STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLAN WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
May 31, 2002
9:20 a.m.

No. 221851
Wayne Circuit Court
LC No. 98-006098

Updated Copy
August 30, 2002

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

ZAHRA, J. *(concurring in part and dissenting in part.)*

I agree with the majority's conclusion that defendant's trial counsel effectively assisted defendant at trial. I write separately because I disagree with the majority's conclusion that the trial court committed error requiring reversal in admitting codefendant's inculpatory statement as evidence against defendant. I also disagree with the majority's conclusion that the trial court abused its discretion in denying defense counsel the opportunity to conduct a voir dire of a juror midtrial. I would affirm defendant's convictions.

I. Admissibility of codefendant's statement

Counsel for codefendant indicated that codefendant would assert his Fifth Amendment right against self-incrimination. Therefore, defendant's right to confront codefendant is implicated. In *People v Petros*, 198 Mich App 401; 499 NW2d 784 (1993), Justice (then Judge) Corrigan observed that the Confrontation Clause "'permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.'" *Id*. at 410, quoting *Idaho v Wright*, 497 US 805, 814; 110 S Ct 3139; 111 L Ed 2d 638 (1990). "Admission of a hearsay statement by an unavailable declarant will 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." *People v Schutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000), citing *People v Poole*, 444 Mich 151, 162-163; 506 NW2d 505 (1993); see *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

Significantly, the majority concludes that defendant's rights under the Confrontation Clause were violated without considering whether the declaration against penal interest hearsay exception is "firmly rooted" in law. The majority finds a violation based only on the

determination that the totality of the circumstances indicate there was not adequate indicia of reliability with respect to codefendant's statement. Such reasoning is erroneous. As stated in *Schutte, supra* at 717-718, introduction of hearsay by an unavailable declarant will not violate the Confrontation Clause if the hearsay exception under which the statement is introduced is "firmly rooted" in law *or* there are adequate indicia of reliability surrounding the statement. Thus, logic dictates that before a Confrontation Clause violation may be found, the Court must determine that the hearsay exception is not "firmly rooted" *and* there are not adequate indicia of reliability surrounding the statement. The majority has not eliminated, let alone considered, the possibility that the declaration against penal interest exception is "firmly rooted" in law, and, therefore, its determination that defendant's Sixth Amendment rights were violated is flawed.

Whether the declaration against penal interest hearsay exception is "firmly rooted" in law is a close question, upon which state and federal courts have reached different conclusions. See *Lilly v Virginia*, 527 US 116, 134; 119 S Ct 1887; 144 L Ed 2d 117 (1999) (plurality, opining that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."), and *Neuman v Rivers*, 125 F3d 315 (CA 6, 1997), cert den 522 US 1030 (1997) (interpreting Michigan Rule of Evidence 804[b][3] and concluding that the exception is "firmly rooted."); see also *United States v McKeeve*, 131 F3d 1, 9 (CA 1, 1997), *People v Wilson*, 17 Cal App 4th 271, 278; 21 Cal Rptr 2d 420 (1993), and *State v Tucker*, 109 Or App 519, 526; 820 P2d 834 (1991) (each holding the exception *is* firmly rooted), and *Simmons v Maryland*, 333 Md 547, 558-559; 636 A2d 463 (1994), *Linton v State*, 880 P2d 123, 129 (Alas App, 1994), and *United States v Flores*, 985 F2d 770, 776 (CA 5, 1993) (each holding the exception *is not* firmly rooted).[1] However, I need not decide whether MRE 804(b)(3) is "firmly rooted" in law because I conclude that adequate indicia of reliability surrounded codefendant's statement. See *Poole, supra* at 163-164, *People v Beasley*, 239 Mich App 548, 557-559; 609 NW2d 581 (2000), and *Petros, supra* at 412.

In *Poole, supra* at 165, our Supreme Court instructed:

> 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.

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[1] No Michigan case has squarely addressed the issue whether MRE 804(b)(3) is "firmly rooted" in law. In *People v Richardson*, 204 Mich App 71, 77; 514 NW2d 503 (1994), this Court in obiter dictum "suggest[ed] that MRE 804(b)(3) is not 'firmly rooted' in Michigan law." The *Richardson* panel offered no rationale to support its conclusion. Other Michigan courts have declined to address the issue given their conclusions that sufficient indicia of reliability established no Confrontation Clause violation. See *Poole, supra* at 163-164, *People v Beasley*, 239 Mich App 548, 557-559; 609 NW2d 581 (2000), and *Petros, supra* at 412.

> 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 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.
>
> 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. See, generally, *United States v Layton*, 855 F2d 1388, 1404-1406 (CA 9, 1988). 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.

In the present case, codefendant's statement "I did it—I'm the shooter" was voluntarily given. Moreover, the statement was uttered spontaneously within minutes of the events referenced. While the statement was made to police officers, it is significant that codefendant did not minimize his role in the crime. To the contrary, his statement indicates an attempt to assign responsibility only to him. Unlike the majority, I do not consider codefendant's alleged mental status reason to find his statement unreliable. While defendant's appellate counsel speculates that codefendant "may have been mentally or psychologically unstable at the time [the statement was made]," there is no record evidence establishing that codefendant was mentally unstable at the time of the offense. Codefendant was evaluated and determined mentally competent to stand trial. Given the circumstances surrounding codefendant's making of the statement and the statement's content, I conclude there were sufficient indicia of reliability. *Poole, supra* at 165. Thus, admission of the hearsay statement did not violate defendant's rights under the Confrontation Clause. *Schutte, supra* at 717-718.

II. Denial of mid-trial voir dire

I further conclude that the trial court did not abuse its discretion when it denied defendant's counsel's request to conduct a voir dire of a juror in the midst of trial. During a break in trial, defendant's counsel suggested to the trial judge that a juror had been seen during a previous lunch break associating with a trial spectator, who counsel suspected had some degree of contact with the victim or the victim's family. The judge questioned the juror regarding the incident, at which time the juror indicated the person in question was a "friend" who had come to meet her for lunch. The juror specified that she did not discuss anything in regard to the case with the person and verified that her association with the person would not influence her ability to make a fair decision in this case. Under these circumstances, the trial court's decision to deny

defendant's counsel's request to further question the juror was not grossly violative of fact and logic. The juror answered the trial judge's pointed questions. Defendant's counsel's suspicion in regard to the juror's bias was merely speculative. Further questioning by counsel posed the real risk of intimidating the juror and, thereby, ultimately serving to chill the free and full jury deliberations on the evidence. See *People v Adams*, 245 Mich App 226, 241; 627 NW2d 623 (2001). Therefore, I would find no error and affirm defendant's convictions.

/s/ Brian K. Zahra