

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARDELL ROBINSON, JR.,

Defendant-Appellant.

UNPUBLISHED

March 30, 2001

No. 219686

Jackson Circuit Court

LC No. 98-087785-FC

Before: Holbrook, Jr., P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant was charged with open 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), for killing Michael Cotton. Following a jury trial, he was convicted of manslaughter, MCL 750.321; MSA 28.553, and the felony-firearm charge. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to a term of twenty to thirty years' imprisonment for the manslaughter conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues the trial court violated his federal and state right to confrontation by admitting hearsay statements into evidence. We review a trial court's decision to admit evidence for abuse of discretion, and review the constitutional issue de novo. *People v Stephen Smith*, 243 Mich App 657, 669, 682; ___ NW2d ___ (2000). A defendant has a right to confront the witnesses against him, but admitted statements do not violate that right if they possess the particularized guarantees of trustworthiness which the Confrontation Clause demands. See US Const, Am VI; Const 1963, art 1, § 20; *People v Poole*, 444 Mich 151, 163-164; 506 NW2d 505 (1993). Reliability can be inferred without more in a case where the contested evidence falls within a firmly rooted hearsay exception. *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998). In this case, each of the two challenged witnesses' statements was within one of the exceptions to impermissible hearsay.

The first challenged statement was admitted by the trial court after the court found the prosecutor had exercised due diligence in attempting to locate a witness and allowed the witness' testimony from the preliminary examination to be read into the trial record. A trial court's determination of due diligence is a factual matter and the court's findings will not be reversed unless clearly erroneous. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

The prosecutor testified that attempts were made to locate the witness (or information of his whereabouts) at his last known address, the homes of his relatives, and corrections rosters. This is not a case where the prosecutor failed to follow up on any leads or ignored information he already had. See *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). “The test is whether the proponent of the evidence made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it.” *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). The trial court did not abuse its discretion in finding that the prosecution acted with due diligence and that the witness was unavailable; therefore the witness’ former testimony was not impermissible hearsay and thus did not violate the Confrontation Clause. MRE 804(b)(1); *Meredith*, *supra* at 71.

The other challenged statement, made by the victim, implicated defendant as the shooter and was admitted into evidence as an excited utterance. MRE 803(2) defines an excited utterance as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The question is not strictly one of time, but of the possibility for conscious reflection and the capacity to fabricate. *People v Larry Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). Whether a statement made in response to questioning should be excluded depends on the circumstances and whether it appears that the statement was the result of reflective thought. *Id.* at 553. Here, the victim made the statement several times to a number of witnesses minutes after he was shot, and the statement related directly to the startling event – being shot. There was no time between the event and the statement in which to reflect and fabricate the content of the statement. The question, “Who did this?” was not suggestive and thus does not exclude the answer, “Ardell,” from the definition of an excited utterance. The trial court is given wide discretion in its determination that the declarant was still under the stress of the event, and did not abuse its discretion in admitting the statement under this exception. *Id.* at 552. Because the statement was excepted from hearsay, defendant’s right of confrontation was not violated. *Meredith*, *supra*.

Defendant next argues that he was denied effective assistance of counsel at sentencing because defense counsel did not present character witnesses on defendant’s behalf. To merit reversal of an otherwise valid conviction, defendant must show that counsel’s representation fell below an objective standard of reasonableness and so prejudiced defendant that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court will not second-guess counsel’s trial strategy. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 542 NW2d 3 (1994). At the evidentiary hearing, defense counsel testified that defendant refused to provide any information when counsel asked, in person and by letter, what defendant would like to have presented at the sentencing hearing. Defense counsel’s stated trial strategy, to limit the proofs at sentencing to errors in the PSIR, has not been shown by defendant to be unsound. Furthermore, defendant has not shown any resulting prejudice to his case because the trial court ultimately denied resentencing despite the additional character witnesses testifying at the evidentiary hearing.

Finally, defendant argues that his sentence was disproportionate and was based on the trial court independently finding defendant guilty of murder. This Court reviews the sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). A trial court does not abuse its discretion in giving a

sentence within the statutory limits when an habitual offender demonstrates an inability to conform his conduct to the law of society. *Hansford, supra* at 326. Because the statutory maximum for the underlying felony of manslaughter was fifteen years, MCL 750.321; MSA 28.553, the third habitual offender statute provides for a maximum sentence of thirty years. MCL 769.11; MSA 28.1083. At both the sentencing hearing and the evidentiary hearing, the trial court especially noted the “egregious conduct” of defendant and the minimal likelihood of his rehabilitation. Thus, the trial court did not abuse its discretion in sentencing defendant because the sentence was within the statutory limits, and the court’s reasoning showed defendant was unable to conform to the laws of society.

A sentencing judge is not permitted to make an independent finding of a defendant’s guilt on another charge, or to consider an offense of which defendant was found not guilty, and use that as a basis for justifying a sentence. *People v Zuccarini*, 172 Mich App 11, 17; 431 NW2d 436 (1988). However, consideration of the underlying facts of the offense is not precluded at sentencing so long as those facts are sufficiently reliable. *People v Ewing (After Remand)*, 435 Mich 443, 453; 458 NW2d 880 (1990). In this case, we find nothing in the record supporting defendant’s assertion that the trial court made an independent finding of guilt on the murder charge and sentenced defendant on the basis of that finding. The trial court did not depart from the statutory sentencing limits for manslaughter, and because defendant was charged with open murder, he had the opportunity to rebut the same facts considered by the sentencing court. The trial court’s comments that defendant, in fact, killed the victim and that incarceration was the only deterrence that might work merely reflect its reasoning for sentencing defendant to the maximum sentence within the limits. The trial court correctly concluded that defendant could not conform his conduct to that of society, and therefore did not abuse its discretion in sentencing him to the maximum set by the statute.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald
/s/ Henry William Saad