STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN BYRON GRANBERRY,

Defendant-Appellant.

UNPUBLISHED
February 14, 1997

No. 172081
LC No. 92-005831-FH

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), conspiracy to commit unlawful possession with the intent to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of one to twenty years' imprisonment for the possession and conspiracy convictions, and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions for possession of cocaine with intent to deliver and felony-firearm. However, we reverse defendant's conviction for conspiracy to possess cocaine.

I

Defendant argues that he was denied his constitutional right of confrontation when the trial court admitted evidence of the out-of-court statement of a nontestifying codefendant, James Williams, Jr. We agree.

For a nontestifying codefendant's statement to be admissible against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser. *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause

* Circuit judge, sitting on the Court of Appeals by assignment.

normally requires a showing that he is unavailable. *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993). Even then, his statement is admissible only if it bears "adequate indicia of reliability." *Id.*; *Spinks, supra*, 491.

Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *Poole, supra*, p 162; *Spinks, supra*, p 491. However, we may not infer reliability from the blanket categorization of Williams' statement as being against penal interest. *Spinks, supra*, p 492. Rather, we must decide whether this statement bears sufficient indicia of reliability to provide the trier of fact a satisfactory basis for evaluating its truth. *Poole, supra*, pp 163-164. These indicia must exist by virtue of the inherent trustworthiness of the statement and may not be established by extrinsic, corroborative evidence. *Id.*, p 164. Reliability must be shown from those circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. *Id.*

The presence of the following factors would favor admission of a nontestifying codefendant's 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. *Poole, supra*, p 165; *Spinks, supra*, p 493. On the other hand, 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 accomplices, (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. *Poole, supra*, p 165; *Spinks, supra*, p 493. Courts should also consider any other circumstance bearing on the reliability of the statement at issue. *Poole, supra*, p 165.

Here, it appears that Williams did not inculpate defendant in order to minimize his involvement, shift blame, or avenge himself. See *Poole, supra*, p 166. However, Williams' statement was made to a law enforcement officer, and in response to being questioned about what happened on that day. These factors distinguish this case from *Poole* where the statement was spontaneously made to one of the declarant's relatives. *Id.*; *People v Richardson*, 204 Mich App 71, 76; 514 NW2d 503 (1994). In addition, a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities. *Poole, supra*, p 162. As this Court recently stated, "accusatory statements in a codefendant's custodial confession are 'properly presumed at the outset to be *uniquely* and *especially* suspect and unreliable, much *more* so than typical, run-of-the-mill hearsay.'" *Spinks, supra*, pp 492-493 (quoting from *People v Watkins*, 438 Mich 627; 475 NW2d 727 (1991)). Accordingly, we do not believe that Williams' statement has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns. *Poole, supra*, pp 163-164; *Spinks, supra*, p 493; *Richardson, supra*, pp 75-76.

Defendant argues that *Poole* was overruled by the United States Supreme Court in *Williamson v United States*, 512 US ___; 114 S Ct 2431; 129 L Ed 2d 476 (1994). However, *Poole* was decided on state law grounds, and is binding on this Court until the Supreme Court overrules itself. *People v Kevorkian No 1*, 205 Mich App 180, 191; 517 NW2d 293 (1994), rev'd on other grounds

447 Mich 436; 527 NW2d 714 (1994). In any case, although the Court in *Williamson* minimized the importance of the Advisory Committee Notes to FRE 804(b)(3), the Court did not address the defendant's Confrontation Clause argument. *Williamson*, *supra*.

A violation of the Confrontation Clause, like the erroneous admission of evidence, may be harmless if the appellate court can conclude beyond a reasonable doubt that the error did not affect the jury's verdict. *Spinks*, *supra*, p 493. An error is not harmless if the minds of an average jury would have found the prosecution's case significantly less persuasive had the statements of the accomplice been excluded. *Id.*

Here, Detective Dennis McMahan of the Bay Area Narcotics Enforcement Team testified that he interviewed Williams during the execution of the search warrant. Williams told McMahan that there had been a party going on all day and that there was a lot of cocaine traffic. Williams admitted that both he and defendant had been involved in selling cocaine that day. The testimony about Williams' statement did not address firearms or access to the places in the house where firearms were found. Accordingly, the admission of Williams' statement was harmless beyond a reasonable doubt in regard to defendant's conviction of felony-firearm. *Spinks*, *supra*, p 494; *Richardson*, *supra*, p 78.

McMahan testified that defendant made similar admissions about cocaine possession to those made by Williams. In particular, defendant told McMahan that there had been a substantial amount of cocaine and crack cocaine sales out of the residence. Defendant stated that he had received money himself from the sales. Because of the similarity of the two statements, and the other independent evidence of defendant's guilt, we believe that admission of Williams' statement was harmless beyond a reasonable doubt in regard to defendant's conviction for possession with intent to deliver cocaine. *Spinks*, *supra*, p 494; *Richardson*, *supra*, p 78.

In regard to the conspiracy conviction, however, Williams said that defendant was involved with him in selling drugs. Defendant's statement to McMahan did not suggest that Williams was involved in the crime. Although other testimony implied that defendant might be involved in a conspiracy, Williams' statement was the most direct and the most damaging evidence of such a conspiracy. Accordingly, we do not believe that the admission of Williams' statement was harmless beyond a reasonable doubt as to defendant's conspiracy conviction. *Spinks*, *supra*, p 494; *Richardson*, *supra*, p 77. Because we must reverse defendant's conviction for conspiracy, defendant's arguments concerning consecutive sentencing and the sufficiency of the evidence as to conspiracy are moot.

II

Defendant argues that there was insufficient evidence to convict him of felony-firearm. We disagree. Conviction of felony-firearm requires that the prosecutor prove, beyond a reasonable doubt, that the defendant possessed or carried a firearm during the commission of any felony or attempted felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992). Possession of a firearm may be actual or constructive, joint or exclusive, and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989); *People v Williams*, 212 Mich App

607, 609; 538 NW2d 89 (1995). A defendant has constructive possession of a firearm if the location of the weapon is known and reasonably accessible to the defendant. *Hill, supra*, pp 470-471; *Williams, supra*, p 609. Looking at the evidence in the light most favorable to the prosecution, sufficient evidence was presented for a rational trier of fact to find that the essential elements of felony-firearm were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Williams (Aft Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993); *People v Becoats*, 181 Mich App 722, 726; 449 NW2d 687 (1989).

III

Defendant argues that he was denied his constitutional right to due process when the trial court did not list the name of Williams in its jury instructions for conspiracy. We agree.

In every criminal prosecution, the defendant has the right to be informed of the nature of the accusation. Const 1963, art 1, § 20; *People v Johns*, 384 Mich 325, 333; 183 NW2d 216 (1971); *Sands v Sands*, 192 Mich App 698, 702-703; 482 NW2d 203 (1992), aff'd 442 Mich 30; 497 NW2d 493 (1993). A defendant is entitled to be proceeded against under an information which specifies the particular charge made against him with a fair degree of certainty and which fixes the scope of the prosecution. *People v Burd No 1*, 13 Mich App 307, 315; 164 NW2d 392 (1968). This fundamental element of due process is guarded with vigilance by Michigan's appellate courts. *People v Anderson*, 8 Mich App 110, 114; 153 NW2d 885 (1967). Accordingly, a jury instruction which broadens the scope of the information is reversible error. *People v Springs*, 101 Mich App 118, 127-128; 300 NW2d 315 (1980). Even more specifically, a trial court's instruction which omits the name of the defendant's alleged conspirator can be reversible error. *People v Smith*, 85 Mich App 404, 413-414; 271 NW2d 252 (1978), rev'd in part on other grounds 406 Mich 945; 277 NW2d 642 (1978).

Here, the amended information only charged defendant with conspiring with Williams. However, the trial court's recitation of the prosecutor's theory of the case stated that defendant "directly participated in the tacit agreement to deliver cocaine with *James Williams or others*," and that defendant "admitted to Detective McMahan that he participated [in] selling cocaine at the residence, in participation *with others*." Furthermore, the trial court instructed the jury that the prosecutor was required to prove beyond a reasonable doubt that "the defendant *and someone else* knowingly agreed to commit unlawful possession of a controlled substance." The trial court's instructions omitting the name of defendant's alleged conspirator are independent grounds for reversing defendant's conviction for conspiracy. *Sands, supra*, p 703; *Springs, supra*, pp 127-128; *Smith, supra*, pp 413-414.

IV

Defendant argues that he was denied a fair trial when the prosecutor improperly vouched for the credibility of McMahan and argued that the case involved a "low level felony." Defendant did not object to any of the alleged improprieties. After evaluating the comments in context, we do not believe that a miscarriage of justice occurred. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Any prejudicial effect

of these comments could have been cured by a timely instruction had one been requested. *Stanaway*, *supra*, p 687; *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). However, we caution the prosecutor to avoid vouching for the credibility of a witness or suggesting that he has special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach