

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL DAVIS,

Defendant-Appellant.

UNPUBLISHED

July 11, 2000

No. 214118

Wayne Circuit Court

LC No. 97-009655

Before: Jansen, P.J., and Hood and Saad, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of 13 to 30 years, 10 to 20 years, 6 years, eight months to 10 years, and a consecutive 2 year term for the firearm conviction, and appeals as of right We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that codefendant Damon Harper's statement to police, which inculpated both defendant and Harper, was improperly read into the record. Defendant argues that, because Harper did not testify at their joint trial and therefore was not subject to cross-examination, admission of Harper's police statement violated defendant's Sixth Amendment right of confrontation. Defendant's constitutional challenge to the admission of Harper's statement is raised for the first time on appeal. This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). A "reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 774. Here, defendant does not assert innocence and we find no plain error affecting his substantial rights.

To be admissible as substantive evidence at trial, a non-testifying codefendant's self-inculpatory statement that also inculpates the defendant must overcome its presumptive unreliability as hearsay, MRE 804(b)(3), and must not violate the defendant's right of confrontation under the United States and

Michigan Constitutions. *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993); *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (Docket No. 213259, issued 05/02/2000), slip op at 2.¹ This Court must examine the individual facts of each case to determine whether sufficient indicia of reliability of the statement exists without resort to extrinsic, corroborative evidence. *Poole*, *supra* at 163-164.

Here, the totality of the circumstances indicate that codefendant Harper's statement possessed sufficient indicia of reliability to be admitted against defendant despite Harper's unavailability for cross-examination. *Schutte*, *supra*, slip op at 3. Although Harper made his statement during interrogation by a police officer, he had agreed to be questioned and the voluntariness of the statement was stipulated at trial. Moreover, although the interrogation was conducted in a question/answer format, Harper was asked a general open-ended question by the officer to which Harper gave a narrative-type answer regarding his and defendant's participation in the offenses. Harper's statement did not attempt to minimize his own role in the assaults or shift the entire blame to defendant. Accordingly, we conclude that sufficient indicia of reliability was established "to provide the trier of fact a satisfactory basis for evaluating the truth of the statement" and thus to satisfy Confrontation Clause concerns. *Poole*, *supra* at 164; *Schutte*, *supra*, slip op at 3.

Finally, because this was a bench trial, any danger of unfair prejudice resulting from the admission of Harper's statement was minimized. Accord, *People v Butler*, 193 Mich App 63; 483 NW2d 430 (1992). In sum, defendant has not established plain error affecting his substantial rights. *Carines*, *supra*.

Affirmed.

/s/ Kathleen Jansen

/s/ Harold Hood

/s/ Henry William Saad

¹ As the *Schutte* panel noted, this Court held, in *People v Beasley*, 239 Mich App 548 (No. 210668, issued 02/01/2000), that it was not bound by a recent United States Supreme Court decision which held that the defendant's Confrontation Clause rights were violated by the admission of a non-testifying codefendant's self-inculpatory statement. *Beasley*, *supra* at 558-559. The *Beasley* Court noted that a majority of the United States Supreme Court had not agreed that the Confrontation Clause imposed a "blanket ban on the government's use of accomplice statements that incriminate a defendant." *Id.* at 559, quoting *Lilly v Virginia*, ___ US ___; 119 S Ct 1887, 1905; 144 L Ed 2d 117 (1999). This Court further noted that as between non-binding precedent from the United States Supreme Court and binding precedent from the Michigan Supreme Court, it was bound to follow the latter. *Beasley*, *supra* at 559. Thus, both the *Beasley* and *Schutte* panels applied *Poole*.