STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY E. NANCE,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 227349
Wayne Circuit Court
LC No. 99-003797

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a bench trial of voluntary manslaughter, MCL 750.321. The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to 7 to 22 ½ years' imprisonment. We affirm.

Defendant first argues that he was denied his constitutional right to confront witnesses when the trial court admitted the prior testimony of an unavailable witness. We disagree. A challenge to the admission of hearsay evidence based on the deprivation of the right to confrontation is subject to de novo review. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 26 (2000), remanded on other grounds 465 Mich 928 (2001).

If a witness is unavailable,[1] testimony given by that person at an earlier hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity and a similar motive to develop the testimony through cross-examination. MRE 804(b)(1); *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1999). Here, the unavailable witness, Timothy Seneca, was cross-examined by defendant's counsel, as well as by the codefendant's counsel, at the preliminary examination. Because defendant had an opportunity and similar motive to develop the testimony at the preliminary examination, the Michigan Rules of Evidence allowed the introduction of Seneca's preliminary examination testimony. MRE 804(b)(1); *Meredith, supra* at 67.

[1] Defendant does not challenge on appeal the lower court's finding that the prosecutor showed due diligence in its search for the missing witness. In fact, at trial, defense counsel agreed that the prosecution met the standard of due diligence and stated the following: "I at this juncture feel that due diligence has been put forth. I consent on behalf of Mr. Nance."

However, hearsay that is admissible under the Michigan Rules of Evidence can still be inadmissible if it deprives the defendant of his constitutional right to confront the witnesses against him. *Meredith, supra* at 67. To be constitutionally admissible, hearsay testimony must bear adequate indicia of reliability. *Id.* at 68. Such reliability is established "without more" when the proposed evidence is within a firmly rooted exception to the hearsay rule. *Id.* at 69. In *Meredith,* the Michigan Supreme Court noted that MRE 804(b)(1), the hearsay exception based on an unavailable witness' former testimony, is deeply imbedded in American jurisprudence and, as such, is a firmly rooted exception to the hearsay rule. *Id*. at 70-71. Thus, the Court held that evidence admitted under the exception does not deprive a defendant of his right to confrontation. *Id*. Applying the identical principles in this case, because Seneca's testimony falls within MRE 804(b)(1), a firmly rooted exception to the hearsay rule, the trial court properly included Seneca's preliminary examination testimony at trial. *Id*.

Next, defendant argues that certain statements contained in Seneca's prior testimony about what the codefendant, Brian Carlton, allegedly said to Seneca[2] are inadmissible hearsay. We disagree. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that he asserts on appeal. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). The instant argument is not preserved because, although defendant objected at trial to the admission of the prior testimony that included the statement containing the alleged multiple hearsay, defendant did not object specifically on the basis of inadmissible multiple hearsay. We review unpreserved issues under the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is unwarranted unless a clear or obvious error occurred that likely affected the outcome of the proceedings. *Id*. at 763.

Hearsay within hearsay cannot be admitted unless each of the statements satisfies a viable exception to the rule against hearsay. *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982). Defendant claims that the first level of hearsay was Seneca's preliminary examination testimony and the second level of hearsay was Carlton's statement to Seneca. As discussed above, Seneca's preliminary examination testimony was admissible under MRE 804(b)(1). Therefore, the first level of the alleged double hearsay was satisfied and admissible.

With regard to the second level of the alleged double hearsay, MRE 804(b)(3) is dispositive. This rule states that if a declarant is unavailable, his out-of-court statement against his penal interest may avoid the hearsay rule if certain thresholds are met. In *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996), our Supreme Court held that the determination whether a hearsay statement is admissible as a statement against the declarant's penal interest under MRE 804(b)(3) involves four sub-issues, namely:

> (1) whether the declarant was unavailable, (2) whether the statement was against 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.

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[2] According to Seneca, Carlton told Seneca that he and defendant had just physically beaten someone.

To determine whether the "corroborating circumstances clearly indicate the trustworthiness of the statement" under MRE 804(b)(3), the following list of factors favor admission of 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. [*Barrera, supra* at 274, quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993).]

The following factors disfavor a finding of admissibility: whether the statement (1) was made to police or at the prompting of the listener, (2) minimizes the role of the declarant or shifts blame to an accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie. *Id*. at 274-275.

In the instant case, whether the declarant was unavailable need not be addressed because this issue is not contested. Second, a review of the record shows that Carlton's statement to Seneca was against his penal interest. Carlton voluntarily told Seneca that he and defendant had just finished beating up someone and asked Seneca for a rag to wipe off a bloody wrench he was carrying. Carlton made the statement almost immediately after the crime, because Carlton walked directly up to Seneca and told him he was just coming from the beating and that he needed to wipe off and then get rid of his weapon, the bloody wrench. Carlton would likely speak the truth to Seneca because they were friends, and Carlton was seeking Seneca's assistance in cleaning and disposing of his weapon. Seneca did not prompt Carlton to make the statement. Carlton told Seneca on his own, because he needed Seneca's help to get rid of the weapon. The statement was not made to police officers, and Carlton did not minimize his role in the crime; rather, he stated that both he and defendant had beaten the victim. *Id.* at 275. Additionally, nothing points to Carlton having any vengeful motivations or a motive to lie to Seneca. *Id*. Under these circumstances, the statement bore sufficient indicia of reliability to be admissible and to satisfy the Confrontation Clause. See *People v Schutte*, 240 Mich App 713, 717-720; 613 NW2d 370 (2000). No clear or obvious error occurred with regard to the second level of the alleged double hearsay.

Finally, defendant argues that the trial court erred by admitting defendant's statement to police into evidence because he was intoxicated when he waived his rights and gave the statement. He seeks a remand to the trial court so that a hearing on this issue may take place. However, this Court has already denied defendant's request for a remand, and we decline to revisit that decision. Moreover, the totality of the circumstances surrounding defendant's statements to police do not show that defendant was intoxicated to such an advanced stage that would affect the voluntariness of his statement or the validity of his waiver of rights. See generally *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987) (some level of intoxication not dispositive of the issue of voluntariness).

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter