STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2002
V	No. 226569 Ottawa Circuit Court
TIMOTHY JAMES BAKER, Defendant-Appellant.	LC No. 99-023359-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, on a theory of premeditation and deliberation, as well as a theory of felony-murder. MCL 750.316(1)(a),(b). The jury also convicted defendant of armed robbery, carrying a concealed weapon, and felony-firearm. MCL 750.529; MCL 750.227; MCL 750.227b. The trial court sentenced defendant to life imprisonment for first-degree murder and imposed concurrent sentences of 285 to 480 months' imprisonment for armed robbery and thirty-six to sixty months' imprisonment for carrying a concealed weapon. Finally, the trial court sentenced defendant to the mandatory term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Motion to Suppress Evidence

Defendant first argues that the trial court erroneously denied his motion to suppress evidence regarding his second statement to police. Defendant does not challenge the admissibility of his initial statement to police, made within hours of the offense. Before making that first statement, defendant received his *Miranda* rights.[1] Defendant then told investigating detective Bulthuis that he had picked up a hitchhiker who committed the robbery-murder in defendant's presence, but without defendant's prior knowledge or assistance.

After defendant made the above statement, Bulthuis learned that co-defendant Anthony Krehn had implicated defendant as the shooter. Bulthuis questioned defendant a second time,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

confronting him with Krehn's statement and with inconsistencies that had been discovered regarding defendant's first statement. Bulthuis did not repeat defendant's *Miranda* rights verbatim before taking defendant's second statement. However, Bulthuis testified that he did remind defendant that his *Miranda* rights were still available to him, and defendant indicated that he still understood those rights and agreed to talk further with police. Defendant then admitted that he and co-defendant Krehn had planned the robbery, and admitted that he had shot the victim because he knew that the victim would be able to identify him.

Defendant filed a pretrial motion to suppress his second statement to Bulthuis, arguing that the statement was taken in violation of his Sixth Amendment right to counsel. Both Bulthuis and defendant testified that they did not know, at the time of defendant's statement, that defendant's family had retained an attorney to act on defendant's behalf. Nevertheless, defendant claims that he impliedly requested an attorney before making his second statement, and argues that Bulthuis should have immediately ceased his questioning when defendant made that request.[2]

At the suppression hearing, the trial court made a factual finding that defendant never requested an attorney, either explicitly or impliedly. The trial court specifically found that defendant's testimony was not credible and the trial court accepted Bulthuis' testimony that defendant did not mention the issue of an attorney, either before or during defendant's second statement. The trial court denied defendant's motion to suppress, concluding that defendant's statements were voluntary and preceded by a knowing and intelligent waiver of his *Miranda* rights.

Although defendant argues that his Sixth Amendment right to counsel attached before he made his second statement to Bulthuis, we need not decide that issue in order to resolve defendant's appeal. Regardless of when a defendant's Sixth Amendment right to counsel attaches, it is clear that a defendant is required to assert that right in order to enjoy its protection. As our Supreme Court explained in *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994):

> The [Sixth Amendment] right to counsel attaches and represents a critical stage only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. However, *the right is invoked only by requesting counsel*, usually at postcharge questioning or at arraignment. Therefore, after formal adversarial proceedings have begun *and* the defendant asserts the right to counsel either at questioning or arraignment, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. [Citations, footnotes, and internal quotations omitted; emphasis added.]

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[2] At the suppression hearing, defendant testified that he had asked Bulthuis, "When do I get a lawyer?" Defendant admitted that this was distinguishable from a present request to speak to an attorney.

In the present case, whether defendant invoked his right to an attorney was a disputed fact that the trial court was required to determine at the suppression hearing. The credibility of witnesses is a key factor in determining contested facts, and the trial court is in the best position to assess the credibility of witnesses. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). In fact, this Court "gives deference to the trial court's superior ability to judge the credibility of the witnesses, and will not reverse the trial court's factual findings unless they are clearly erroneous." *People v Bender*, 208 Mich App 221, 227; 527 NW2d 66 (1994), aff'd 452 Mich 594 (1996). Here, the trial court expressly found that defendant did not invoke his right to counsel. Based on our review of the record, we cannot say that the trial court's factual finding was clearly erroneous, because we are not left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). Because defendant did not invoke his Sixth Amendment right to counsel, the trial court properly denied defendant's motion to suppress his second statement to police.

II. Hearsay Evidence and the Confrontation Clause

Defendant next contends that the prosecutor violated defendant's rights under the Confrontation Clause of the Sixth Amendment[3] when he introduced at trial certain excerpts from his co-defendant's guilty plea to first-degree murder. For the co-defendant's plea statement to be admissible as substantive evidence against defendant at his trial, the statement must be admissible under the Michigan Rules of Evidence, and admission of the statement cannot violate defendant's rights under the Confrontation Clause. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). We conclude that the trial court erroneously admitted the co-defendant's plea statement. Nevertheless, we conclude that this preserved, nonstructural constitutional error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000), remanded 465 Mich 928 (2001).

A. Hearsay Evidence

In the present case, the trial court admitted excerpts of the co-defendant's guilty plea under MRE 804(b)(3). When reviewing a trial court's decision to admit a statement against penal interest under that rule, this Court should consider the following four factors: (1) whether the declarant was unavailable, (2) whether the statement was against the declarant's penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement. *People v Ortiz-Kehoe*, 237 Mich App 508, 518; 603 NW2d 802 (1999).

First, it is clear that the co-defendant was unavailable to testify at defendant's trial, having communicated through his attorney that he would invoke the Fifth Amendment and refuse to testify. Second, the statement was clearly against the co-defendant's penal interest because it

[3] US Const, Am VI; Const 1963, art 1, § 20.

subjected him to a penalty of life in prison without parole. Third, a reasonable person in the co-defendant's position would not have made such a statement, implicating himself in a plot to commit first-degree murder, unless that portion of the statement were true. Nevertheless, defendant argues that those parts of the codefendant's guilty plea that inculpated him were not against the co-defendant's penal interest, that those statements could have been made by a reasonable person in the co-defendant's position regardless of their truth or falsity, and that the statements lacked traditional indicia of trustworthiness. Therefore, defendant argues that the portions of the co-defendant's guilty plea that inculpated him should not have been admitted at trial under MRE 804(b)(3). We agree.

In *Poole*, *supra* at 160, our Supreme Court considered whether portions of a co-defendant's statement that inculpated a defendant in a crime could be considered as properly admissible, under MRE 804(b)(3), at the defendant's trial. The Court concluded that such statements could be deemed admissible, in their entirety, as long as certain conditions were met: [4]

> "[W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." [*Id*.]

In *Poole*, the co-defendant's statement was made to a relative without prompting, encouragement or questioning regarding the details. *Id*. at 157-158. Further, the co-defendant's statement was a narrative account, given at his own initiative, in a non-custodial setting, without examination by law enforcement officials. *Id*. at 154, 160. Under those facts, the Court found the whole of the co-defendant's statement admissible under MRE 804(b)(3). *Id*. at 161-162.

In the present case, we conclude that the co-defendant's plea statement does not satisfy the *Poole* test, and that the trial court erroneously admitted this testimony under MRE 804(b)(3). First, we start with the presumption that defendant's statement is unreliable. *People v Schutte*, 240 Mich App 713, 717; 613 NW2d 370 (2000); *People v Richardson*, 204 Mich App 71, 75; 514 NW2d 503 (1994). Next, we must consider the fact that the co-defendant's statement was made to authorities in a custodial setting. Although the co-defendant's guilty plea was voluntary, the plea proceeding itself cannot be said to be at the co-defendant's initiative, or a contemporaneous statement or statement to friends or relatives such that the co-defendant's statement would be viewed as eminently trustworthy. *Id* .; *United States v York*, 933 F2d 1343, 1362-1363 (CA 7, 1991), rev'd on other grounds sub nom *Wilson v Williams*, 182 F3d 562 (CA 7, 1999). Further, the plea was not an open-ended narrative, but involved prompting and inquiry by the prosecutor. Finally, the statement was made to law enforcement authorities and involved some degree of blame-shifting that minimized the declarant's role.

[4] In *Williamson v United States*, 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994), the United States Supreme Court ruled that the comparable federal rule, FRE 804(b)(3), does not include statements that inculpate another person, even if such statements are included in a broader self-inculpatory narrative. Nevertheless, we must follow *Poole*, rather than *Williamson*, on this point. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

The prosecutor argues that the co-defendant's statement was reliable because it was made under oath and subjected the co-defendant to a penalty of life imprisonment. Nevertheless, once the co-defendant decided to acknowledge his guilt and became aware that he faced no further penalty, there was little incentive for him to speak truthfully. Furthermore, the co-defendant retained an incentive to minimize his own role and maximize defendant's role for purposes of placing himself in a better light. The co-defendant did so in the present case, claiming that defendant was the shooter and that defendant shot the victim several more times than the co-defendant had planned. Given all of the above facts, we conclude that the portions of the co-defendant's statement that inculpated defendant were not properly admissible under MRE 804(b)(3).

B. Confrontation Clause

Even if the co-defendant's statement were properly admissible under the above hearsay exception to the rules of evidence, we would conclude that its admission would nonetheless violate the Confrontation Clause.

In *Poole, supra*, our Supreme Court held that a co-defendant's statement inculpating the defendant does not violate the Confrontation Clause so long as the co-defendant was "unavailable as a witness and his statement bears adequate indicia of reliability. . . ." *Id.* at 162-163, citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980).[5]

> 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.
>
> 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)

[5] As set forth above, the co-defendant was unavailable as a witness at defendant's trial, given his invocation of his Fifth Amendment rights. Defendant does not contest the co-defendant's unavailability.

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* at 165.]

Our evaluation of the above factors leads us to the inescapable conclusion that admission of the co-defendant's plea statement at defendant's trial violated defendant's rights under the Confrontation Clause.

C. Harmless Error

Although the trial court erroneously admitted excerpts of the co-defendant's statement, we must still determine whether that error requires reversal of defendant's convictions. Admission of hearsay testimony in violation of the Confrontation Clause, where preserved, is not structural error that defies harmless error analysis. *Lilly v Virginia,* 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *Smith, supra* at 690. A preserved constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).

In the case at bar, it is clear that a rational jury would have found defendant guilty without admission of the co-defendant's guilty plea. At all times, defendant acknowledged that he was present at the time of the robbery-murder, and acknowledged that he fled the scene. The victim's brother observed a large person, matching defendant's description, fleeing the scene with what appeared to be the bag in which the store kept change. Defendant fled the scene, "ditched" his mother's car, telephoned for a ride, and then hid in the back seat of a car when picked up—all indicating a consciousness of guilt. Defendant admitted that he lied to his mother, other relatives, and the police about who he was with during the robbery-murder. The police found substantial physical evidence connected to the crime near the "ditched" car, including the murder weapon. Defendant was captured on videotape at a store the day before the robbery-murder, with the co-defendant, purchasing ammunition matching that used in the murder weapon. Defendant, who was wearing a "Big Dog" brand shirt, and who was known to the victim and his brother as "Big Dog," also had a motive to commit the murder, because the victim could identify defendant to the police. Given all of the above evidence, we conclude that the trial court's error in admitting excerpts of the co-defendant's guilty plea was harmless beyond a reasonable doubt.

III. Prosecutorial Misconduct

Finally, defendant's argument that the prosecutor impermissibly shifted the burden of proof in his closing argument has been forfeited by defendant's failure to make a specific contemporaneous objection or request a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Moreover, we conclude that the prosecutor's arguments were properly based on the evidence or reasonable inferences from the evidence and were responding to defense arguments that defendant's first statement to police was true while his second statement to the police and a later statement to a jail inmate were suspect. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659

(1995); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Therefore, we find no miscarriage of justice.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski

I concur in the result and join in all portions of the opinion except II, IIA and IIB.

/s/ Richard Allen Griffin