

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY MONTAGUE,

Defendant-Appellant.

UNPUBLISHED

August 22, 1997

No. 183743

Recorder's Court

LC No. 94-6840

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). He was convicted of only voluntary manslaughter, MCL 750.321; MSA 28.553, and was sentenced to a term of imprisonment of seven to fifteen years. He now appeals as of right. We reverse.

Defendant became involved in an altercation with a neighbor, Darrell Cowan, after Cowan allegedly began harassing defendant by, for example, dumping an ashtray full of cigarette butts into defendant's barbecue. The altercation escalated, and eventually resulted in a bystander being shot and killed. It was unclear whether defendant or Cowan had been the instigator of the physical confrontation, and it was also unclear whether defendant or Cowan produced the firearm that later discharged, killing the bystander.

Defendant was charged with murder, and it was anticipated that Cowan would be a principal prosecution witness. However, prior to trial, Cowan was the victim of a severe assault. Michael Boyd was charged in connection with the assault. While in custody, Boyd gave a statement to police admitting that he had assaulted Cowan, but simultaneously asserting that he had done so only because defendant had, while in jail, telephoned Boyd and threatened that if he did not kill Cowan, defendant would harm Boyd and his loved ones.

Boyd did not testify at defendant's trial, asserting his Fifth Amendment privilege against self-incrimination in light of his involvement in the assault against Cowan. However, the prosecution attempted to introduce the substance of Boyd's "confession," which incriminated defendant, through the

testimony of the police officer who had interrogated Boyd. Defendant objected, but the trial court ruled that Boyd's statement qualified as an admission against penal interest and was, therefore, admissible as falling within an exception to the bar against hearsay testimony. Defendant was convicted of the crime set forth above.

On appeal, defendant again contends that the statements of Boyd were hearsay and should not have been admitted. The parties effectively agree that the statements in issue would normally constitute hearsay, which is defined as "a statement, other than the one made by the declarant while at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, they dispute whether the statements fall within the exception to the rule disallowing hearsay set forth at MRE 804(b)(3). This Rule of Evidence provides that, where a declarant is unavailable, as defined in MRE 804(a), a statement made by the declarant may be admissible where the statement

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 believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

We review the trial court's decision to admit statements pursuant to this rule of evidence for an abuse of discretion. *People v Barrera*, 451 Mich 261, 269: 547 NW2d 280 (1996).

We conclude that the trial court abused its discretion in admitting into evidence Boyd's statement where the circumstances surrounding Boyd's "confession" render it untrustworthy. As explained in *Barrera, supra*, at 272, for a statement to be properly admitted into evidence pursuant to MRE 804(b)(3), it must not only be against the declarant's penal interest, but the circumstances surrounding the utterance of the statement must also imply that the statement is trustworthy. Certain factors may enhance the appearance of trustworthiness, while other factors may undermine the trustworthiness of such a statement. Our Supreme Court, in *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1996), while stressing that all relevant factors should be considered, set forth the following non-exclusive list of specific factors that should be considered when evaluating the trustworthiness of a statement that is against the declarant's penal interest.

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 whom the declarant would likely speak the truth, and (4) uttered spontaneously 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 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.

Applying these factors in the present case, it becomes apparent that Boyd's "confession" is not a statement of sufficient trustworthiness to warrant its admission into evidence. There has been no allegation that Boyd's statement was not given voluntarily, a consideration that supports a finding that the statement was trustworthy. However, he made the statement not to "family, friends, colleagues, or confederates," *id.*, but to police officers at their prompting while he was being subjected to custodial interrogation. In fact, the record on appeal suggests that Boyd was told by the interrogating officers that they were not interested in prosecuting him, but in prosecuting defendant, and that Boyd formulated his version of the assault with this in mind. This implies that Boyd's statement was made to curry favor, and the fact that his version shifted blame to defendant also suggests a motive to lie.

Considering the totality of the circumstances, Boyd's "confession" does not appear particularly trustworthy. Boyd made a statement to police officers, at the instigation of police officers, while in custody, that minimized his own involvement and implicated defendant, which statement satisfied the articulated interest of the police in prosecuting defendant. As explained in a leading treatise on the matter, "[p]articular significance is attached to the fact that the declarant was at the time in the custody of law enforcement authorities While courts generally do not accord conclusive effect to the fact of custody, great weight is attributed to it." 2 McCormick, *Evidence* (4th ed; Practitioner Series), § 319, p 346. While these factors, considered in the aggregate, do not establish that Boyd fabricated the statement, they do certainly tend to undermine its trustworthiness. To again quote from McCormick, "if it appears that a declarant had some motive, whether of self-interest or otherwise, which was likely to lead to misrepresentation of the facts, the statement should be excluded." McCormick, *supra*, p 348. Certainly, such a statement is not sufficiently trustworthy so as to merit introduction into evidence without its speaker being subjected to cross-examination. We consider its introduction to be an abuse of discretion. *Barrera, supra*.

Finally, this evidentiary error may not be considered to have been harmless. Beyond the testimony of the officer who related Boyd's statements, no evidence implying that defendant attempted to assassinate a witness was introduced. Obviously, such incendiary testimony was highly prejudicial, and may not be deemed to have been harmless on any rational view of the record. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

In light of our resolution of this issue, we find it unnecessary to address the remaining issue raised by defendant on appeal.

Reversed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell