firearm. In view of the circumstances surrounding the offense and defendant's prior criminal history, we hold that that defendant's 15 to 22½ year prison sentence does not violate the principle of proportionality.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin