

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AL EVANS, a/k/a CRAIG JOHNSON,

Defendant-Appellant.

---

UNPUBLISHED

February 6, 2001

No. 214710

Wayne Circuit Court

LC No. 98-004723

Before: Neff, P.J., and Talbot and J.B.Sullivan,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, 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 28.484(2). He was sentenced to five to fifteen years' imprisonment for armed robbery, a concurrent five to fifteen years for assault with intent to commit armed robbery, and a consecutive sentence of two years for felony-firearm. Defendant now appeals as of right, and we affirm.

Complainant testified that, on March 31, 1998, at approximately 12:00 a.m., he stopped on his way home from work to talk with a female who appeared to be a prostitute. She directed him to a house, and they went into a bedroom. She left the bedroom in search of a condom, and returned with a gun which she used to rob him of his money, keys, license, and pager. She then directed him to walk toward the front room of the house, where defendant was standing, and handed the gun to defendant. Defendant pointed the gun at complainant's chest and asked if he had anything else of value. Complainant told them that he did not, and was released.

Both defendant and the female were subsequently arrested and bound over for trial on charges of armed robbery and felony-firearm, and defendant was also charged with assault with intent to commit armed robbery. Prior to defendant's trial, the now codefendant female, who had made a statement to the police inculcating both herself and defendant, pleaded nolo contendere to armed robbery, and was sentenced to eighteen months to ten years' imprisonment. Defendant's theory at trial was that he was not the person who assisted codefendant, and complainant's testimony was not credible.

---

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

Defendant first argues that his right to confrontation was violated by the trial court's erroneous admission of codefendant's statement under MRE 804(b)(3).<sup>1</sup> We agree. The admission of evidence is reviewed for an abuse of discretion, *People v Schutte*, 240 Mich App 713, 714; 613 NW2d 370 (2000), and constitutional questions are reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). In determining whether a statement against penal interest is admissible as substantive evidence against an accused other than the declarant, the trial court must first determine whether the statement is admissible as substantive evidence pursuant to the Michigan Rules of Evidence. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). Generally, a codefendant's statement which *inculcates* an accomplice is presumptively unreliable and inadmissible as substantive evidence under MRE 804(b)(3). *Schutte*, *supra*, 717; see also *Poole*, *supra*, 151 n 8. However, if the statement is made in the context of a narrative, at the declarant's initiative, without prompting or inquiry, and the statement as a whole is against the declarant's penal interests, it may be admissible under MRE 804(b)(3). *Id.*, citing *Poole* at 161; *Beasley*, *supra*, 553-554. Statements to acquaintances, family or friends are more likely to qualify for admission than statements made while in custody. *Poole*, *supra*, 162.

If a statement against interest which inculcates another is admissible under the rules of evidence, the inquiry then becomes whether the statement violates the defendant's Sixth Amendment right to confrontation. *Poole*, *supra*, 162-163. The statement must either fall within a "firmly rooted" hearsay exception, or must bear adequate indicia of reliability. *Schutte*, *supra*, 718. Because Michigan does not recognize a declaration against interest as a "firmly rooted" hearsay exception, *id.*, we look for adequate indicia of reliability, determined on a case by case basis. *Poole*, *supra*, at 163-164. The indicia of reliability necessary to satisfy the Confrontation Clause may not be established by extrinsic, corroborative evidence. *Id.* at 164; *Schutte*, *supra*, 718. Factors favoring the admission of a statement include whether the statement was voluntarily given, made contemporaneously with the events discussed, made to someone to whom the declarant would speak truthfully, and made without inquiry or prompting. *Poole*, *supra*, 165; *Beasley*, *supra*, 557. Factors favoring inadmissibility include whether the statement was made to the police, reduces the declarant's responsibility, was made to curry favor, or whether declarant had a reason to lie. *Poole*, *supra*, 165; *Beasley*, *supra*, 557-558. The factors for determining admissibility are not exclusive, and the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission although the defendant is unable to cross-examine the declarant. *Poole*, *supra*, 165; *Beasley*, *supra*, 558.

---

<sup>1</sup> MRE 804(b)(3) provides that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness:"

*Statement against interest.* 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. A statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement [emphasis added].

In this case, we conclude that the trial court abused its discretion when it admitted codefendant's statement under MRE 804(b)(3). *Schutte, supra*, 714. While the statement was against codefendant's penal interest, it inculpated defendant and is therefore presumptively unreliable. *Schutte, supra*, 717. Further, the statement was not made on codefendant's own initiative without inquiry or prompting, but rather was a custodial statement given in response to questions from a police officer. Accordingly, the statement should not have been admitted as substantive evidence pursuant to MRE 804(b)(3). For many of the same reasons, we conclude that the admission of the statement was also violative of defendant's right to confrontation. *Beasley, supra*, 557. Additionally, while codefendant was arrested within an hour after the commission of the crime and given her rights shortly thereafter at approximately 2:00 a.m., she did not make the statement until 8:00 p.m., after she had spent eighteen hours in the lockup, supporting defense counsel's closing argument suggestion that her statement was not voluntary.

A nonstructural, preserved constitutional trial error is reviewed to determine whether the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994); *People v Smith*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 209326, rel'd 12/15/2000), slip op at 17. The party benefited by the error bears the burden of proving beyond a reasonable doubt "that there is no 'reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Anderson, supra*, 406, quoting *Chapman v California*, 386 US 18, 23; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

In this case, after examining the entire record, we conclude that the trial court's erroneous admission of codefendant's statement was harmless beyond a reasonable doubt. Complainant's testimony and identification of defendant, which was clearly believed by the jury, standing alone, proved beyond a reasonable doubt that defendant committed the crimes. The trial court instructed the jury on an aiding and abetting theory of armed robbery, MCL 767.39, 750.529; MSA 28.979, 797, pursuant to which the prosecution must show that the crime was committed, that the defendant assisted in the commission of the crime through acts or encouragement, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Complainant's testimony established not only that defendant assisted codefendant by receiving the gun from her, keeping it pointed at complainant while inquiring if he had anything else and while complainant walked out the front door, but also that defendant had knowledge that codefendant had robbed the complainant.

Complainant's testimony also proved defendant's guilt of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and felony-firearm, MCL 750.227b; MSA 28.424(2). The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Assault with intent to commit armed robbery is a felony. MCL 750.89; MSA 28.284. The elements of felony-firearm are that the defendant possess a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In short, even without the admission of codefendant's statement (which, we note, added nothing to the primary issue of identity), the

prosecution can prove all the elements of the crimes beyond a reasonable doubt, and reversal is not warranted.

Defendant next argues he is entitled to a new trial because the prosecutor intimidated codefendant into not testifying so that her statement could be introduced as substantive evidence under MRE 804(b)(3) rather than merely for impeachment purposes. We disagree. A trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion, *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), and its rulings on a motion to suppress evidence are reviewed de novo. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The burden is on the prosecution to show that a witness' refusal to testify was not due to the prosecution's intentional or negligent conduct. *People v McIntosh*, 142 Mich App 314, 327-328; 370 NW2d 337, aff'd in part 422 Mich 951 (1985). Issues of credibility are left to the trier of fact. *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998).

At the evidentiary hearing following remand from this Court, the prosecutor testified that she told codefendant, in a conversational tone of voice, that codefendant would be questioned regarding the contents of her statement if codefendant testified. The prosecutor did not threaten codefendant with additional charges or attempt to intimidate codefendant. Codefendant testified that she was threatened and intimidated by the prosecutor into not testifying. The trial court found that codefendant was not credible. Since this Court defers to the trial court on credibility issues, we conclude that the trial court did not abuse its discretion by denying defendant's motion for new trial.

Finally, defendant argues that he is entitled to resentencing because of inaccurate scoring of the guidelines. We disagree. Defendant's failure to object waives appellate review of this issue. See, *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999); MCR 6.429(C). In any event, there is no juridical basis for claims of error based on alleged misinterpretation or misapplication of guideline variables. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997); *People v Winters*, 225 Mich App 718, 729-730; 571 NW2d 764 (1997).

Affirmed.

/s/ Janet T. Neff

/s/ Joseph B. Sullivan

Judge Talbot concurs in the result, and additionally would find no error in the admission of codefendant's statement under MRE 804(3)(b).