STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JOHN HUFF,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 213571
Allegan Circuit Court
LC No. 97-010463 FH

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant Ronald Huff, whose three-month-old daughter died of asphyxiation while she and defendant slept on a couch, appeals by right from his conviction by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553. The trial court sentenced defendant to three to fifteen years' imprisonment. We affirm.

Defendant claims that the trial court should have granted his motion for a new trial based on the allegedly improper exclusion at trial of a hearsay statement made by the baby's mother, Tina Cameron, to a friend. We review a trial court's decision regarding a motion for a new trial, as well as a trial court's decision regarding evidentiary matters, for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *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, could find no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The statement defendant claims should have been admitted at trial was a statement by Cameron that before she left for work on the morning of the baby's death, she either placed the baby with defendant on the couch while defendant was sleeping or left for work after defendant, who had been drinking, had fallen asleep on the couch with the baby.[1] Defendant admits that the statement constituted hearsay but claims that (1) because it tended to show that Cameron contributed to the baby's death, it should have been admitted as a statement against penal interest under MRE 804(b)(3), and (2) because the statement was particularly probative and trustworthy, it should have been admitted under the "catch-all" hearsay exception found in MRE 804(b)(6). MRE 804(b)(3) and (6), however, apply only if the

declarant is "unavailable" as defined by MRE 804(a). Defendant claims that Cameron was "unavailable" under MRE 804(a)(1) and (3), which state:

> "Unavailability as a witness" includes situations in which the declarant –
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> * * *
>
> (3) has a lack of memory of the subject matter of the declarant's statement.

Defendant claims that Cameron should have been deemed unavailable under MRE 804(a)(1) because if she had been asked about the subject matter of the statement, she would have invoked her Fifth Amendment privilege against self-incrimination. We disagree. In order for a witness to be deemed unavailable because of the privilege against self-incrimination, there must be proof that the witness would assert the privilege if asked about the information in question. *People v Blankenship*, 108 Mich App 794, 797; 310 NW2d 880 (1981). Here, defendant offered no proof that Cameron would have asserted the privilege if asked about her actions prior to the baby's death. In fact, Cameron testified at trial, and during her testimony she did not refuse to answer any questions regarding those actions. She testified that she placed the baby with defendant and that defendant could have been asleep when she left for work. Therefore, defendant's claim that Cameron was unavailable under MRE 804(a)(1) is without merit.

Similarly without merit is defendant's claim that Cameron was unavailable under MRE 804(a)(3) because of a lack of memory on the subject matter. Indeed, the record does not support a finding that Cameron did not remember the events that occurred on the morning of the baby's death. She testified at the hearing on defendant's motion for a new trial that defendant was awake when she handed him the baby, and her testimony both at trial and at the hearing on defendant's motion for a new trial reveals that she simply did not know for certain whether defendant had actually fallen asleep when she left for work – she testified that defendant "was going to sleep" and "could have been asleep" when she left. Accordingly, because Cameron merely lacked some knowledge, as opposed to memory, about the subject matter in question, she was not an unavailable witness under MRE 804(a)(3). Cf. *People v Hayward*, 127 Mich App 50, 58; 338 NW2d 549 (1983) (witness is unavailable if unable to recall the events in question).

Because the admission of a hearsay statement under MRE 804(b)(3) or (6) requires that the declarant be unavailable, and because Cameron was available, the trial court did not abuse its discretion in ruling that Cameron's hearsay statement was inadmissible at trial under those rules of evidence.

Defendant further contends that Cameron's statement was admissible under MRE 803(24), the "catch-all" hearsay exception that applies regardless of the declarant's availability. This rule requires, among other things, that the hearsay statement be "more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." MRE 803(24).

Here, Cameron testified under oath at trial (1) that she handed the baby to defendant right before she left for work, and (2) that that defendant "was going to sleep" and "could have been asleep" when she left. The trial court did not abuse its discretion in concluding that these *firsthand* statements by Cameron were more probative on the point in question – that Cameron negligently left the baby with a sleeping man that she knew had been drinking – than the hearsay statement. See *People v Goree*, 132 Mich App 693, 702; 349 NW2d 220 (1984) (assessing probative value of evidence is "particularly and peculiarly a task for the trial judge"). Since the trial judge properly concluded that the hearsay statement was less probative than other, admissible evidence, the court did not abuse its discretion in ruling that the statement was inadmissible under MRE 804(24).

We note that even if Cameron's hearsay statement *had* been admissible under either MRE 803(24), MRE 804(b)(3), or MRE 804(b)(6), the trial court's denial of defendant's motion for a new trial would have nonetheless been proper, because the absence of the statement was harmless. Cameron's trial testimony that she handed the baby to defendant right before leaving for work and that defendant was "going to sleep" and "could have been asleep" when she left essentially replicated the substance of the excluded statement. Moreover, the evidence of defendant's guilt was strong, especially given (1) defendant's own written statement – made at the hospital shortly after the baby's demise – that he was awake when he initially lay down with the baby, and (2) defendant's additional statement to a police officer that he placed the baby on the couch after Cameron left for work. Accordingly, the exclusion of the hearsay statement could not reasonably have affected the outcome of the trial. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (preserved, nonconstitutional error does not require reversal unless "it is more probable than not that the error was outcome determinative").

Finally, defendant argues that his trial attorney rendered ineffective assistance by failing to argue at trial that Cameron's hearsay statement was admissible under MRE 803(24), MRE 804(b)(3), and MRE 804(b)(6). To establish ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because counsel's arguments to admit Cameron's statements under MRE 803(24), MRE 804(b)(3), and MRE 804(b)(6) would not have been successful, and because they would not have affected the outcome of the trial even if they *had* been successful, defendant failed to show that his trial attorney was ineffective. Thus, the trial court did not err in concluding that defendant received effective assistance of counsel, and the court properly denied defendant's motion for a new trial.

Affirmed.

/s/Richard A. Bandstra
/s/Patrick M. Meter

Markman, J. did not participate.

[1] During the hearing on defendant's motion for a new trial, the friend to whom Cameron made the statement in question testified that Cameron stated that she placed the baby with defendant and that defendant was sleeping when she left for work, implying that defendant may not have been asleep when Cameron initially gave him the baby. However, in an affidavit submitted with defendant's motion, the friend indicated that Cameron stated that defendant was already asleep when she placed the baby with him.