

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN WALKER,

Defendant-Appellant.

---

UNPUBLISHED

March 1, 2005

No. 239711

Wayne Circuit Court

LC No. 01-003031

Before: Murphy, P.J., and Cooper and C. L. Levin\*, JJ.

LEVIN, J. (*dissenting*).

I respectfully dissent. The dying declaration should not have been admitted. This error was not harmless. A new trial should be granted.

I

The majority states that “considering the circumstances,” the trial court did not err in admitting the dying declaration. The deceased “had been shot multiple times. He had undergone two surgeries in two days to control his bleeding. He was in the intensive care unit, could not talk because tubes were down his throat, and could not move his lower extremities.” Also, “[t]here was testimony that family members were praying with the victim immediately before the statement was made, and that the victim had “complete fear in his eyes.”

Defendant relies, in his reply brief, on *Mattox v United States*, 146 US 140, 152; 13 S Ct 50; 36 L Ed 917 (1892), where the United States Supreme Court, in an opinion by Chief Justice Fuller, stated that it must be shown that the dying declaration was “made under a sense of impending death,” and that this might “appear from what the injured person said; or from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive.” He cautioned, however:

But the evidence must be received with the utmost caution, and, if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is *realized by the dying man because of the hope of recovery, it ought to be rejected.* [Emphasis added.]

---

\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

The rule of law that the “declarant must have spoken without hope of recovery” was again expressed by the Court in an opinion by Justice Cardozo:

To make out a dying declaration, the declarant must have spoken without hope of recovery and in the shadow of impending death.

*Shepard v United States*, 290 US 96, 99; 54 S Ct 22; 78 L Ed 196 (1933).

The Court of Appeals of New York, similarly stated, in *People v Bartelini*, 285 NY 433, 440; 35 NE 2d 29; 167 ALR 139 (1941):

Dying declarations are dangerous, because made with no fear of prosecution for perjury and without test of cross-examination, which is the best method known to bring out the full exact truth. *People v Falletto*, 202 NY 494, 499; 96 NE 355, 357. It is for those salutary reasons that extreme caution is required of the trial court before a dying declaration is received in evidence the fundamental requirement being that ‘preliminary to the admission of such evidence \* \* \* there must be clear proof of the certainty of speedy death, and that the *declarant had no hope of recovery*. [Emphasis added.]

The foregoing statement of the New York Court of Appeals was quoted by the Michigan Supreme Court with approval in *People v Johnson*, 334 Mich 169, 174, 175 (1952). The Court ruled that the dying declaration should not have been admitted because, among other things, “[i]t may be that [the declarant] expected to recover at the time he made the statement.”

In the instant case, the dying declaration was admitted through testimony of the decedent’s mother who said that he had nodded affirmatively when she asked, “did Juan do this.” On cross-examination, she acknowledged, however, that her son believed her when she told him that she would be taking him home, and, thus, that he would survive his wounds.

*Q.* Okay. And when you saw him, he was coming out of the anesthesia from the second surgery, is that correct?

*A.* It could be. He was just laying there with his eyes open.

*Q.* Was he in the I.C.U., the Intensive Care Unit?

*A.* Yes.

*Q.* Now, you went into the room and you indicate that he was there with his eyes open, and you’re there with your sister, right?

*A.* Yes.

*Q.* And you’re trying to be encouraging to him, is that correct?

*A.* Yes.

*Q. You're gonna be okay. T.J. We're gonna bring you home.*

*A. I'm gonna take you to my mother's house.*

*Q. Okay. And that he was gonna be okay, and that you were gonna take care of him, is that right?*

*A. Yes.*

*Q. Okay. And do you believe that he believed you?*

*A. Yes.*

*Q. Okay. How do you - - how did you get the feeling that he believed you?*

*A. We was pretty close.*

[Emphasis added.]

The foregoing exchange precludes a finding other than that the declarant had a hope of recovery, and thus precludes the admission in evidence of the dying declaration.<sup>1</sup>

## II

The error was not harmless. The other evidence of the defendant's guilt was problematic.

The deceased's godmother testified that the defendant came to her home in either 1999 or 2000, and requested the return of certain items that the deceased had allegedly stolen from him, and that she saw the defendant carrying a gun on the right side of his pants. She did not inform the police about this incident at the time, and acknowledged that she did not inform the police of this incident until the time scheduled for the preliminary examination (*see n. 1 supra.*)

---

<sup>1</sup> It is noteworthy that although there were many opportunities, when the police were at the mother's home following the shooting, to inform them of the dying declaration, the mother and her sister did not do so until the time scheduled for the preliminary examination, March 1, 2001, over eight months after the shooting.

It is also noteworthy that when the declarant was admitted to the hospital, he stated that he did not know who had shot him.

In *Crawford v Washington*, 531 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), n 6, the United States Supreme Court said:

We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

The deceased's mother testified that her son acknowledged to her that he had stolen the defendant's automobile. The police also first learned of this around the time of the originally scheduled preliminary examination, March 1, 2001.

Two teenage girls witnessed the shooting. Police officers testified that one of them informed them shortly after the shooting, that a classmate, Treye Jones, was the shooter. At the trial this teenage girl denied that she had made that statement to the police, and denied that Treye Jones was the shooter. She testified that she was unable to identify the defendant as the shooter. She described the shooter to the police as weighing 150 pounds, with a low cut haircut, and a skin complexion much darker than defendant's.

The other teenage girl who witnessed the shooting was the last witness to provide evidence regarding the incident. She identified the defendant at the trial as the shooter. This teenager had observed the defendant for seconds in a startling setting. She testified that she had not observed him in a lineup. Nor had she seen a photograph of him. She observed him for the first time sixteen months after the shooting sitting in the courtroom when she appeared to testify two days before she actually testified. She had described the shooter to the police as dark complected, heavy build, and bald. She acknowledged that the defendant was medium, not heavy build, that he was light complected, that the shooter was "much darker" when she saw him than defendant, and that defendant was not bald at the time of trial.

The infirmities respecting the testimony of the godmother and the mother regarding the alleged motive, and the infirmities in the eyewitness identification testimony, are such that it is more probable than not that the error in admitting the dying declaration was outcome determinative. See *People v Lukity*, 460 Mich 484, 496 (1999).

I would reverse and remand for a new trial.

/s/ Charles L. Levin