

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE ROBARD MANLEY,

Defendant-Appellant.

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UNPUBLISHED

October 3, 1997

No. 191775

Recorder's Court

LC No. 93-009569-FC

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to commit first-degree criminal sexual conduct, 750.520(g)(1); MSA 28.788(7)(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to mandatory life imprisonment for the first-degree murder conviction, fifteen to thirty years' imprisonment for the assault with intent to commit murder conviction, ten to thirty years' imprisonment for the assault with intent to commit first-degree criminal sexual conduct conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We reverse.

Defendant first argues that the trial court erred by admitting into evidence a written confession of a nontestifying codefendant that alleged that defendant intended to commit a robbery and in the course thereof killed one of the victims. We agree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. This Court will find an abuse of discretion only if an unprejudiced person, considering the fact on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

For a nontestifying codefendant's statement to be used as evidence against a defendant, the statement must be admissible under the Michigan Rules of Evidence, and it must not violate the defendant's constitutional right of confrontation.<sup>1</sup> *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). Although we would find that the statement was admissible pursuant to MRE 804(b)(3),

we reluctantly must conclude that the admission of this evidence violated defendant's right to confrontation.

In determining whether the statement of a nontestifying codefendant violates a defendant's right to confrontation, courts must decide on a case by case basis whether a statement against penal interest that also inculcates an accomplice bears sufficient indicia of reliability to provide the trier of fact a satisfactory basis for evaluating its truth and whether it has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns. *Poole, supra* at 163-164. Further, this determination of reliability must be based upon the inherent trustworthiness of the statement and may not be established through the use of extrinsic, corroborative evidence. *Id.* at 164. Our Supreme Court in *Poole* identifies a nonexhaustive list of factors that either favor or disfavor admissibility. *Id.* at 165.

In this case, plaintiff candidly admits that none of the factors that favor admissibility and one of the factors that weighs against admissibility are present in this case. Plaintiff's sole argument to support admissibility is that the statement, when compared to the testimony of the surviving victim, bears a strong indication of reliability. Were we at liberty to analyze the statement on this basis, we would agree. However, this involves the use of extrinsic corroborative evidence, which is not permitted. *Id.* at 164. Analyzed absent any extrinsic corroborative evidence, the statement at issue, which was given during a police interrogation and absolves the maker of the statement from any involvement in the actual shooting of the victims and places the blame for those acts on defendant and another codefendant, does not meet the test for reliability set forth in *Poole*.<sup>2</sup> See also *People v Spinks*, 206 Mich App 488; 522 NW2d 875 (1994).

Furthermore, we conclude that the error in this case was not harmless. A violation of the Confrontation Clause is not harmless if average jurors would have found the prosecution's case significantly less persuasive had the statement at issue been excluded. *Spinks, supra* at 493. Here, as in *People v Watkins*, 438 Mich 627; 475 NW2d 727 (1991), the jury, while deliberating, requested copies of the nontestifying codefendant's statement. Because the jury was specifically concerned with the improperly admitted confession, we cannot conclude that the error was harmless. *Id.* at 667.

To the extent they may be relevant for retrial, we have examined defendant's remaining arguments, most of which are unpreserved, and find them to be without merit.

Reversed.

/s/ Jane E. Markey  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra

<sup>1</sup> US Const, Am VI; Const 1963, art 1, § 20.

<sup>2</sup> Although plaintiff argues that *Williamson v United States*, 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994) undermines the basis for our Supreme Court's holding in *Poole* that extrinsic, corroborative evidence cannot be employed when deciding a statement's reliability, *Poole* nonetheless represents the law in Michigan and we are bound to follow it.