

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBORAH ANN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 24, 1999

No. 209821

Grand Traverse Circuit Court

LC No. 97-007396 FH

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

A jury convicted defendant of two counts of perjury committed in court, MCL 750.422; MSA 28.664, and the trial court sentenced her to concurrent terms of imprisonment of five to fifteen years for each conviction. Defendant appeals as of right. We affirm defendant's conviction on Count I, but reverse defendant's conviction on Count II.

Defendant argues that the trial court abused its discretion in excluding from evidence the prior testimony of defendant's son. We agree. Defendant's son invoked his Fifth Amendment privilege against self-incrimination at defendant's trial, and defendant then sought to admit his prior testimony under MRE 804(b)(1), which provides that when a declarant is unavailable as a witness, testimony given by the declarant in a prior proceeding may be admitted if the party against whom the evidence is being offered had an opportunity and similar motive to develop the testimony at the prior proceeding.

Defendant's son was unavailable as a witness because he invoked his Fifth Amendment privilege against self-incrimination. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). The trial court held that the proffered evidence met the requirements of MRE 804(b)(1) because it consisted of testimony given by defendant's son at a hearing at which he was questioned by the prosecutor. The court excluded the evidence, however, because the court concluded that it lacked any guarantee of trustworthiness and appeared to be false. When statements of an unavailable declarant are offered against a criminal defendant, the statements must meet not only the requirements of the Michigan Rules of Evidence, but also must bear adequate indicia of reliability so that the defendant's Sixth Amendment right to confront prosecution witnesses is not violated. *Meredith*, *supra* at 67. In that context, our Supreme Court has held that "the reliability requirement is satisfied 'without more' if the

proposed testimony falls within a firmly rooted exception to the hearsay rule.” *Id.* at 69. The Court also held that MRE 804(b)(1) was a firmly rooted exception to the hearsay rule. *Id.* at 69-70. Where proffered hearsay evidence of an unavailable declarant satisfies the requirements of MRE 804(b)(1), it bears adequate indicia of reliability such that it may be used against a criminal defendant without violating the defendant’s right of confrontation. Therefore, we conclude that the trial court erred in requiring an additional showing of reliability under the circumstances of this case.

An evidentiary error is not a basis for reversal unless the error was harmless. MCR 2.613(A); MCL 769.26; MSA 28.1096. Recently, our Supreme Court articulated that in order for a preserved nonconstitutional evidentiary error to warrant reversal, the error must have more probably than not resulted in a miscarriage of justice. *People v Lukity*, ___ Mich ___; ___ NW2d ___ slip op at 11-12 (1999).¹ The proffered evidence in this case consisted of prior testimony of defendant’s son that he tricked defendant into signed two savings bonds. This evidence was central to defendant’s case regarding Count II, which charged her with perjury for making false statements under oath regarding two bonds that had been placed into conservatorship but had been redeemed in 1996. Defendant acknowledged that her signature appeared on the bonds and testified that her son later explained to her how her signature was placed on the bonds. Her son’s prior testimony was necessary to completely inform the jury of her defense that her son had tricked her into signing those two bonds. We cannot conclude that it was more probable than not that the exclusion of evidence central to defendant’s case did not affect the jury’s verdict. Therefore, the error was not harmless and requires reversal of defendant’s conviction on Count II. However, her son’s prior testimony also indicated that he did not know what had happened to the third bond. Count I charged defendant with perjury for making false statements under oath regarding that bond. Defendant testified that, at the time she made those statements, she did not recall that she had redeemed that bond. Her son’s testimony was not important to this defense, and the exclusion of this evidence was harmless error with regard to Count I, and does not require reversal of defendant’s conviction of that charge.

Defendant also argues that the trial court erred in refusing to grant defendant’s proposed jury instructions regarding the falsity element of perjury. We review claims of instructional error de novo, reviewing the jury instructions as a whole to determine whether any error requiring reversal exists. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999); *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant’s rights. *Bartlett, supra* at 143-144.

Here, the trial court instructed the jury according to the standard instruction regarding perjury found in CJI2d 14.2. We note that although CJI2d 14.1 is the instruction for perjury committed in court, the instruction given by the trial court was substantially the same, and adequately informed the jury of the elements of perjury. Defendant requested that the trial court add an instruction regarding the requirement that the prosecutor prove the contradiction of defendant’s statements by presenting strong corroborating evidence of the truth of the contradiction. This instruction was also requested by the defendant in *People v McIntire*, 232 Mich App 71, 115-117; 591 NW2d 231 (1998). In that case, this Court noted that such an instruction could be given because it is an accurate statement of the law,

People v Cash, 388 Mich 153, 162; 200 NW2d 83 (1972), but that the standard instruction given by the court adequately informed the jury of each of the elements of perjury; therefore, the instruction fairly presented the issues tried and sufficiently protected the defendant's rights. We reach the same conclusion in this case. Defendant also requested an instruction that defendant's statements must have been intentionally false, or not made in good faith, in order for the jury to convict defendant. The trial court refused to grant this instruction, but did modify the standard instruction regarding the falsity element to inform the jury that the prosecutor must prove that defendant willfully made a false statement. This instruction adequately informed the jury of the requirement that the statement must be intentionally false, and we find no error in the trial court's refusal to grant defendant's proposed instructions.

Defendant next argues that the trial court erred in denying her motion for a directed verdict because the prosecutor failed to present sufficient evidence of the materiality or the falsity of defendant's statements. In reviewing a trial court's ruling on a motion for a directed verdict, we view the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). We conclude that the trial court correctly denied defendant's motion for a directed verdict. When viewed in a light most favorable to the prosecutor, the evidence presented was sufficient to allow a rational trier of fact to find that all the elements of perjury had been proved beyond a reasonable doubt. ²

Defendant finally argues that her sentences of five to fifteen years were disproportionate because she was a nonviolent offender and because the court considered as a sentencing factor its belief that defendant had committed perjury during her trial. We review the sentences to determine whether the sentencing court abused its discretion by violating the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). This principle requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* There are no sentencing guidelines for perjury. *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996). Defendant's sentences of five to fifteen years were not an abuse of discretion. Our Supreme Court has held that it is proper for a sentencing court to consider whether a defendant committed perjury during trial where there is a rational basis in the record for concluding that the defendant willfully made a flagrantly false statement on a material issue. *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995). Our review of the entire record indicates that the court had a rational basis for concluding that defendant had committed perjury during trial. Also, considering the serious nature of the crime of perjury, the importance of deterrence, and defendant's previous three felony convictions, we conclude that defendant's sentences were proportionate to the circumstances surrounding the offense and the offender.

Affirmed in part and reversed in part.

/s/ Gary R. McDonald

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

¹ The Supreme Court justified its decision by stating:

[MCL 769.26; MSA 28.1096] places the burden on the defendant to demonstrate that “after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.” We agree with the *Mateo* Court’s holding that reversal is only required if such an error is prejudicial and that the appropriate inquiry “focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.” [*Id.* at 12-13 (citations omitted).]

² The elements of perjury are (1) the administration to the defendant of an oath authorized by law, by competent authority; (2) an issue or cause to which the facts sworn are material; and (3) willfully false statements or testimony regarding those facts. *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (1996). Regarding the first element, the probate court reporter testified that defendant was properly placed under oath at the probate court hearing. The second element, materiality was also satisfied. A statement is material “if it could have affected the course or outcome of the proceeding.” *Kozyra, supra* at 432. The trial court correctly held that defendant’s statements regarding the status of the bonds placed into the conservatorship were material because the very purpose of the probate court hearing was to determine the status of those bonds. Also, regarding the final element, the prosecutor presented sufficient evidence that defendant’s statements were intentionally false. The prosecutor presented testimony and documentary evidence that demonstrated that defendant redeemed the bonds in 1994 and 1996 and used the funds to purchase two vehicles, and that defendant stated under oath that she did not discover that the bonds were missing until after she received notice of the probate court hearing in 1997.