STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY DALE BUNKER,

Defendant-Appellant.

UNPUBLISHED
May 13, 1997

No. 187941
Kalkaska Circuit Court
LC No. 94-001419-FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of aiding and abetting armed robbery, MCL 750.529; MSA 283.797, MCL 767.39; MSA 28.979. He was sentenced to 125 to 240 months' imprisonment. He appeals as of right. We affirm.

On February 26, 1994, at approximately 7:00 p.m., defendant drove the actual robber, John Hall[1], to a convenience store and supplied Hall with a ski mask, a sweat shirt, a BB gun and loaned Hall his gym shoes. Hall then entered the convenience store, pointed the gun at the clerk, and robbed her.

I

Defendant first argues that the trial court erred in allowing a witness, Vernon Swafford, to testify that Hall had admitted to committing the robbery and had implicated defendant as an accomplice. Specifically, defendant argues that this ruling denied him his right to confront Hall and that the trial court erred in relying on *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), to support its conclusion that this testimony was admissible. We disagree.

Defendant argues that *Poole* should not be followed because the United States Supreme Court ruled in *Williamson v United States*, 514 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994), that collateral statements that incriminate another party in conjunction with self-inculpatory statements are not admissible pursuant to FRE 804(b)(3). However, the Court's ruling in *Williamson* is limited to the evidentiary issue regarding FRE 804(b)(3) and explicitly does not address whether such statements would violate the Confrontation Clause. *Id*. *Williamson* therefore has no bearing on the Michigan

Supreme Court's ruling in *Poole* that such evidence does not violate the Confrontation Clause under appropriate circumstances.

We find that the trial court did not err in allowing Swafford's testimony. Under *Poole*, admission of testimony does not violate a defendant's confrontation rights if the declarant was unavailable and the statement was admissible under a firmly rooted hearsay exception or had adequate indicia of reliability. *Poole, supra* at 165. 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, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. *Id.*

Here, Hall voluntarily and spontaneously initiated the conversation with Swafford without prompting or inquiry. The statement was made to a schoolmate and not the police. "Speaking to acquaintances unconnected to law enforcement makes declarant's inculpatory statements eminently trustworthy." *People v Petros*, 198 Mich App 401, 416; 499 NW2d 784 (1993). In addition, the statement did not shift blame to defendant, but incriminated Hall and mentioned that defendant was with him at the time and was afraid that they would be caught. Also, the statement was made close in time to the robbery, and there is no evidence that Hall had a reason to distort the truth or that he made the statement intending to incriminate defendant in order to seek vengeance or curry favor with the authorities. We therefore conclude that the trial court did not err in ruling that there was adequate indicia of reliability.

We also note that defendant's argument that this testimony was inadmissible pursuant to *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), is misplaced. The United States Supreme Court clarified *Bruton* in *Richardson v Marsh*, 481 US 200, 201-202; 107 S Ct 1702; 95 L Ed 2d 176 (1987). It held that in *Bruton*, the Court recognized a very narrow exception to the general rule that a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. *Id*. at 208. The ruling in *Bruton* was based on the Court's determination that the statement at issue was so directly incriminating against the defendant that in reality the jury could not be expected to follow an instruction to disregard the codefendant's statement when assessing the guilt of the defendant. *Bruton, supra* at 135-136; *Richardson, supra* at 207-208. In *Lee v Illinois*, 476 US 530, 544; 106 S Ct 2056; 90 L Ed 514 (1986), the Court noted that *Bruton* is inapplicable to a situation, such as this case, where the effectiveness of limiting instructions in preventing "spill-over" prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial is not at issue.

Likewise, defendant's reliance on *People v Watkins*, 438 Mich 627; 475 NW2d 727 (1991), cert den 502 US 1057; 112 S Ct 933; 117 L Ed 2d 105 (1992), for the proposition that detailed admissions of non-testifying codefendants are not admissible, is misplaced. This Court has determined that *Watkins* has no precedential effect because there was no majority opinion. *Petros, supra* at 406.

II

Defendant next argues that the prosecutor injected inadmissible evidence when he asked prosecution witness Timothy Baggs a question which he knew, or should have known, would elicit the fact that Baggs had previously taken a lie detector test. It is well established that results of lie-detector tests are not admissible at trial. *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). However, applying the factors set forth in *Rocha, supra* at 8-9, we find that error requiring reversal did not occur as a result of the prosecutor's question because defendant failed to object and a curative instruction could have prevented any prejudice to defendant, the reference to the polygraph test was brief, and no results were admitted. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995); *People v King*, 215 Mich App 301, 308-309; 544 NW2d 765 (1996).

III

Defendant further argues that the trial court violated the principle of proportionality when it departed from the minimum guidelines range of 24 to 72 months' imprisonment and sentenced him to 125 to 240 months' imprisonment. We disagree. Our review of sentencing decisions is limited to determining whether the trial court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentence must be proportional to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). When a trial court departs from the minimum sentencing guidelines, it is required to state its reasons both on the record and on defendant's SIR. MCR 6.425(D)(1).

In this case, contrary to defendant's assertions, the trial court articulated its reasons for departing from the guidelines range. The trial court explained on the Sentencing Information Report Departure Evaluation that it believed that defendant "probably planned [the armed robbery] and was every bit as culpable as the trigger man." He further indicated that defendant "should have been sentenced as the leader" and that "the guideline range is insufficient." In addition, the trial court adequately stated its reasons for departure on the record. The trial court indicated that the guidelines were inadequate given the impact of the crime on the community and on the victim, and because defendant was just as responsible as Hall. The court noted that defendant drove the truck to the location of the offense and that defendant provided the gun. The court also referred to defendant's prior felonies. We find that the trial court adequately articulated its reasons for sentencing defendant outside the guidelines range. We also conclude that defendant's sentence was proportional to the offense and the offender. *Milbourn, supra*.

IV

Defendant finally claims that the trial court erred in scoring twenty-five points for offense variable 2. This challenge does not state a cognizable claim for relief. The Michigan Supreme Court recently ruled that "[a]ppellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied." *People v Mitchell*,

454 Mich 145, 178; ___ NW2d ___ (1997). We conclude that the sentence imposed was proportionate.

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] John Hall was convicted of armed robbery.