STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GREGORIO A. RIOJAS,

Defendant-Appellee.

UNPUBLISHED
December 30, 1997

No. 195495
Oakland Circuit Court
LC No. 94-132904-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316; MSA 28.548, and conspiracy to commit armed robbery, MCL 750.529; MSA 28.797, MCL 750.157a; MSA 28.354(1). The district court conducted two preliminary examinations, and bound defendant over for trial after each exam. However, the Oakland Circuit Court subsequently granted defendant's motion to quash the information against defendant on the basis that the district court relied on the inadmissible statements of two codefendants to find probable cause to bind him over. The prosecution now appeals as of right. We reverse.

The prosecution first argues that the circuit court erred in ruling that the statement made by codefendant Sean Sword to the police while he was in custody, was inadmissible against defendant. We agree.

For a nontestifying codefendant's statement to be admissible against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser. *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). MRE 804(b)(3) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Where an accomplice inculpates a defendant, in a statement made at the accomplice's initiative without any prompting or inquiry, that statement is against the declarant's penal interest and, as such, is reliable. Accordingly, the whole statement—including portions that inculpate the defendant—is admissible as substantive evidence at trial. *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993). In reaching this conclusion, the Supreme Court was guided by the comment of the Advisory Committee for the Federal Rules of Evidence concerning FRE 804(b)(3), on which the Michigan rule is modeled:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. [*Id*. at 162.]

Once it is decided that a statement is admissible under MRE 804(b)(3) as substantive evidence against a defendant, it must be determined whether admission of the statement violates the defendant's Sixth Amendment right of confrontation. *Id*. 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. *Id*. 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—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.
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> 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.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence

> or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Id*., citation omitted.]

First, we find that Sean Sword's statement was admissible against defendant pursuant to MRE 804(b)(3).[1] The circuit court ruled that Sword's statement was sufficiently against his penal interest to be admissible against him, but not against defendant. However, the portions of Sword's statement that inculpated defendant were made in the context of a narrative of events, at his initiative, were against Sword's penal interest and were reliable. *Poole, supra* at 161. Second, the admission of Sword's statement against defendant did not violate defendant's Sixth Amendment right of confrontation because the statement bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against defendant.

Sword's statement meets two of the four factors that favor admissibility. The statement was voluntarily given and made at Sword's initiation, without prompting or inquiry by Detective Harvey. Detective Harvey testified that he introduced himself to Sword and told Sword that if he wanted to speak to him, he was available. Detective Harvey did not ask Sword any questions or tell him that the other codefendants were making statements. Sword subsequently requested to speak with Detective Harvey. In his statement, Sword indicated that he initiated the meeting and the only questions he had been asked up until that point was his name. Detective Harvey told Sword that he could not give him any deals. Thus, we find that the statement was voluntary and made at Sword's own initiation. However, Sword's statement was not made contemporaneously with the events referenced, nor was it made to family, friends, colleagues or confederates.

To the contrary, only one of the factors that favors nonadmissibility was present in this case; the statement was made to a law enforcement officer. However, the statement did not minimize Sword's role or shift blame to defendant; nor was it made to avenge himself or curry favor. Moreover, Sword did not have a motive to lie or distort the truth. Sean Sword readily admitted that he shot and killed Esam Marougi without attempting to shift the responsibility to his codefendants. Sword stated that he, defendant, Eugene Pickard and Patrick Wetherwax agreed to "hit licks" and that they would shoot any person who attempted to flee from them. "Hitting a lick" is a street term for committing a robbery. They also agreed that the person who did not shoot the fleeing witness would be killed by the other members of the group. Sword stated that he never killed anyone before March 16, 1994, but he shot Esam Marougi because Marougi looked like he was going to run away from him.

Sword then described the role of his codefendants. Wetherwax drove the men to the In and Out party store in defendant's car and went in the store first to survey the activity. After he came back out, the men parked the car. He, defendant and Pickard entered the store carrying guns, which they loaded before entering the store. Sword went into the store first, followed by Pickard and then defendant. Sword stated that he attempted to shoot Marougi in the leg, but he could not control the gun because it kicked. Sword did not think he hit Marougi. Pickard and defendant told Sword to get the money and the tape after he fired the shot, but Sword refused and left the store. Sword did so because he was afraid that Marougi went to the back to get a gun. After they left the store, Sword's

codefendants wanted to hit another lick, but Sword refused. However, Sword conducted two other robberies the following day with defendant.

Sword's statement was strongly against his penal interest and he thoroughly inculpated himself in Esam Marougi's murder. Even though Sword stated that he never shot anybody prior to shooting Esam Marougi and that his codefendants told him to get the money after the shooting and subsequently wanted to "hit another lick," we do not believe that he shifted the blame or attempted to avenge himself or curry favor. Sword plainly stated that he wanted to leave the party store after he fired the shot because he was afraid Marougi would come back out with a gun. Sword's statement shifted responsibility away from his codefendants and minimized their role in the murder. No reasonable person could seriously contend that Sword expected to shift the blame away from himself when he admitted sole responsibility for shooting Marougi. At best, Sword's statement would shift enough blame that he and codefendants would share responsibility for the crime. Sword would be exposed to an equally severe penalty on the basis of his confession alone. *People v Petros*, 198 Mich App 401, 416; 499 NW2d 784 (1993). Moreover, Sergeant Alan Whitefield's testimony that a spent shell casing was found on the floor behind the counter, and Dr. Kanu Virani's testimony that Marougi died of a gunshot wound consistent with a .45 caliber gun, fired into his back, corroborates Sword's description of the shooting. *Id*. at 416-417. Therefore, we believe that Sean Sword's statement, as a whole, was admissible as substantive evidence against defendant.[2]

The prosecution also argues that the circuit court erred in excluding from evidence the following statement made by Eugene Pickard while in detention following the first preliminary examination:

> Sword had entered into the store. You and I went in after him. We stood next to the potato chip rack. He shot. We ran out to the car where [Wetherwax] was. In the video – that's my leg in the video and I'm wearing the shoes now that was in the video.

We find that Pickard's statement was admissible against defendant. First, Pickard's statement is against his penal interest because he admits to entering into the store with Sword, that his leg was in the video and that he fled after Sword shot the store clerk. In addition, three of the four factors favoring admission of the statement were present. Pickard voluntarily made the statement to defendant, his friend, and it was uttered spontaneously at his initiation, apparently without any prompting from defendant. The only factor favoring admissibility that was not present was that the statement was not made contemporaneously with the events referenced. *Poole*, *supra* at 165. On the other hand, none of the four factors favoring inadmissibility were present. The statement was not made to law enforcement officers or at the prompting of the listener. Contrary to the circuit court's conclusion, we do not believe that the statement minimized Pickard's role or shifted blame to his accomplices. Pickard merely stated that he and defendant entered the store after Sword did and stood by the potato chip rack while he shot. That does not imply that Pickard was opposed to Sword shooting Marougi or that he stood by the potato chip rack because he did not wish to participate in the crime. Pickard's statement that they ran out to the car after the shooting also does not diminish responsibility. It appears that Pickard's statement was a recitation of how the events occurred. Moreover, by stating that his leg was in the video and that he was currently wearing the same shoes as those in the video, indicates that

he was not trying to avenge himself or curry favor. Moreover, we do not believe Pickard had a motive to lie or distort the truth because when he made the statement, he was speaking to defendant within the hearing of the other two codefendants, while waiting in a jail cell. Although Pickard could have known that Deputy Bruce Ligard could hear his statement, the preliminary examination testimony had already been concluded for the day, and there is no indication that Pickard believed the deputy's hearing of the statement could aid him.

Defendant argues that Pickard's statement was inadmissible because it did not have sufficient indicia of reliability given that the context of the statement was ambiguous. However, Deputy Ligard testified that the statement was made in the context of a discussion of the events that had occurred in court that day. Deputy Ligard believed that Pickard's statement was his indication of what happened as opposed to the version of events that was portrayed in court. Therefore, we find that the statement was sufficiently reliable. Accordingly, the circuit court erred in concluding that the district court improperly admitted Pickard's statement against defendant.

Finally, the prosecution argues that the circuit court erred in quashing the information against defendant. We agree.

This Court's review of the circuit court's analysis of the bindover is de novo. *People v Reigle*, 223 Mich App 34, 36; 566 NW2d 21 (1997). This Court must determine if the magistrate committed an abuse of discretion in determining whether there was probable cause to believe that the defendant committed the offense charged. *Id*. at 36-37. A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. *Reigle, supra* at 37. There must be some evidence from which each element of the crime may be inferred. *Id*. Probable cause that the defendant has committed the crime charged is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged. *Id*. At the preliminary examination, the prosecution is not required to prove each element of the crime beyond a reasonable doubt. *Id*. Rather, where there is presented credible evidence both to support and to negate the existence of an element of the crime, a factual question that exists should be left to the jury. *Id*.

Defendant was charged with conspiracy to commit armed robbery, MCL 750.529; MSA 28.797, MCL 750.157a; MSA 28.354(1), and felony murder, MCL 750.316; MSA 28.548. MCL 750.157a; MSA 28.354(1) provides in pertinent part that: "Any person who conspires together with one or more persons to commit an offense prohibited by law, . . . is guilty of the crime of conspiracy." MCL 750.529; MSA 28.797 reads:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money to other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

Moreover, MCL 750.316(1)(b); MSA 28.548 (1)(b) provides in relevant part:

> A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> Murder committed in the perpetration of, or attempt to perpetrate . . . robbery . . . .

The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b); MSA 28.548 (1)(b). *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).

MCL 767.39; MSA 28.979, further provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Turner, supra* at 568. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id*. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id*. at 569. To sustain an aiding and abetting charge, the guilt of the principal must be shown. *Id*.

Because Sean Sword's statement was admissible against defendant, the evidence established probable cause that there was a conspiracy to commit armed robbery and that defendant participated in the conspiracy. The evidence also established probable cause that a felony murder was committed and that defendant aided and abetted Sword in that murder, because there was evidence to indicate that defendant supported, encouraged, or incited Sword to shoot Marougi. *Turner, supra* at 568. Accordingly, the circuit court erred in quashing the information against defendant because there was probable cause that he was guilty of conspiracy to commit armed robbery and felony murder.

Reversed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] Before a statement can be admitted under MRE 804(b)(3), it must be established that the declarant is unavailable. Unavailability is established if the declarant asserts his Fifth Amendment privilege against self-incrimination. *People v Petros*, 198 Mich App 401, 414; 499 NW2d 784 (1993). The prosecution explains that at the time the circuit court ruled on the admissibility of Sword's statement against defendant, Sword had indicated that he would assert his Fifth Amendment right, and therefore, was unavailable. Sword subsequently testified at his trial. However, the prosecution asserts that "this does not mean that Sword cannot reassert the privilege against self-incrimination at a future date," especially during the appeals process. Because Sword was unavailable at the time the court decided the admissibility of his statement, we treat him as unavailable.

[2] After Sword completed his discussion of the shooting and attempted robbery on March 16, 1994, he discussed other crimes allegedly committed by codefendants, namely the robbery of a motel. However, there is no indication that the prosecutor wanted to admit those portions of the statement into evidence because he did not include them in the list of assertions that he sought to admit. Therefore, we assume that the prosecutor did not seek to admit the statement in its entirety and do not discuss the latter portion of the statement.