STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

AARON JACKSON,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 181782
LC No. 94-001209

Before: Michael J. Kelly, P.J., and Markman and Jeffrey L. Martlew,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison for the first-degree murder conviction, and two years for the felony-firearm conviction. We affirm.

First, we find that the magistrate did not abuse its discretion in binding defendant over on the charge of first-degree premeditated murder. At a preliminary examination, the prosecutor need not prove each element of the offense, but must only show some evidence of each element. *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). Kenneth Hubbard testified that defendant and Edmonds got out of the car and approached decedent with their guns out and ready. Six or seven rounds were fired at decedent over a minute and a half. Defendant immediately drove off at a high rate of speed. Several witnesses testified regarding threats made by defendant on decedent's life. The evidence suggests not only an intentional killing, but one which was premeditated.

Next, we find that decedent's statement that defendant shot him was admissible as a dying declaration under MRE 804(b)(2), and defense counsel's failure to object to such evidence could not, therefore, have constituted ineffective assistance of counsel. There are four requirements that must be met before a statement can be admissible as a dying declaration: 1) the declarant was conscious of impending death; 2) death ensued; 3) the statements are sought to be admitted against one who killed decedent; and 4) the statements relate to the circumstances of the killing. *People v Parney*, 98 Mich App 571, 583; 296 NW2d 568 (1979). In this case, only decedent's consciousness of impending

death was disputed. "Consciousness of death" requires that the declarant was *in extremis* or "in the last illness" at the time the statement was made, and in fact believed his death was impending. *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988). The fact of a declarant's belief of impending death may be proven by circumstances surrounding the event. *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev'd on other grounds, 406 Mich 888; 276 NW2d 27 (1979). In this case, the number, nature and severity of the wounds would support an inference that the one so wounded believed he had an injury of fatal proportions. We therefore conclude that decedent's statements were admissible as dying declarations under MRE 804(b)(2).

Further, we find that the trial court did not clearly err in concluding that the photographic line-up was not unduly suggestive. The record shows that the identifying witness chose defendant's photograph because he believed defendant to be the perpetrator, and not because of any one external characteristic. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1994). The identification testimony was properly admitted.

We find no merit in defendant's assertion that the trial court impermissibly restricted cross-examination. Defendant was given wide latitude to cross-examine witnesses, and was only restricted for legitimate reasons by the trial court.

The trial court did not abuse its discretion in allowing the prosecutor to introduce prior consistent statements of certain witnesses. In each case, defendant sought to question the credibility of each witness, suggesting recent fabrication. The prosecutor was then entitled to rebut the implied charge of recent fabrication with the witness' prior consistent statement. MRE 801(d)(1)(B); *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994).

By leave granted, defendant, in a Pro Per Supplemental Brief, claims error in the trial court's exparte communications with the jury, by way of notes, during deliberation. A review of record reveals that the jury was instructed on 10/25/94 and started deliberation on the following morning. At 10:30 AM the jury requested, by note to the court, a rereading of the premeditated murder instruction, which was given. Thereafter a second note was sent to the court "Judge Edwards, we are at a stall right now, we need some fresh air!". The court file does not contain a response to this message nor is a record made of its receipt. A third note, stated "Judge Edwards we need to have a break". The court responded: "Continue with your deliberations Sg. Judge Edward 10/26/94 3PM mod". The following day a fourth note stating "We are still dead locked" was received by the court to which the court responded "Continue with your deliberations Judge Edwards 10/27/94." The jury reached a verdict at 3 PM on 10/27/94 finding defendant guilty of first degree murder. The court placed the notes in the court file, but did not advise the attorneys or the defendant, nor were the communication entered on the court record in any formal way.

Defendant argues that defense counsel was denied the opportunity to request that the court take action on the jurys' request for "… some fresh air …" or "… to have a break" … or to move for instructions when the jury advised that they were … dead locked …".

This court will find reversible error upon a showing of any reasonable possibility of prejudice. These were administrative communications that carry no presumption of prejudice. In view of the trial court's failure to advise counsel of the communications this court will treat such communications as though they were objected to and preserved for review on appeal.

Futile reverence is no longer paid to the rule against communication with sitting, debating jurors. The communications under consideration were administrative, with no presumption of prejudice. A trial judge can depart from the rules, statutory or case law, in communicating with jurors, and still not err unless there is a showing of prejudice *People v France* 436 M 138, 142; 461 NW2d 621 (1990). The responses of the court to these administrative communications were not prejudicial, but rather were appropriate instructions to continue to deliberate. We do not find any prejudice in the trial courts' actions. There was no error requiring reversal.

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew