STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY MONTAGUE,

Defendant-Appellant.

UNPUBLISHED

No. 183743
Recorder's Court
LC No. 94-6840

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

MARKMAN, P.J. (dissenting).

I respectfully dissent. Because I do not agree with the majority that the trial court abused its discretion in admitting evidence of Boyd's confession, I would affirm defendant's conviction. Boyd's statement to the police was read into the record at trial by a police officer. The statement was as follows:

> About two days after a guy named Sneak [defendant] got arrested for killing a guy at the apartment building on Cass. He called me at a guy named Zeek's building. He told me that I was going to have to do some work for him. I asked him what he meant, and he told me he wanted a guy named Dee [Cowan] shot because he saw him do the shooting and was going to testify against him. I told Sneak [defendant] I never shot nobody before. Then he told me that I owed him, and that the same thing that happened to Ant [Anthony Dudley] would happen to me and my girl if I didn't do it. Before it went to court on the 24th, he just kept saying you owe me. I know where your family and girl lives. At about 2:30 p.m. on Sunday I went to Dee's [Cowan's] apartment and told him he was wrong for what he was fixing to do. We started arguing and I told him that I had to do what I had to do. I pulled my gun out and he took off running into a room of the apartment . He slammed the door and I tried to kick it open but couldn't, so then I shot through the door and I heard him say, "You shot me." Then I got scared and left.

The trial court admitted this statement into evidence on the basis that the statement was made against Boyd's penal interest and that it was otherwise trustworthy. Accordingly, the trial court believed it was admissible under MRE 804(b)(3) as an exception to the hearsay rule. This exception provides as follows:

> *Statement against interest.* A statement which 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, or to render invalid a claim by the declarant against another, 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.

Boyd's statement was indisputably contrary to his own legal interest. In *People v Barrera*, 451 Mich 261, 269-71; 547 NW2d 280 (1996), the Supreme Court held that the phrase "tended to subject the declarant to . . . criminal liability" in MRE 804(b)(3) included a broad array of inculpatory statements. For a statement to be made against one's penal interest, it need not amount to a complete or direct confession or prove the declarant's guilt by itself. Rather, the statement need only be a "brick in the wall" of evidence to prove the declarant's guilt. *Id*. at 270-271. Further, a reasonable person in the declarant's shoes must have realized that the statement could implicate the declarant in a crime. *Id*. at 271-272. I do not believe that Boyd could not have failed to recognize that his statement exposed himself to the possibility, indeed likelihood, of a prosecution for first-degree murder.[1]

Defendant argues and the majority apparently agrees that Boyd's statement, even if parts of it may fall within the scope of MRE 804(b)(3), should not have been admitted in its entirety; only those parts that implicated Boyd in the crime should have been admitted, not those parts that allegedly implicated only the defendant. By this view, while the final five sentences of Boyd's statement may have been within the scope of MRE 804(B)(3), the first seven sentences fall outside. I disagree with this remarkably fine parsing of both the statement and the trial court's exercise of its judgment.

In *People v Poole*, 444 Mich 151, 161, n 17; 506 NW2d 505 (1993), the Supreme Court stated that the so-called "carry-over" portions of a statement against legal interest will also be included within the scope of MRE 804(B)(3) if these were made "in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry" such that the statement "as a whole is clearly against the declarant's penal interest and as such is reliable." *Id*. at 161-62.

Here, Boyd's statement consisted of a unified narrative of events made to the police describing his role in Cowan's shooting. Further, the verboten (according to the majority) seven sentences of the statement provide necessary context for the non-verboten five sentences of the statement. A fact-finder in the instant case hearing only the non-verboten part of the statement would be utterly confused as to its relevance absent the verboten part of the statement. Indeed, to exclude the verboten part of the statement is to considerably diminish the believability of the non-verboten part of the statement, i.e. that Boyd, an individual with utterly no involvement or stake in a fatal dispute between defendant and the

victim, witnessed by Cowan, would, for no apparent reason, attempt to kill Cowan shortly before he was to testify in defendant's trial. At the very least, I interpret *People v Watkins*, 438 Mich 627, 630; 475 NW2d 727 (1991) to allow the admission into evidence of those parts of a unified statement against legal interest which provide the fact-finder with some context or basis for assessing the credibility of the statement as a whole.[2] The majority's interpretation of the `statement against interest' hearsay exception is sufficiently narrow that, had it been applied by the trial court, the prosecutor quite likely would have chosen to withhold from the jury the entirety of Boyd's statement. In the process, the jury would have been deprived of valuable evidence enabling them to more accurately assess the truth of what occurred in this criminal episode.

In addition, the verboten part of Boyd's statement was, in fact, contrary to his self-interest by "tending to subject" him to criminal liability. First, it implicated himself in a *conspiracy* to murder Cowan rather than merely in an isolated effort to carry out this act. *Williamson v United States*, 512 US 594; 114 S Ct 2431, 2437; 129 L Ed 2d 476 (1994). Second, it made clear beyond any doubt that his conduct was fully premeditated. Therefore, even if we draw as fine a line between the diverse parts of Boyd's statement as the majority does in this case, the entire statement satisfies the express language of MRE 804(B)(3). The verboten part of Boyd's statement is genuinely necessary to fully assess the extent to which the entirety of his statement is contrary to his penal interest.

Finally, I believe that additional evidence of the reliability of Boyd's statement consists both of the timeliness of his confession, made only two days after Cowan's shooting, and by the corroboration of three eyewitnesses to the action that Boyd described in his statement. That the eyewitnesses may not have known what prompted Boyd's conduct does not mitigate that they were able to corroborate a principal part of the events which he described.[3] Nor do I agree with the majority that the "totality of the circumstances," *Poole*, *supra* at 165, otherwise fail to conduce in favor of the reliability of Boyd's statement. Boyd's entire statement was deemed by the court after the *Walker* hearing to have been offered voluntarily; the statement was made in relatively contemporaneous fashion with the events described; and the verboten part of the statement did not occur in response to any special prompting of the police but rather occurred as part of a unified and internally coherent recitation of events. In my judgment, such circumstances suggest that the "statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant." *Id*.

Therefore, I respectfully dissent and would find that the trial court did not abuse its discretion in admitting Boyd's full statement into evidence.

/s/ Stephen J. Markman

[1] While the defendant contends that Boyd's statement indicates that he agreed to shoot Cowan only because he "owed" defendant and defendant threatened Boyd and his girlfriend, the statement nevertheless implicates Boyd in the shooting and the plan to kill Cowan. A reasonable person in Boyd's shoes would have realized clearly that the statement given to the police "thoroughly inculpated himself" in

a serious criminal act. *People v Petros*, 198 Mich App 401, 415; 499 NW2d 784 (1993), lv den 444 Mich 904 (1993). Even if Boyd raised the possibility of a duress defense, the statement was still against his penal interest because the defense would not have been, and could not reasonably have been perceived as, completely exculpatory, about Boyd's role in the crime. Duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996), lv den ___ Mich ___ (3/14/97). Further, despite the so-called "threats" made by defendant to Boyd, there seems to be little serious disinclination on Boyd's part to repay his alleged "debt" to defendant by shooting Cowan. Indeed, his initial response to defendant's overture to shoot Cowan was to tell defendant, "I never shot nobody before." In my judgment, an individual in Boyd's circumstances could not have reasonably supposed that *any* duress defense would have been nurtured by this statement, much less a defense that would resulted in his full exoneration. *Petros, supra* at 416. "A reasonable declarant would recognize the disserving effect" of this confession. *Id*., citing *State v Kiewart*, 135 NH 338, 344; 605 A2d 1031 (1992).

[2] "If it has a close narrative and logical connection to the salient statement, then the balance of what was said may add meaning or dimension to the salient statement (in effect enhancing the against-interest element) or provide more facts that in context further impair the interest of the speaker. To this extent, the balance of what was said seems to satisfy the against-interest requirement. A court following the lead of *Williamson* [*v United States*, 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994)] could admit the balance for such reasons, and *Williamson* was careful to say that facially neutral statements could fit the exception if in context they are against the interest of the speaker." Mueller & Kirkpatrick, Modern Evidence §8.62 (1995).

[3] Additionally, I note that, as in *Petros*, *supra*, at 417, Boyd testified at an earlier *Walker* hearing and denied having made the alleged statement. Such testimony was fully presented to the jury. The availability to the jury of this testimony, which was consistent with what *defendant* argued, considerably dilutes any Sixth Amendment confrontation concerns that may be raised by Boyd's hearsay statement. *Id*. at 417-8.