

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES ANDREW DORCHY,

Defendant-Appellant.

UNPUBLISHED

September 18, 2001

No. 217665

Oakland Circuit Court

LC No. 98-160800-FC

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b.¹ He pleaded guilty to being a felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to concurrent prison terms of mandatory life for the first-degree murder conviction and two to seven years for the felon in possession of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant was ordered to pay restitution in the amount of \$20,000. He appeals as of right, and we affirm.

Defendant first argues that the trial court erred in admitting evidence that a witness was allegedly threatened by defendant's girlfriend. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001).

The evidence was relevant to the witness' state of mind when testifying and, therefore, was probative of her credibility. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995); *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Further, because the threats were not attributed to defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

¹ Defendant was acquitted of a second felony-firearm count and an additional charge of assault with intent to commit murder, MCL 750.83.

Defendant next argues that the trial court abused its discretion and violated his right of confrontation by admitting Ernest Knox's testimony from proceedings involving codefendant Damian Deshawn Martin.² Knox, an eyewitness to the charged crimes, could not be located at the time of defendant's preliminary examination and trial. At defendant's preliminary examination, the court admitted Knox's testimony from Martin's preliminary examination. At defendant's trial, the court admitted Knox's testimony from Martin's trial.³ We review de novo a defendant's claim that he was denied his constitutional right of confrontation. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

"To be admissible under the MRE 804(b)(6) 'catch-all' hearsay exception, not only must a statement qualify under the rules of evidence, admitting the statement must also be consistent with the rights embodied in the Confrontation Clause of the Sixth Amendment." *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000), citing *Idaho v Wright*, 497 US 805, 814; 110 S Ct 3139; 111 L Ed 2d 638 (1990). "[A] hearsay statement admitted under MRE 804(b)(6) must show a 'particularized guarantee[] of trustworthiness' before a trial court may allow a party to introduce the evidence." *Smith, supra*, citing *Wright, supra* at 814-815. "A court must determine whether such statements are trustworthy and reliable after considering 'the totality of the circumstances.'" *Smith, supra*, citing *Wright, supra* at 819. "However, 'the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.'" *Smith, supra*, citing *Wright, supra* at 819-820, 822.

We conclude that Knox's testimony had sufficient guarantees of trustworthiness. Knox was an eyewitness to the shooting. The record indicates that Knox's preliminary examination and trial testimonies in Martin's proceedings were consistent. The testimonies were also consistent with both Knox's statement to the police and a statement given by a second eyewitness. Also, the testimony was given in court and under oath. Knox was subject to cross-examination by Martin, who had a similar interest in challenging the reliability and accuracy of Knox's account of the shooting. We conclude that the trial court did not abuse its discretion in determining that the former testimony had adequate indicia of reliability. MRE 804(b)(6); *People v Welch*, 226 Mich App 461, 467; 574 NW2d 682 (1997).

Further, Knox's testimony was more probative of the circumstances surrounding the shooting than any other evidence that the prosecution could procure through reasonable efforts. MRE 804(b)(6); *Smith, supra* at 684. Martin was called to testify at defendant's preliminary examination, but he claimed that he did not remember anything about the charged incident. Although there was a second witness to the shooting, at Martin's trial he testified that he was told what to write in his statement to the police and that he really did not know what happened. We conclude that admission of the evidence furthered the general purposes of the rules of evidence and best served the interests of justice. *Welch, supra* at 466. Because the statements had the

² The codefendant, Damian Deshawn Martin, was convicted of second-degree murder in connection with the charged incident.

³ Prior to the admission of this evidence, the trial court conducted an evidentiary hearing on the question of Knox's unavailability. MRE 804(a)(5).

requisite particularized guarantees of trustworthiness, defendant's right of confrontation was not violated. *Beasley, supra* at 560.

Defendant also challenges the bindover decision based upon the admission of Knox's testimony at Martin's preliminary examination. Knox's testimony at Martin's preliminary examination was consistent with his testimony at Martin's trial and his statement to the police shortly after the incident. Based upon our foregoing analysis, we conclude that Knox's testimony was properly admitted at defendant's preliminary examination. MRE 803(24); MRE 804(b)(6). We note that although the district court did not expressly make the same findings of due diligence as the circuit court, the officers testified to the measures employed to secure Knox's presence and defendant does not challenge Knox's unavailability on appeal. Even assuming MRE 804(b)(1) does not apply, the testimony was properly admitted under MRE 803(24). *People v Lee*, 243 Mich App 163, 170; 622 NW2d 71 (2000). Because Knox's testimony provided the requisite probable cause to believe that a crime had been committed and that it was defendant who committed it, *People v Goetze*, 457 Mich 442, 469; 579 NW2d 868 (1998); MCR 6.110(E), we therefore conclude that the district court did not abuse its discretion in binding defendant over for trial. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Defendant next contends that the trial court abused its discretion and violated his right of confrontation when it admitted evidence of Deon McCrary's statement to the police in which he stated that he saw defendant shoot the victim in the head. McCrary was unavailable to testify at defendant's trial.⁴ The trial court admitted the statement under the catch-all exception of MRE 804(b)(6), but indicated that the statement also qualified as an excited utterance, MRE 803(2).

We conclude that neither exception to the hearsay rule applies and that the evidence was improperly admitted. McCrary's statement to police did not bear a sufficient indicia of reliability or guarantee of trustworthiness. The statement was made an hour and a half after the incident. Although the passage of time is not dispositive of the statement's trustworthiness, the circumstances prior to the statement merited exclusion. After the shooting, McCrary ran away to his aunt's house and hid his and Knox's guns under a bed. McCrary then conferred with his uncle, who advised McCrary to go to the police. When he made the statement to police, McCrary was not subject to cross-examination. Accordingly, we conclude that the statement lacks the requisite indicia of reliability and was not admissible as an excited utterance or pursuant to the catch-all hearsay exception of MRE 804(b)(6).

Notwithstanding the erroneous admission of McCrary's statement, reversal is not required because the error was harmless. *Smith, supra* at 690; citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). At defendant's trial, the parties stipulated to the admission of McCrary's testimony given at Martin's trial, in which McCrary disavowed his statement to the police. Moreover, the evidence against defendant was substantial. Defendant admitted at trial

⁴ McCrary was unavailable for purposes of MRE 804(b)(6) due to his assertion of his Fifth Amendment right against self-incrimination. See *People v Schutte*, 240 Mich App 713, 716; 613 NW2d 370 (2000).

that he shot the victim, although he maintained that he acted in self defense. In light of defendant's admission that he shot the victim, as well as the strength of the other untainted evidence, we conclude that the admission of McCrary's statement to police was harmless.

Defendant next argues that the trial court abused its discretion by admitting evidence that defendant fled to Florida after the crime. We disagree. The evidence was admissible to show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

We also disagree with defendant's claim that the prosecutor committed misconduct by eliciting testimony that defendant used various aliases while in Florida. Because defendant asserted that he shot the victim in self-defense, his credibility was at issue. Evidence of defendant's use of aliases was relevant to his credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); MRE 608(b). See also *Coleman, supra* at 4-5.

Next, defendant argues that his trial counsel was ineffective by failing to raise at sentencing the issue of his inability to pay restitution. See *People v White*, 212 Mich App 298, 315-317; 536 NW2d 876 (1995). In order to prevail on his claim of ineffective assistance of counsel, defendant must show that counsel was deficient for failing to raise the issue of his ability to pay restitution in the amount of \$20,000, and that the alleged deficiency was prejudicial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Pursuant to MCL 780.767, as amended effective June 1, 1997, a trial court is no longer required to consider a defendant's ability to pay when ordering restitution. *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). We recognize that the instant offense was committed before the effective date of the amendment. However, the amendment is procedural in nature and operates in furtherance of a remedy already existing. See *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). Because the statute neither creates new rights nor destroys existing ones, it applies retroactively. *Russo, supra* at 594. Accordingly, counsel's failure to raise the issue cannot constitute ineffective assistance of counsel.

Finally, we reject defendant's claim that he was denied a fair trial because of the cumulative effect of the alleged errors. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra