

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE ALEXANDER WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 253299

Saginaw Circuit Court

LC No. 02-021184-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 20 to 40 years for his conspiracy conviction, 10 to 40 years for his conviction of home invasion, 25 to 50 years for his conviction of assault with intent to rob while armed, and 2 to 10 years for his conviction of possessing a firearm as a felon. Defendant was also sentenced to consecutively serve a two-year term of imprisonment for his felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing or articulation of substantial and compelling reasons to support a departure from the appropriate sentencing guidelines' range.

Defendant was tried with codefendants David Barker and Ronald Johnson in connection with a home invasion, during which the residents of the home were held at gunpoint while the intruders searched the home for money and drugs. Barker was apprehended inside the home, while defendant and Johnson were apprehended near the home later that night. At arraignment, Barker stated that neither Johnson nor defendant were with him at the home that night. Defendant argued for severance of the trials and admission of Barker's statement under MRE 804(b)(3). The trial court denied both requests and defendant was tried jointly with Barker and Johnson before a single jury.

On appeal, defendant first argues that the trial court erred by refusing to admit the statement made by Barker under MRE 804(b)(3). We disagree.

To be admissible under MRE 804(b)(3), the proponent of an out-of-court statement offered to exculpate the accused at a criminal trial must show that the declarant is unavailable to

testify, that the statement was against the declarant's penal interest, and that corroborating circumstances support the trustworthiness of the statement. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). Here, the trial court excluded the statement at issue on the ground that the statement did "not meet the level of trustworthiness necessary to be admitted into evidence" under MRE 804(b)(3). The determination whether there are sufficient indications of trustworthiness depend on both a trial court's findings of fact and the application of the law to those facts. *Barrera, supra* at 268-269. The findings of fact of the trial court are reviewed for clear error and the trial court's decision to admit or exclude the evidence is reviewed for an abuse of discretion. *Id.* at 269. Additionally, "[i]n exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence." *Id.*

To determine whether "corroborating circumstances clearly indicate the trustworthiness of the statement" within the meaning of MRE 804(b)(3), a court must look to the totality of the circumstances, including the credibility of the declarant. *Barrera, supra* at 273, 275. Factors favoring admission of a particular statement include that the statement was voluntarily or spontaneously given contemporaneous with the referenced events, or was made "to someone to whom the declarant would likely speak the truth." *Id.* at 274, quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993). In contrast, that a statement was made to law enforcement officers or at the prompting of the listener generally favors a finding of inadmissibility. *Barrera, supra* at 274-275. Where the declarant was in custody at the time the statement was made, a court should also consider any relationship between the declarant and the exculpated party, and whether there is any evidence that the statement was made in order to curry favor with the authorities. *Id.* at 275. Whether the statement was given by the declarant after being advised of his *Miranda*¹ rights is also a consideration relevant to the trustworthiness of the statement, and should similarly be considered when determining the admissibility of a statement under MRE 804(b)(3). *Barrera, supra*.

When viewed in accordance with the foregoing considerations, the circumstances here do not clearly preponderate in the direction of admitting or excluding the statement at issue. With respect to those factors favoring admission, we note that the statement appears to have been spontaneous, and was also clearly incriminating and thus against Barker's penal interests. See *Poole, supra*. Further, there is no evidence in the record before us that Barker and defendant knew one another or that the statement was made to curry favor with the prosecution. Additionally, although we see no clear evidence that Barker was advised of his *Miranda* rights, it is clear that he was advised at the arraignment of his right to counsel and his right to remain silent.

Conversely, the statement was made well after the event and after Barker alone was apprehended by police at the scene. The statement also was not made to someone known to Barker and, although made in a judicial setting, Barker was not under oath at the time he made the statement. Further, failure to admit the statement did not preclude defendant from presenting

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

his chosen defense, i.e., that he was not one of the men who committed the home invasion. Indeed, defendant took the stand and testified that he was not among the men who broke into the victims' home.

Again, the circumstances do not clearly preponderate in the direction of admitting or excluding the evidence. However, given that defendant was able to present his chosen defense without the subject statement, and mindful that "a trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion," *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000), we conclude that the court did not abuse its discretion in excluding the evidence. *Barrera, supra* at 269.

In any event, even were we to conclude that the trial court erred in this regard, reversal of defendant's convictions is not warranted in light of the weight of the evidence supporting defendant's involvement in the home invasion, properly admitted at trial. See *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). Police officers involved in the investigation testified that defendant was found, shortly after the break-in, hiding under a bush in a neighboring backyard wearing shoes matching foot impressions left by one of two unidentified individuals seen fleeing from the victims' home. A red bandana described by the victims as having been worn by one of the would-be robbers and found to contain DNA matching that of defendant was similarly discovered by the police only a short distance from the victims' home. Given this evidence, any error in the trial court's exclusion of the statement exculpating defendant through denial of his involvement in the charged crimes was harmless. Accordingly, even assuming that the trial court erred in excluding the subject statement, defendant is entitled to no relief. *Id.*

Defendant also argues, however, that the trial court erred in ordering that the two-year mandatory sentence for his conviction of felony-firearm be served consecutively to each of the other sentences imposed by the court. On this, we agree. In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), our Supreme Court held that a felony-firearm sentence is to run consecutive only to the sentence for the underlying or predicate offense, not to all other felonies of which a defendant is convicted. In this case, defendant's conviction of first-degree home invasion constitutes the predicate felony for the sole count of felony-firearm of which defendant was convicted. Consequently, defendant's sentence for the felony-firearm conviction should run consecutively only to his conviction of first-degree home invasion. *Id.*

Additionally, we sua sponte note that the trial court erred in scoring twenty-five points for offense variable (OV) 13 of the sentencing guidelines. MCL 777.43 instructs a court to score twenty-five points under OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Citing defendant's instant convictions of conspiracy to commit armed robbery, first-degree home invasion, and assault with intent to rob while armed, the prosecutor argued at sentencing that OV 13 was properly scored at twenty-five points because each of the cited offenses constitute a crime against a person for purposes of MCL 777.43(1)(b). The trial court agreed and, over objection by defense counsel, scored OV 13 at twenty-five points. We note, however, that although the offenses of first-degree home invasion and assault with intent to rob while armed constitute crimes against a person for purposes of the sentencing guidelines, see MCL 777.16d and MCL 777.16f, the offense of conspiracy is classified as a crime against public safety, see MCL 777.18. Consequently, we conclude that the trial court improperly scored OV 13 at twenty-five points;

rather, no points should have been scored. See MCL 777.43(1)(g). Moreover, because the reduction in score for OV 13 places defendant's sentence for his conviction of assault with intent to rob while armed above the appropriate sentencing guidelines,² we must remand this case for resentencing or articulation of a substantial and compelling reason for a departure from that range. See MCL 769.34; see also MCR 7.216(A)(7).

We affirm defendant's convictions, but remand this matter to the trial court for resentencing or articulation of substantial and compelling reasons to support a departure from the sentencing guidelines range. Regardless of which procedure is employed by the trial court, a judgment of sentence appropriately reflecting the consecutive nature of defendant's felony-firearm conviction must be entered by the trial court on remand. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Bill Schuette

² The trial court's scoring of the guidelines for defendant's assault with intent to rob while armed conviction placed defendant in prior record level E and offense variable level III for class A offenses against the person, resulting in a minimum sentence range of 126 to 315 months imprisonment, as third habitual offender. Reduction of OV 13 to a score of zero places defendant in offense variable level II, and results in a new sentencing guidelines' range of 108 to 270 months' imprisonment. Thus, defendant's minimum sentence of twenty-five years', i.e., 300 months', imprisonment for his conviction of assault with intent to rob while armed exceeds the applicable guidelines' range.