STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUS G. ZOYIOPOULOS,

Defendant-Appellant.

UNPUBLISHED
September 24, 2002

No. 232819
Wayne Circuit Court
LC No. 99-008892

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of arson of a dwelling house, MCL 750.72, and insurance fraud, MCL 500.5411. The trial court sentenced him to three years' probation and ordered him to perform 100 hours of community service and make restitution. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was tried jointly with Dale Maxwell. The prosecution's theory was that defendant hired Maxwell to set fire to a house that defendant owned and was in the process of remodeling. The evidence against defendant came primarily from Judith Donnelly, and to a much lesser extent, Karen Pacurai. Defendant's claim on appeal is that Donnelly's testimony was inadmissible hearsay that violated his right of confrontation and that, absent the testimony, there was insufficient evidence to sustain his convictions.[1] We disagree.

The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 290; 531 NW2d 659 (1995). The right to confront one's accusers is a constitutional right. *People v Tanner*, 222 Mich App 626, 632; 564 NW2d

[1] While defendant offers the bald assessment that Pacurai's testimony was also "patently inadmissible," his primary claim regarding her testimony is that it contained no declaration by Maxwell that implicated defendant.

197 (1997). Constitutional issues are reviewed de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999).

MRE 804 sets forth exceptions to the hearsay rule when, as it was undisputed in this case, the declarant is unavailable as a witness. MRE 804(b)(3) allows the admission of certain statements against the declarant's interests:

> "(3) *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."

In *People v Poole*, 444 Mich 151, 154; 506 NW2d 505 (1993), our Supreme Court held that under certain circumstances, a declarant's hearsay statements against penal interest that also implicate another person may be admissible as substantive evidence against the other person. *Poole* employed a two-part inquiry: (1) whether the statement is admissible as a matter of the law of evidence, and (2) whether its admission would violate the accused's right of confrontation. *Id.* at 162.

The first inquiry focuses on the reliability of the hearsay statement and takes into consideration its content and the circumstances under which the statement was made. *Id.* at 160-161. The *Poole* Court concluded that the declarant's statement in that case was reliable—and hence admissible against the accused under MRE 804(b)(3)—because the declarant's inculpation of his accomplice was made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, and the statement as a whole was clearly against the declarant's penal interest. *Id.* at 161.

In this case, Maxwell's statements were made to a long-time friend. Although they were made in response to Donnelly's questions, the circumstances were not akin to a custodial interrogation and Maxwell had no reason to curry favor with Donnelly. More importantly, the statements were highly damaging to Maxwell himself, suggesting that they were reliable. See *People v Beasley*, 239 Mich App 548, 555-556; 609 NW2d 581 (2000). On balance, we conclude that the statements were sufficiently reliable to be admissible under MRE 804(b)(3).

With regard to the second inquiry, the *Poole* Court held that admission of a hearsay statement by an unavailable declarant does not violate a defendant's right to confront his accusers if the statement falls within a firmly rooted hearsay exception or if it bears adequate indicia of reliability. *Poole*, *supra* at 162-163. Michigan has not recognized a declaration against interest as a "firmly rooted exception." *People v Schutte*, 240 Mich 713, 718; 613 NW2d 370 (2000). The statements must therefore be examined to determine whether they bear sufficient indicia of reliability. In this regard, the *Poole* Court stated:

> "In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it

to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.

"The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates – that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.

"On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

"Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant." [444 Mich at 165. Citation omitted.]

Here, Maxwell's statements to Donnelly implicating defendant were given voluntarily and made to a friend rather than an officer. The statements did not minimize Maxwell's role in the arson or shift the blame to defendant, and there is nothing suggesting that they were made to avenge Maxwell or to curry favor. Moreover, there is nothing in the record indicating that Maxwell had a motive to lie or distort the truth. On the other hand, the statements were not contemporaneous with the arson and were made upon Donnelly's inquiry. In view of the totality of the circumstances surrounding the making of the statements, however, we are satisfied that the statements bore sufficient indicia of reliability to allow their admission even though defendant was unable to cross-examine Maxwell.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly