STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN FRANCIS RUSSELL,

Defendant-Appellant.

UNPUBLISHED
November 9, 1999

No. 209466
St. Clair Circuit Court
LC No. 97-002026 FH

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of conspiring to break into or enter a motor vehicle with the intent to steal property valued over $5, MCL 750.157a; MSA 28.354(1), and aiding and abetting the breaking into or entering a motor vehicle with the intent to steal property valued over $5, MCL 750.356a; MSA 28.588(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to two terms of two to ten years' imprisonment, to be served consecutively to the remainder of a term for defendant's parole violation. Defendant appeals as of right, and we affirm.

Defendant first argues that the erroneous admission of statements made by two codefendants, Troy Russell and Randy Russell, violated the Confrontation Clause of the federal and state constitutions, US Const, Am VI; Const 1963, art 1, § 20, thereby requiring a new trial. We disagree. We review constitutional issues de novo. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

The statements of Troy Russell and Randy Russell were unsworn out-of-court statements that were offered by the prosecutor to establish the truth of the matter asserted. MRE 802 provides that hearsay is inadmissible as substantive evidence except as the rules otherwise provide. MRE 804(b)(3) creates an exception for a hearsay statement "that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability … that a reasonable person in his position would not have made the statement unless he believed it to be true." When a declarant makes a statement that implicates both himself and another in a crime, the portion implicating the other person is admissible under MRE 804(b)(3) where the inculpation is made in the context of a narrative of events at the declarant's initiative without any prompting. *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993). Where a statement is made to the authorities

while the declarant is in custody, the trial court should consider the relationship between the declarant and inculpated party, whether the statement was voluntary after being advised of *Miranda*[1] rights, and any evidence that the statement was made in order to curry favor with authorities. *People v Barrera*, 451 Mich 261, 275-276; 547 NW2d 280 (1996). Even if a statement falls within an exception to the hearsay rule, it must nonetheless satisfy the requirements of the Confrontation Clause in order to be admissible at trial. The admission of an out-of-court statement by an unavailable codefendant does not violate the clause if the statement bears sufficient indicators of reliability. *Poole, supra* at 163.

We conclude that the statement by Troy Russell had sufficient indicators of reliability to be admissible. Troy Russell made the statement as part of a narrative of events which subjected him to criminal liability. *Id.* at 161-165. Although the statement was given during police custody, the circumstances do not indicate that it was made to curry favor with the authorities. Troy Russell's statement was principally self-inculpatory because he admitted to committing the actual break-in and assigned defendant the minimal role of "getaway driver." There was no attempt to shift blame to defendant, and the statement was given within a few hours of the break-in. Based on the totality of the circumstances, the admission of Troy Russell's statement did not violate the Confrontation Clause of the federal and state constitutions. *Poole, supra*.

The statement of Randy Russell, however, did not bear sufficient indicators of reliability to warrant admission. This statement inculpated defendant to a greater degree than the declarant himself. There was the strong possibility that the statement was given to curry favor with the authorities. Accordingly, the statement was erroneously admitted. *Poole, supra*. However, there was strong, untainted evidence of defendant's guilt. We conclude that the erroneous admission of Randy Russell's statement was harmless error. *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994).[2]

Defendant next argues that there was insufficient evidence to convict him of the charges. We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of breaking or entering a motor vehicle with the intent to steal property valued over $5 are: (1) the defendant entered or broke into a vehicle; (2) he entered or broke into the vehicle with the purpose or intent to steal or unlawfully remove property; and (3) the defendant intended to remove the property valued over $5. *People v Nichols*, 69 Mich App 357, 359; 244 NW2d 335 (1976). To support a conviction of aiding and abetting, the prosecution must demonstrate that (1) the defendant or some other person committed the charged crime; (2) the defendant gave encouragement or performed acts that assisted the commission of the crime; and (3) the defendant, at the time he gave aid or encouragement, intended the commission of the crime or knew that the principal intended its commission. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). A defendant's intent may be inferred from factors such as "a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995).

Even excluding the statement of Randy Russell from consideration, there was sufficient evidence to support defendant's aiding and abetting conviction. Aside from the statement of Troy Russell, the following evidence, viewed in the light most favorable to the prosecution, supported the conviction: (1) defendant admitted that Troy committed the charged crime; (2) defendant admitted that the agreement to commit the break-in was made in Marine City and action was taken to obtain the proper tools; (3) defendant agreed to assist by picking up the individuals who would commit the break-in; (4) defendant was observed driving near the car dealership shortly after the break-in; and (5) defendant lied to a plainclothes officer when he stated that he lived at a home located near the dealership. This Court will not disrupt the jury's resolution of any credibility disputes when deciding whether sufficient evidence to sustain a conviction existed. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

The aforementioned evidence was also sufficient to support defendant's conviction for conspiracy, which required the prosecution to show that defendant specifically intended to combine with others to accomplish an illegal objective. *People v Whitney*, 228 Mich App 230, 258; 578 NW2d 329 (1998); MCL 750.157a; MSA 28.354(1). The credibility of defendant's contradiction of the testimony of police officers was resolved by the jury, and we will not disturb its resolution. *DeLisle, supra*.

Affirmed.

/s/ Harold Hood
/s/ Kathleen Jansen

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Defendant also argues that "carry over" portions of a declarant's statement which inculpate a codefendant are inadmissible pursuant to *United States v Williamson*, 512 US 594, 114 S Ct 2431; 129 L Ed 2d 476 (1994). The *Williamson* Court expressly noted that inculpatory statements were to be examined on a case-by-case basis and the holding would not eviscerate this exception. Furthermore, our Supreme Court examined the *Williamson* decision in *Barrera, supra,* and did not adopt the narrow interpretation urged by defendant.