STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MCMULLEN,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 186971
LC No. 94-008763

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD HOWARD,

Defendant-Appellant.

No. 186972
LC No. 94-008763

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Defendants Kenneth McMullen and Bernard Howard, and a codefendant, Ladon Salisbury, were tried jointly, but with two separate juries—one for McMullen and Howard and one for Salisbury. The jury convicted defendant McMullen of three counts of first degree premeditated murder, MCL 750.316; MSA 28.548, three counts of felony-murder, MCL 750.316; MSA 28.548, three counts of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Howard was convicted of three counts of second-degree murder, MCL 750.317; MSA 28.549, three counts of first-degree felony-murder, three counts of armed robbery, and one count of felony-firearm. Salisbury was convicted by

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

his jury of three counts each of first-degree premeditated murder, first-degree felony-murder and armed robbery, together with one count of felony-firearm. Defendants McMullen and Howard each received sentences of life imprisonment without parole for the first-degree murder convictions and life imprisonment for the armed robbery convictions, together with a consecutive two-year sentence for the felony-firearm conviction.[1] McMullen and Howard filed separate appeals as of right, which were consolidated for our review.[2] We affirm in part, but reverse and vacate each defendants' armed robbery convictions and sentences, and modify defendant McMullen's judgment of sentence to reflect only three convictions and sentences for first-degree murder.

Defendants' convictions stem from the July 16, 1994, robbery and shooting deaths of three individuals, Marcus Averitte, Reshay Winston, and John Thornton, each of whom died from multiple gunshot wounds. Testimony indicated that marijuana, cash, and other items of personal property were stolen from the victims. Witnesses at trial placed McMullen, Salisbury and a third unidentified individual at the scene of the crime near the time of the shootings. The police investigation produced evidence that the victims were shot with three different firearms. One witness heard a barrage of gunshots and then observed a van, which she later identified as belonging to codefendant Salisbury, pull away from the crime scene at a high rate of speed. A subsequent search of codefendant Salisbury's house led to the discovery and seizure of a Glock 9mm semi-automatic pistol that was later identified as one of the firearms used in the offense.

Shortly after the offense, the police obtained a written statement from defendant McMullen, wherein McMullen admitted assisting Howard and Salisbury in the commission of the offenses. However, McMullen claimed that it was Howard and Salisbury who shot the victims and McMullen denied either possessing a gun or shooting any of the victims himself. The police also obtained a written statement from defendant Howard, wherein Howard admitted assisting McMullen and Salisbury, but Howard denied possessing any gun himself and claimed that it was McMullen and Salisbury who shot the victims. Both statements were introduced at trial, but the jury was instructed that each statement was admissible only against the defendant who made the statement and could not be considered against the other defendant.

Following their arrests, McMullen, Howard and Salisbury were all placed in the Detroit Police Headquarters' jail where they allegedly met Joe Twilley, who was also an inmate at the jail, but had trustee status, thereby giving him the ability to move about the jail. Twilley claimed that McMullen and Salisbury both spoke to him about the charged offense and both told him that all three of them, McMullen, Howard and Salisbury, committed the offenses together and that all three of them were armed with guns and participated in shooting the victims. The statements by McMullen to Twilley and Salisbury to Twilley were both admitted at trial, not only against the defendant who made the statement, but also as substantive evidence against each of the other codefendants implicated in the statement.

McMullen and Howard both presented an alibi defense. Also, they each took the stand and denied any involvement in the offenses. Both admitted signing their respective police statements, but claimed they were coerced into doing so by the police, who, they claimed, fabricated the events described in the statements. McMullen and Howard both denied discussing the offense with Joe Twilley.

On appeal, defendants McMullen and Howard challenge the admission of Salisbury's statements to Joe Twilley as substantive evidence against each of them. Additionally, defendant Howard challenges the admission of McMullen's statement to Twilley as substantive evidence against him. Defendants contend that the statements made by Salisbury, as to each of them, was inadmissible hearsay and, further, that admission of the statements violated their constitutional right to confrontation. US Const, Am VI; Const 1963, art 1, § 20. Defendant Howard also makes the same arguments with respect to the statement made by McMullen.

The statements, although hearsay, were offered as substantive evidence at trial pursuant to MRE 804(b)(3), which provides that a hearsay statement is admissible if "at the time of its making [it was] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[3] A trial court's decision whether to admit a statement under MRE 804(b)(3) is reviewed for an abuse of discretion. *People v Barrera*, 451 Mich 261, 269; ___ NW2d ___ (1996).

In *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), our Supreme Court stated:

> [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). [Emphasis added.]

The record indicates that Salisbury's and McMullen's statements to Twilley were made under circumstances similar to those described in *Poole*. Additionally, viewed as a whole, each statement was so far contrary to the declarant's penal interest that a reasonable person in the declarant's shoes would have realized that the statement could implicate the declarant in a crime. Accordingly, the whole statement, including those portions implicating the other codefendants, was admissible as substantive evidence at trial pursuant to MRE 804(b)(3). *Poole*, *supra*. See also *Barrera*, *supra* at 270-271.

We also reject defendants' claims that admission of the statements violated their constitutional right to confrontation. The Confrontation Clause is not violated by the admission of a statement where the statement bears an adequate indicia of reliability. *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *Poole*, *supra* at 162. Our Supreme Court, in *Poole*, *supra* at 165, set forth a list of factors to be considered when evaluating whether a statement against penal interest that inculpates another person as well as the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person. After evaluating Salisbury's and McMullen's statements in light of those factors, we find that both statements bear sufficient indicia of reliability to satisfy Confrontation Clause concerns.

The record discloses that both statements were voluntarily made. Neither statement was made to a law enforcement officer, or while under interrogation, but rather each was made to a fellow inmate,

someone who in Salisbury and McMullen were more likely to trust. According to Twilley, it was McMullen who initiated contact with him and, while Twilley subsequently initiated contact with Salisbury, he did so only to let Salisbury know that McMullen was asking about him, not to prompt Salisbury into giving a statement concerning the events. In each statement, the references to the codefendants occurred in the context of a narrative description of the events. There is no indication that Twilley inquired about the particular events referenced in the statements. Also, neither Salisbury nor McMullen minimized their role or responsibility in the offense, nor did they attempt to shift the blame to the other codefendants. To the contrary, Salisbury stated that he "engineered" the offense, he admitted possessing a gun, and he admitted participating in the shooting of the victims. McMullen similarly admitted having a gun and participating in shooting the victims. Although McMullen did state that he was not involved in the loading of property into Salisbury's van, he explained that his lack of involvement was motivated by a desire to stay out of sight rather than an unwillingness on his part to take the subject property. Finally, neither defendant suggests, nor is there any indication in the record, that Salisbury's statement was made to avenge himself or to curry favor, or that Salisbury had a motive to lie or distort the truth in relating the details of the offenses to Twilley.

Defendant Howard summarily asserts in his brief that McMullen's statement was unreliable because "[i]t was made to an informant of the police at his prompting; minimized the role of the declarant and shifted blame to the accomplices; was made to curry favor, and the declarant had a motive to lie or distort the truth." However, Howard does not point to any portion of the record supporting his position that McMullen's statement was made to Twilley at Twilley's prompting; he does not refer to any particular statement demonstrating how McMullen minimized his role in the offense or attempted to shift blame to his accomplices; he does not explain how McMullen's statement was calculated to curry favor, nor does he identify what motive McMullen had to lie or distort the truth to Twilley.

McMullen and Howard also both argue that sufficient indicia of reliability does not exist because Twilley was a police informant and circumstances suggest that Twilley was attempting to curry favor by cooperating with the police. We conclude that the assessment of Twilley's credibility was for the jury. See *Idaho v Wright*, 497 US 805, 819; 110 S Ct 3139; 111 L Ed 2d 638 (1990); *Barrera*, *supra*, 451 Mich at 272 n 10; *Poole*, *supra* at 164.

Finally, we disagree with defendant McMullen's claim that the probative value of the evidence was "substantially outweighed" by the danger of unfair prejudice. MRE 403; *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

Accordingly, for the reasons discussed above, we conclude that the trial court did not abuse its discretion in admitting McMullen's and Salisbury's statements to Twilley as substantive evidence at trial.

Next, defendants McMullen and Howard argue that a new trial is required because the other defendant's police statement was admitted at their joint trial and, as to each of them, the other defendant's statement was hearsay. We disagree. The record indicates that both statements were admitted only against the defendant making the statement, a nonhearsay purpose. MRE 801(d)(2). The jury was specifically instructed that neither statement could be considered against the other

defendant. Furthermore, no Sixth Amendment confrontation violation occurred by the introduction of the statements because both defendants testified at trial and were subject to cross-examination. *Nelson v O'Neil*, 402 US 622, 627; 91 S Ct 1723; 29 L Ed 2d 222 (1971); *Bruton v United States*, 391 US 123, 136; 88 S Ct 1620; 20 L Ed 2d 476 (1968). See also *People v Anderson (After Remand)*, 446 Mich 392, 407, n 38; 521 NW2d 538 (1994); *People v Jackson*, 179 Mich App 344, 349-350; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1990).

Defendant Howard also argues that the trial court erred in denying his motion to suppress his police statement on the grounds that he was coerced into signing it or that it was induced by a promise of leniency. After a thorough and independent review of the record, and according deference to the trial court's superior ability to observe the credibility of the witnesses, we reject Howard's claims that his statement was improperly induced by a promise of leniency or was otherwise involuntary. *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984); *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972); *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). Additionally, the factual issue of whether Howard in fact made the statement in question was properly left to the jury's determination. *People v Neal*, 182 Mich App 368, 371-372; 451 NW2d 639 (1990); *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981).

Both defendants argue that the trial court erred in denying their requests for separate trials or, alternatively, separate juries. Defendants McMullen and Howard contend that separate trials, or juries, were required because their defenses were mutually exclusive. We disagree.

A trial court's decision whether to sever or join the trials of criminal defendants, or whether to use separate juries, is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Here, we find no abuse of discretion. Like the trial court, we disagree with the defendants' contentions that mutually exclusive defenses were established by their respective police statements. See *Hana*, *supra* at 349-350. In any event, at trial, each defendant presented an alibi defense and each claimed that the events described in their police statement were fabricated. There was no finger pointing by either defendant. The jury, in order to believe the core of evidence offered on behalf of one defendant, was not required to disbelieve the core of evidence offered on behalf of the other defendant. Thus, the defenses actually presented at trial clearly were not mutually exclusive. *Hana*, *supra*. Therefore, no prejudice to the defendants' substantial rights in fact occurred at trial. Accordingly, there is no basis for reversal.

Defendant Howard also argues that severance was required because the statements made by McMullen and Salisbury to Joe Twilley were inadmissible as to him. We have already concluded, however, that both statements were admissible as substantive evidence against Howard. Therefore, severance was not required on this basis.

Next, defendants McMullen and Howard argue that the trial court erred in excluding: (1) testimony from Anthony Averitte that Marcus Averitte's former girlfriend, Jacqueline Williams, had previously indicated that she wanted Marcus Averitte killed because he caught her stealing two guns and some money; and (2) testimony from Yolanda Jackson that Reshay Winston's former boyfriend, a person known as Snoop Dog, told Reshay that he was upset that she was seeing someone else and then

threatened to kill the person that she was seeing, i.e., Marcus Averitte. Defendants contend that this evidence was relevant to show that another person, i.e., Jacqueline Williams or Reshay Winston's former boyfriend Snoop Dog, had a motive to commit the crimes in question. We find that the trial court did not abuse its discretion in excluding the above evidence. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

First, defendants have failed to show that the evidence in question was not hearsay or was admissible under an applicable hearsay exception. Although defendants argued below that the statement made by Snoop Dog was a statement against the declarant's penal interest, MRE 804(b)(3), that exception is applicable only where the declarant is unavailable. In this case, defendants failed to show that Snoop Dog was unavailable. Moreover, MRE 804(b)(3) provides that where a statement against penal interest is offered to exculpate the accused, it is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." In this case, defendants do not identify any corroborating circumstances that clearly indicate the trustworthiness of the statement, nor were any corroborating circumstances identified below.

Defendant McMullen also argues, for the first time on appeal, that the statement attributed to Snoop Dog was admissible as a statement of the declarant's then existing state of mind. MRE 803(3). However, because that exception was not raised below, the issue is not preserved for appeal. *People v Lino (After Remand)*, 213 Mich App 89, 94; 539 NW2d 545 (1995).

In any event, even if we were to conclude that the statements in question did not constitute inadmissible hearsay, we would find that exclusion of the evidence was proper on the ground that it was irrelevant and collateral in nature. See MRE 402. Evidence of a third person's possible motive to commit the crime of which the defendant is charged, standing alone, is insufficient to establish relevance. Rather, as the Hawaii Supreme Court observed in *Hawaii v Rabellizsa*, 79 Haw 347, 351; 903 P2d 43, 47 (1995), "there must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive." Here, other than evidence of a possible motive, neither McMullen nor Howard, or codefendant Salisbury for that matter, presented any evidence, direct or circumstantial, linking Jacqueline Williams or Reshay Winston's former boyfriend Snoop Dog to the charged crime. Accordingly, the trial court did not abuse its discretion in excluding the subject evidence.

Finally, the prosecutor concedes that defendant McMullen was improperly convicted of, and sentenced for, six counts of first-degree murder where there were only three killings. Defendant McMullen's judgment of sentence is hereby modified to reflect three convictions for first-degree murder (supported by two theories: first-degree premeditated murder and felony-murder), together with three concurrent sentences of life imprisonment without parole. *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Additionally, defendants McMullen and Howard are both entitled to have their convictions and sentences for armed robbery reversed and vacated inasmuch as "[c]onviction of and sentences for both felony murder and the predicate felony constitute multiple punishments for the predicate offense and thereby violate double jeopardy principles[.]" *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). The defendants' convictions and sentences are affirmed in all other respects.

Affirmed in part, reversed and vacated in part, and modified in part.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber

[1] The trial court vacated defendant Howard's second-degree murder convictions.

[2] Codefendant Ladon Salisbury has filed a separate appeal, which is pending in this Court in Docket No. 191785.

[3] MRE 804(b)(3) is applicable only where the declarant is unavailable. Neither defendants contests the assertion that Salisbury was unavailable, nor does defendant Howard contest the assertion that McMullen was unavailable. In *People v Poole*, 444 Mich 151, 163; 506 NW2d 505 (1993), our Supreme Court observed that a declarant was unavailable where, as here, the declarant was being prosecuted for the same offenses that the defendant was charged with and the statement at issue related to those offenses, thereby precluding the prosecutor from calling the declarant as a witness.