STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2008
v	No. 278172 Calhoun Circuit Court
MICHAEL DESHAWN THOMPSON, Defendant-Appellant.	LC No. 2006-002703-FC

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, discharging a weapon from a motor vehicle, MCL 750.234(a), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arose from a shooting that occurred following an altercation at Green's Tavern in Battle Creek, Michigan. That altercation was a shoving match which led to defendant and his companion, Terrance "Jack" Stevens, being ejected. Rather than leave, defendant and Stevens waited outside for their adversaries. After the tavern closed, a fight ensued with the outnumbered defendant and Stevens receiving a beating. Then defendant and Stevens called a friend, Leon Mohead, for a gun. Mohead met defendant and Stevens at an after-hours place called the Warehouse. At the Warehouse, defendant saw two of his adversaries from Green's Tavern. Defendant, Stevens, and Mohead later followed these men to an apartment complex, where defendant fired several shots from inside a car. One of the men who fought with defendant at Green's Tavern subsequently died from a single gunshot wound to the chest.

On appeal, defendant argues that the trial court erroneously admitted hearsay evidence through the testimony of Charles Ousley. Defendant asserts that statements by Stevens to Mohead, as told to Ousley (hearsay within hearsay), as well as statements by Mohead to Ousley, should have been excluded. We review a trial court's decision to admit evidence for an abuse of discretion, but underlying questions of law are subject to de novo review. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Hearsay is an unsworn, out-of-court statement, which is offered to demonstrate the truth of the matter asserted. MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Generally, hearsay is inadmissible unless it falls under one of the hearsay exceptions set forth in

the Michigan Rules of Evidence. MRE 802; *Stamper*, *supra*. However, a statement does not constitute hearsay where the statement is not offered for the truth of the matter asserted. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 516; 679 NW2d 106 (2004); see, also, *People v Jones*, 228 Mich App 191, 206-207; 579 NW2d 82, modified in part on other grounds 458 Mich 862 (1998) (a statement offered to demonstrate state of mind was admissible nonhearsay); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987) (statements offered to demonstrate the effect on the listener were admissible nonhearsay).

First we consider Stevens' statements to Mohead, as told by Ousley, and conclude that the statements were admissible nonhearsay. Ousley testified that Mohead told him the following while they were incarcerated together: Stevens called Mohead, stating "that they got into it," and asked Mohead to bring a gun to Battle Creek, because "he had some problems." The significance of Stevens' statements was to show that Mohead, at Stevens' request, actually went to Battle Creek with a gun; thus, Stevens' statements were admissible nonhearsay offered for the effect on the listener—Mohead. See *id*. They were not offered to prove the truth of the matter asserted therein. However, the ultimate admissibility of Stevens' statements necessarily turns on the admissibility of Mohead's statements to Ousley.

While Mohead was unavailable as a witness because he was "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance," the prosecution was required to demonstrate due diligence to procure his attendance before offering his statements to Ousley. See MRE 804(a)(5). The test for due diligence is one of reasonableness, "i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

Mohead testified at the preliminary examination, but he thereafter absconded while on parole. Defendant, even on appeal, does not provide any evidence that Mohead was readily available to testify at the instant trial. On the record, the trial court did not engage in in-depth fact finding with respect to the prosecution's efforts to locate Mohead, but the prosecution provided that Mohead absconded from parole, and Mohead's parole officer was available to the trial court and defense counsel for further inquiry. The trial court ruled that it would be unlikely that Mohead would respond to a subpoena to testify in the instant trial. We conclude that the trial court's ruling that Mohead was unavailable was not clearly erroneous on the record before us. See *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

Thus we turn to Mohead's statements to Ousley. Defendant concedes on appeal that the challenged statements are nontestimonial, but he argues that his right to confrontation was violated by the admission of Ousley's statements. This argument lacks merit. The admissibility of nontestimonial hearsay does not violate the Confrontation Clause if the prosecution can establish either (1) that the declarant was unavailable as a witness and that the statements bore adequate indicia of reliability, or (2) that the statements fell within a firmly rooted hearsay exception. *Washington*, *supra* at 671-672. In this case, the prosecution established that the declarant, Mohead, was unavailable as a witness—as discussed above—and the statements bore adequate indicia of reliability.

At trial, Ousley testified that, essentially, Mohead told Ousley about his role in the murder. After Stevens called him and asked him to bring a gun to Battle Creek, Mohead met

Stevens and his cousin, "Big J,"[1] at a "club" on Hamblin Street in Battle Creek, and Mohead got into their car. Mohead saw the victim talking to one of the proprietors of the Warehouse, and then the victim got into a car. Mohead, Stevens, and "Big J" followed the other car. At the apartment complex, "Big J" rolled down the window. Mohead claimed that "Big J" killed the victim, and he opined to Ousley that Stevens was a coward and could not shoot anyone.

Mohead's statements clearly were declarations against his penal interest, and thus were admissible, under MRE 804(b)(3), which provides:

> 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.

Mohead's statements demonstrated that he provided the gun that was used to kill the victim and was also present when the murder took place. These statements tended to subject him to criminal liability, and a reasonable person in his position would not have made the statements without believing them to be true.

However, to determine if these statements against his penal interest bore adequate indicia of reliability we evaluate the circumstances surrounding the making of the statements and their content. *Washington*, *supra* at 672-673, quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993). The presence of the following factors would favor admission of such statements: "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 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." *Washington*, *supra* at 672-673, quoting *Poole*, *supra*. 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." *Washington*, *supra* at 673, quoting *Poole*, *supra*.

Here, considering the totality of the circumstances, we conclude that Mohead's statements to Ousley bears sufficient indicia of reliability to allow their admission as substantive evidence at trial. The statements were voluntary, made to a friend or confederate—another incarcerated inmate, Mohead did not try to minimize his role in the crime, he had no motive to lie or distort the truth, and there is nothing in the statement that indicates he was trying to curry favor at the time he made the statement. See *Washington*, *supra* at 672. While Ousley initiated the conversation, and prompted further responses, the circumstances do not otherwise support a finding of inadmissibility. Thus, we conclude that the trial court did not abuse its discretion when it admitted Mohead's statements through Ousley's testimony.

[1] It appears that defendant is the person being referred to as "Big J."

In reaching this conclusion, we reject defendant's claim of ineffective assistance of counsel. This claim was not presented in defendant's statement of the issues; as such, we need not review this claim. See MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, defendant's claim lacks merit. Defendant argues on appeal that defense counsel rendered ineffective assistance of counsel by failing to object to Ousley's testimony regarding statements by Stevens and Mohead, and for failing to call Mohead to testify at trial. The record provides that defense counsel opposed the prosecution's presentation of the challenged statements during the preliminary examination and a pretrial motion hearing. And, as previously discussed, the testimony was properly admitted; therefore, defendant's ineffective assistance of counsel claim must fail. Counsel's conduct did not fall below an objective standard of reasonableness. See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). With respect to defense counsel's failure to call Mohead as a witness, decisions about what evidence to present and which witness to call or question are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). However, the trial court found that Mohead absconded from parole, thereby rendering it futile for defense counsel to call him as a witness.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra