

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER DUIGUID,

Defendant-Appellant.

UNPUBLISHED

June 11, 1996

No. 175497

LC No. 93-049126

Before: Murphy, P.J., and Griffin and E.R. Post,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and of being a third habitual offender, MCL 769.12; MSA 28.1084. The trial court sentenced him to imprisonment for five to eight years. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court abused its discretion in admitting a particular portion of Valerie Earl's guilty plea testimony and in so doing violated defendant's constitutional right to confront Earl. US Const, Am VI; Const 1963, art 1, § 20. Earl was defendant's codefendant. At defendant's trial, Earl asserted her Fifth Amendment privilege against self-incrimination. Over defendant's objection, the trial court permitted the prosecutor to read into the record excerpts of the transcript from Earl's guilty plea pursuant to MRE 804(b)(3). MRE 804(b)(3) provides for the admission of hearsay statements against interest if the declarant is unavailable as a witness. Defendant concedes that Earl was unavailable and that portions of Earl's guilty plea testimony were admissible pursuant to MRE 804(b)(3) as statements against interest. However, in addition to the statements that were admissible pursuant to MRE 804(b)(3), Earl made a statement that inculpated defendant. The prosecutor asked Earl, "And how did this heroin come to be in the trunk of this car? Did you put it there or did Walter Duiguid put it there?" Earl responded, "Walter." Defendant argues that the trial court abused its discretion in admitting that portion of Earl's guilty plea testimony and that the admission of the testimony deprived him of his constitutional right to confront Earl. We agree.

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

In *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), the Supreme Court addressed the issue whether “carry-over” statements, statements made by a declarant which inculcate others but are not directly against the declarant’s interest and are made in the context of other statements made by the declarant which are against the declarant’s interest, are admissible under MRE 804(b)(3). Regarding the admissibility of carry-over testimony pursuant to MRE 804(b)(3), the Supreme Court held:

[W]here, as here, the declarant’s inculcation 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 inculcate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Id.*, 161.]

In addition to addressing whether carry-over statements are admissible as a matter of evidence pursuant to MRE 804(b)(3), the Supreme Court also addressed the issue whether the admission of carry-over testimony violates a defendant’s constitutional right of confrontation. According to the Supreme Court, courts must “decide case by case whether a statement against penal interest that also inculcates an accomplice bears sufficient indicia of reliability to provide the trier of fact a satisfactory basis for evaluating the truth of the statement, whether it has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns.” *Id.*, 163-164. The Supreme Court set forth specific factors for the trial court to consider in deciding whether the admissibility of a carry-over statement would violate a defendant’s right of confrontation:

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) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id.*, 165.]

Earl’s statement was not made in the context of a narrative of events or at Earl’s own initiative. Moreover, the statement was not voluntarily made or uttered spontaneously without prompting or inquiry and was not made to family or friends. Instead, the statement was made to the prosecutor at

Earl's guilty plea proceeding in response to a specific inquiry by the prosecutor. In addition, the statement was not made contemporaneously with the events referenced.

Under the circumstances, Earl's statement lacked sufficient indicia of reliability to permit it to be admitted as substantive evidence. Earl made the statement inculcating defendant at her guilty plea proceeding, and the statement was made in response to a specific inquiry by the prosecutor regarding who placed the heroin in the trunk. Furthermore, although Earl admitted that the heroin belonged to both her and defendant, the statement tends to place greater blame on defendant as the one who actually placed the heroin in the trunk and thus minimizes Earl's role or responsibility. Finally, we believe that Earl's statement may have been made to curry favor with the trial court by shifting the blame to defendant in the hopes of receiving a less severe sentence. Considering that Earl had not yet been sentenced when she made the statement inculcating defendant, Earl had a motive to lie or distort the truth to make herself appear less culpable.

In sum, we conclude that under the standard established in *Poole*, Earl's carry-over statement indicating that defendant placed the heroin in the trunk is not admissible under the law of evidence and should not have been admitted as substantive evidence against defendant pursuant to MRE 804(b)(3). Furthermore, we conclude that admission of the carry-over statement violated defendant's constitutional right of confrontation because the statement did not contain sufficient indicia of reliability to satisfy Confrontation Clause concerns.

With regard to constitutional errors, Michigan's harmless error rule requires that the appellate court be able to confidently conclude, beyond any reasonable doubt, that the error did not affect the jury's verdict. *People v Watkins*, 438 Mich 627, 667; 475 NW2d 727 (1991) (opinion by Cavanagh, C.J.). This was a bench trial, and the trial judge is presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). However, in this case, the trial judge did not recognize that Earl's statement inculcating defendant was inadmissible. Moreover, it cannot be said that the trial court's error in admitting Earl's statement did not affect the outcome of the trial. In rendering its verdict, the trial court stated:

If there was no evidence presented through the guilty plea of Miss Earl under 804 B-3 [MRE 804(b)(3)] that they jointly possessed it and he put it in the trunk, I don't believe that I could find beyond a reasonable doubt that he possessed it since he was driving someone else's car, didn't have a key to the trunk, and so far as the evidence has been presented wouldn't have any particular way of knowing what was in the trunk of that car.

In light of the trial court's statements on the record, we cannot conclude that the erroneous admission of Earl's guilty plea testimony did not affect the verdict. To the contrary, the trial court's comments show that the improper evidence was the sole basis for the trial court's conclusion that

defendant possessed the heroin and thus formed the basis for the guilty verdict. The trial court's statements on the record reveal that but for the erroneous admission of Earl's statement, the trial court would not have found defendant guilty. We therefore conclude that the erroneous admission of the evidence was not harmless. Accordingly, we reverse defendant's conviction and remand for new trial without the erroneously admitted testimony from Earl's guilty plea transcript.

Because of our resolution of this issue, we need not address defendant's remaining arguments on appeal.

Reversed and remanded.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Edward R. Post