STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2004
v	No. 251315 Kalamazoo Circuit Court
JEFFREY ALLEN RURKA, Defendant-Appellant.	LC No. 02-001916-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree murder, MCL 750.316. The trial court sentenced him to life in prison. We affirm.

The instant case arises from allegations that defendant killed Terry DeHollander, the former roommate of man he blamed for the death by drug overdose of his girlfriend, Lynette Kocher. At trial, the prosecution argued that defendant and Lynette's brother Ken Kocher went to the victim's apartment intending to kill the roommate. After failing to find the intended target, defendant stabbed the victim numerous times and Kocher cut the victim's throat.

Defendant first contends that the trial court erred in admitting the testimony of Kocher's girlfriend, Sharon Lang, regarding statements made by Kocher implicating defendant in the murder. We disagree.

For Kocher's statement to Lang to be admissible as substantive evidence against defendant, the statement must be admissible under the Michigan Rules of Evidence and admission of the statement cannot violate defendant's rights under the Confrontation Clause. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). When the admissibility of evidence involves a preliminary question of law, such as whether a rule of evidence precludes its admission, we review the issue de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Similarly, whether the admission of a statement violates a defendant's rights under the Confrontation Clause presents a question of constitutional law subject to de novo review. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Where "the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement -- including

portions that inculpate another -- is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, *supra*, 161. In *Poole*, one of the defendant's codefendants told his cousin that he killed someone during a robbery and, in describing the events, implicated the defendant. *Id.*, 154-156. In determining that the codefendant's entire statement was admissible against the defendant, our Supreme Court noted that the statement was a narrative description of the course of events focusing on the declarant's own actions and mentioning defendant's participation only in the course of that description and that the statement was made of the declarant's own initiative, without prompting or encouragement. *Id.*, 157-158.

In the instant case, the trial court allowed Lang to testify that Kocher told her the following account of the victim's death.

> We went over to Terry's and Terry said "the bitch [Lynette] got what she deserved." Jeff [defendant] started stabbing him and stabbing him and stabbing him. We were getting ready to leave. I seen that Jeff dropped a cigarette. I picked it up. I put it in my pocket. I looked over at Terry, and he wasn't dead. So I looked at Jeff, and I said the motherfucker ain't dead yet. I picked him up by his hair and slit his throat.

Like statements admitted in *Poole*, Kocher's statements were made in the context of a narrative of events, at Kocher's own initiative without any prompting or inquiry from Lang, and were clearly against his penal interests. Under *Poole*, the trial court properly admitted Kocher's entire statement, including those portions inculpating defendant. Nevertheless, defendant argues that *Poole* should be overturned, based on the subsequent decision of the United States Supreme Court, in *Williamson v United States*, 512 US 594; 114 S Ct 2434; 129 L Ed 2d 476, 483 (1994). In *Williamson*, the Court held that statements of a codefendant implicating the defendant were not self-inculpatory and therefore were not admissible under the Federal Rules of Evidence, even if made within a broader narrative that was generally self-inculpatory. *Id.*, 600-601. But in *Beasley*, *supra*, 551, this Court rejected a similar argument and held that *Poole* rather than *Williamson* controls under Michigan law. Thus, the trial court did not err in admitting the portions of Kocher's statement that implicated defendant under MRE 804(b)(3).

Further, the admission of Kocher's statement implicating defendant did not violate defendant's right to confront witnesses.[1] As our Supreme Court explained in *Poole*, *supra*, 163, the admission of a statement against penal interest as substantive evidence against defendant pursuant to MRE 804(b)(3) does not violate the Confrontation Clause if the prosecutor establishes that the declarant is unavailable as a witness and the statement bears adequate indicia of reliability. In evaluating whether a statement against penal interest bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against a defendant, "courts must evaluate the circumstances surrounding the making of the statement as well as its content." *Id.*, 165. Factors weighing in favor of a finding of admissibility include whether the statement was

[1] We note, and counsel for defendant conceded during oral arguments, that the holding in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), does not apply in the instant case because the evidence at issue was not testimonial in nature.

> (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone to 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. [*Id.*]

But other factors weigh against a finding of admissibility. These include 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. [*Id.*]

The lists of factors are not exclusive and the presence or absence of a particular factor is not decisive. *Id.* Rather, courts must decide, based on the totality of the circumstances, whether a particular statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. *Id.*

In the instant case, the trial court found, and defendant concedes, that Kocher made his statement to Lang voluntarily, that he initiated the conversation without any prompting or inquiry, and that it was not made to a law enforcement officer. But defendant argues that because Kocher made the statement five or six days after the victim's death, it was not made contemporaneously with the events. Further, defendant alleges that Kocher and Lang had an unstable relationship and that she was not someone to whom Kocher would likely speak the truth.

While Kocher made his statement to Lang several days after the victim's death, this was before Kocher had any contact with law enforcement officials regarding the murder and before Lang was aware that he might be involved in the crime. Furthermore, the substance and circumstances surrounding Kocher's statement to Lang, including the manner in which the statement was made and the nature of those portions implicating defendant, are quite similar to the statements found to be admissible in *Poole* and *Beasley*. Based on the totality of the circumstances, Kocher's statement bears sufficient indicia of reliability for it to be used as substantive evidence against defendant. Consequently, we find that the trial court's admission of the statement did not infringe upon defendant's rights under the Confrontation Clause.

Defendant next argues that the trial court erred in admitting autopsy photographs and a photograph of the victim's body at the crime scene. We review the decision to admit photographic evidence for abuse of discretion. *People v Flowers,* 222 Mich App 732, 736; 565 NW2d 12 (1997).

Evidence that has "*any* tendency" to make a fact at issue more or less probable is relevant. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod, remanded 450 Mich 1212 (1995), emphasis in original. Although generally admissible under MRE 402, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Id.*, 75; MRE 403. Courts should exclude photographs under MRE 403 if they may lead the jury to abdicate its truth-finding function and convict due to passion. *People v Coddington,* 188 Mich App 584, 598; 470 NW2d 478 (1991). But "[g]ruesomeness alone need not cause exclusion." *Mills, supra,* 76.

In admitting the photographs and videotape in the instant case, the trial court found that they were relevant to establish intent. Furthermore, it observed that, although graphic, the photographs were not shocking to ordinary sensibilities of people who have lived an adult life." On appeal, defendant merely contends that, because the pictures were gory, their admission prejudiced his case. But under *Mills*, this does not constitute sufficient reason for excluding relevant photographic evidence. Defendant has failed to meet the "heavy burden" of showing that the challenged evidence should have been excluded as unfairly prejudicial. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004). Consequently, we find that the trial court did not abuse its discretion by allowing the prosecution to present the photographs to the jury.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello