STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2011
v	No. 296269 Wayne Circuit Court
WILLIAM MARSHALL MOSLEY, Defendant-Appellant.	LC No. 09-007942

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317,[1] first-degree felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, armed robbery, MCL 750.529, two counts of resisting and obstructing an officer, MCL 750.81d(1), third-degree fleeing and eluding, MCL 750.479a(3), and felony-firearm, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 25 to 45 years for second-degree murder, natural life for first-degree felony murder, 20 to 45 years for carjacking, 10 to 30 years for armed robbery, one to two years for both counts of resisting and obstructing, and one to five years for fleeing and eluding – all to be served consecutive to a two-year sentence for felony-firearm. For the reasons set forth below, we vacate the second-degree murder conviction and sentence, but affirm in all other respects.

The facts of this case are straightforward. On August 16, 2008, two men accosted Anthony Burns at gunpoint in his driveway and demanded the keys to his Maserati. Although Burns complied, he was nonetheless shot twice before the suspect with the firearm fled in the Maserati and the other suspect fled in an SUV. Police responded to the shooting and, based on Burns's descriptions, were able to locate the Maserati in a strip mall parking lot about three hours later. After officers unsuccessfully attempted to remove the driver from the Maserati, a high-speed chase ensued and concluded when the Maserati crashed into several parked cars. Defendant – who had been driving the Maserati and was the only person inside the vehicle –

[1] This is the lesser offense of the charged offense of first-degree premeditated murder, MCL 750.316(1)(a).

attempted to flee on foot before police subdued and arrested him. Notably, during the search of the vehicle, police found a handgun on the floorboard that was later determined to have discharged one of the bullet casings found at the scene of the robbery.

Defendant was subsequently taken to the hospital to receive treatment for a broken leg. At the hospital, police obtained two important statements from defendant and Burns. First, defendant confessed that he was riding in the Maserati, but only after several acquaintances robbed the Maserati driver at gunpoint in his presence. Burns, however, identified defendant as the shooter from a photo array, although he was not "a hundred percent sure." Nearly two months after he was shot, Burns died from complications arising out of his gunshot wounds.

At trial, defendant disputed this version of events and claimed that prior to the "little chase," an acquaintance had invited him to ride in a Maserati. It was only after the acquaintance went into a store and defendant noticed a man (whom defendant did not recognize as a police officer) with an assault rifle coming toward the Maserati that defendant fled the scene out of fear that he would be robbed. Apparently disbelieving defendant's assertions, the jury found defendant guilty of the aforementioned offenses. The instant appeal ensued.

Defendant first argues that the trial court erred in admitting Burns's identification of him from the photo array under MRE 804(b)(2) (dying declaration) and that as a result his Sixth Amendment rights to confrontation and to present a defense were violated. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, to the extent defendant's challenge to the admission of hearsay evidence is based on the deprivation of constitutional rights, our review is de novo. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 928 (2001).

In *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars testimonial hearsay unless the declarant was unavailable and was subject to prior cross-examination. However, as defendant concedes in his brief, our Court has held that dying declarations are admissible as an historical exception to the Confrontation Clause under *Crawford* and therefore pose no conflict with the Sixth Amendment. *People v Taylor*, 275 Mich App 177, 183; 737 NW2d 790 (2007).[2]

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[2] *Taylor* remains controlling authority in this case as the Michigan Supreme Court denied leave, *People v Taylor*, 481 Mich 943; 752 NW2d 454 (2008), and the United States Supreme Court denied certiorari, *Taylor v Michigan*, ___ US ___; 129 S Ct 512; 172 L Ed 2d 376 (2008). Additionally, we note that the recent holding of *Michigan v Bryant*, ___ US ___; 131 S Ct 1143; 179 L Ed 2d 93 (2011), has no bearing on our analysis because that case pertained to a dying declaration within the context of an ongoing emergency (specifically, *Bryant* held that the dying declaration in that case was non-testimonial, see *id*. at ___).

Consequently, resolution of this issue hinges on whether Burns's statement qualified as a dying declaration under MRE 804(b)(2).[3]

That rule excepts as hearsay the statement of an unavailable declarant in the prosecution of a homicide where the declarant made the statement "believing that the declarant's death was imminent" and the statement "concern[ed] the cause or circumstances of what the declarant believed to be impending death." MRE 804(b)(2); see also *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988). Because defendant's challenge rests wholly on whether Burns believed his death was imminent, we need only address that part of the rule.

The determination of whether a declarant believed that death was impending may be inferred from the surrounding circumstances. *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev'd in part on other grounds 406 Mich 888 (1979). Thus, the apparent fatal quality of a wound as well as statements made to the declarant by the doctor or by others that his condition is hopeless are all relevant to prove a declarant's belief of impending death. *Id*., citing, McCormick, Evidence (2d ed), § 282, pp 680-681. Moreover, "it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration." *Siler*, 171 Mich App at 251.

Instructive to our analysis is *Webb v Lane*, 922 F2d 390, 392 (CA 7, 1991). In that case, the Court found that the declarant's identification of the defendant from a photo array two days before the declarant's death satisfied the requirements of a dying declaration. Notably, the declarant in that case made the identification while attached to life support in a hospital due to six gunshot wounds causing major internal injuries. Additionally, the declarant was aware the doctor doubted his chances for survival and had communicated to his relatives, prior to the identification, that he believed he would die. The Court found that from these facts it was reasonable to infer the declarant knew about the seriousness of his condition and that death was imminent. *Id*. at 396

Like the declarant in *Webb*, Burns was in the intensive care unit of the hospital suffering from two gunshot wounds, one of which caused paralysis from the waist down. At the time of the identification, a number of tubes and apparatuses were attached to Burns and he appeared in intense pain. Burns's wife was constantly present with him throughout this time and even Burns's pastor was called to the hospital for prayer. Additionally, just a few hours after making the identification Burns requested that his wife bring their children to him since he "would not see joy in the morning." (According to Burns's wife, this reference meant for her husband that he would not see his family again.) Considering the totality of these circumstances, it is reasonable to infer, as in *Webb*, that Burns was aware of the seriousness of his condition and that he believed death was imminent at the time of the identification even though he did not pass for

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[3] Defendant couches his argument concerning his right to present a defense within the context of the Confrontation Clause and cross-examination. Thus, no separate inquiry is necessary on this issue.

some time after the statement. Therefore, the identification was properly admissible under MRE 804(b)(2) as a dying declaration, and the trial court did not err.

Defendant next argues that the court erred in denying his motion to suppress his confession at the hospital because it was not made voluntarily. This Court reviews a trial court's application of constitutional law and ultimate decision on whether to suppress a confession de novo. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). While we review the entire record and make an independent determination whether the confession was voluntary based on the totality of the circumstances, we will not disturb a trial court's findings of fact unless they are clearly erroneous. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). "A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *Akins*, 259 Mich App at 563.

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Id*. at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The confession must be made without intimidation, coercion, or deception and must be the product of an essentially free and unconstrained choice. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). In determining the voluntariness of a confession, we consider the following nonexhaustive list of factors, although no one factor is dispositive:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

Defendant claims his confession was involuntary because the interrogating officer exploited his condition, which – as he testified at the *Walker* hearing[4] – was weakened by medications and injuries. The interrogating officer, however, testified that defendant appeared coherent during the interrogation, that there was no indication that he was under any influence of narcotics or drugs, and that defendant had no trouble reading over his statement and affixing his initials to the waiver of rights form. Further, defendant made no indication to the officer concerning any residual injuries from his arrest. The trial court apparently believed the officer's account of events as opposed to defendant's, and the trial court's credibility determinations were not clearly erroneous. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005). And

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[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

in any event, whether a defendant is under the influence of drugs is not necessarily dispositive in the determination of whether his confession was voluntary. *People v Dunlap*, 82 Mich App 171, 176; 266 NW2d 637 (1978). As defendant raises no further challenge to the voluntariness of his confession, we find no error in the trial court's decision.

Finally, as the prosecution concedes, defendant is correct that his convictions for both felony-murder and second-degree murder violate the double jeopardy protections of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000) ("defendant cannot properly be convicted of both first-degree murder and the lesser included offense of second-degree murder for the death of a single victim"). The remedy for such a double-jeopardy violation is to vacate the second-degree murder conviction. *Id*. at 429-430; see also *People v McCauley*, 287 Mich App 158, 167 n 3; 782 NW2d 520 (2010).

For the foregoing reasons, we vacate defendant's second-degree murder conviction, but affirm in all other respects.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray