

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON CLAUDE SHUFORD, JR.,

Defendant-Appellant.

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UNPUBLISHED

July 15, 1997

No. 184976

Calhoun Circuit Court

LC No. 94-002716 FC

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a conditional plea of no contest of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to fifteen to thirty years' imprisonment. We affirm.

Ambrose Tate was shot once in the chest and once in the leg in the early morning hours of August 5, 1994. Tate died as a result of the gunshot wound to his chest. Defendant was arrested and charged with open murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with Tate's death. At the preliminary examination, Derrick Young testified that he had been riding in a car with defendant and Tate on August 5, 1994. Defendant and Tate began to argue, so Young got out of the car and ran down the street. Young had observed a gun on the seat next to defendant. About ten minutes later, Young heard what sounded like two gunshots coming from the direction of the car.

Several Battle Creek police officers testified that when they arrived at the intersection of Howland and Roseneath Streets, at approximately 1:45 a.m., an unoccupied vehicle was parked in the intersection and Tate was lying in the driveway at 284 Howland Street. Tate had been shot once in his chest and once in his leg. Tate requested an ambulance several times and also identified defendant as his assailant. Tate was taken to a hospital and pronounced dead at 2:16 a.m.

Defendant entered a conditional plea of no contest to the charge of second-degree murder, MCL 750.217; MSA 28.549, on March 2, 1995 in exchange for the dismissal of the open murder and

felony-firearm charges. Defendant's plea was conditioned on the preservation of all issues raised before the plea, as well as any issues arising at sentencing.

## I

Defendant first contends that the district court abused its discretion in admitting Tate's statements, including Tate's identification of defendant as his assailant, under the dying declaration exception to the hearsay rule. Specifically defendant argues that Tate was not conscious of his impending death and lacked personal knowledge of his assailant.

MRE 804(b)(2) provides the following exception, known as the dying declaration exception, to the hearsay rule:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

During the preliminary examination, the following statements of the victim, Ambrose Tate, were admitted under the dying declaration exception:

(1) Michael VanStratton of the Battle Creek police department testified that when he arrived at the intersection of Howland and Roseneath, he heard Tate say "Over here." When VanStratton approached Tate, Tate stated "Help me, I don't want to die."

(2) Brett Weiss of the Battle Creek police department testified that he asked Tate several times who shot him, and Tate responded by asking for an ambulance.

(3) Timothy Kendall of the Battle Creek police department testified that he heard Weiss ask Tate at least twice who shot him. Tate requested an ambulance after Weiss' first inquiry and replied "Leon Shuford" after Weiss' second inquiry.

(4) Phillip Reed of the Battle Creek police department asked Tate for his name and Tate requested an ambulance. Reed asked Tate for his name a second time and Tate responded "Ambrose Tate." Reed then asked Tate who shot him and Tate asked for an ambulance. After informing Tate that help was on the way, Reed again asked Tate who had shot him and Tate said "Leon Shuford."

All of the above witnesses testified that Tate was found lying down and bleeding at the Howland Street address, and appeared to have gunshot wounds to his chest and leg. VanStratton testified that, based on the trail of blood, it appeared that Tate had traveled forty to fifty yards after he was shot. Kendall and Reed testified that Tate was having trouble breathing. The officers each testified to arriving at the scene between 1:40 a.m. and 2:00 a.m. on August 5, 1994. The time of death declared by the hospital was 2:16 a.m. on August 5, 1994. Dr. Laurence Simson, who performed the autopsy on Tate, testified that none of Tate's wounds were "immediately incapacitating" but that Tate was "becoming progressively unable to breathe as air accumulated in the chest space around the left lung and around the right lung as well."

In *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988), this Court set forth the following four requirements that must be met before a statement can be admitted as a dying declaration:

- (1) The declarant must have been conscious of impending death;
- (2) Death must actually have ensued;
- (3) The statements are sought to be admitted in a criminal prosecution against the individual who killed the decedent; and
- (4) The statements must relate to the circumstances of the killing.

The district court pointed to Tate's statement "Help me, I don't want to die" and Tate's requests for an ambulance in response to questions from Kendall and Reed as evidence of Tate's fear for his life. The district court also noted the testimony regarding the visible gunshot wounds and blood on Tate's chest and leg, and Tate's difficulty breathing. Based on this evidence, the district court found that Tate was conscious of impending death. Further, Simson's testimony that Tate was pronounced dead at 2:16 a.m. reveals that Tate died within approximately one half hour of his statements. Taking all these circumstances into account, the record reveals that Tate was conscious of impending death when his statements were made to the witnesses. Defendant does not dispute the remaining requirements for the admission of a dying declaration.

However, defendant contends that there was insufficient foundation for the testimony because the prosecutor did not establish that Tate had personal knowledge of defendant. MRE 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." It is unclear whether defendant properly preserved this issue, as defendant never objected to the admission of Tate's statements based on MRE 602, but defendant did object to VanStratton's testimony regarding statements made by Tate on the basis of lack of foundation. Further, defendant cites no authority for his application of MRE 602 to the dying declaration exception. However, the district court provided the following reasoning which addresses defendant's contention:

[W]hen we take Derrick Young's testimony, in that he identified Leon Shuford, the defendant, as being in the vehicle shortly before the shooting, and as being the person

who Ambrose Tate was arguing with, and as being the person who was in close proximity to the gun.

So when you take those altogether, a reasonable finder of fact could reasonably infer that the defendant, Leon Shuford, is the Leon Shuford identified by Ambrose Tate.

The reasoning provided by the district court reveals that the prosecutor laid a proper foundation to allow the admission of Tate's statements as a dying declaration. Therefore, the district court did not abuse its discretion in admitting Tate's statements under the dying declaration exception to the hearsay rule.

## II

The second and third issues raised by defendant were not preserved for appeal. Defendant argues that Tate's statements were admitted into evidence at the preliminary examination in violation of the Confrontation Clause. Next, defendant argues that the prosecutor was required to present evidence on the lack of justification or excuse on the open murder charge, and that the district court abused its discretion by not making a finding on this element.

MCR 6.302(C)(2) states, "a conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record."

At the taking of defendant's plea, defendant's counsel stated as follows: "[M]y client's plea is conditional in that the plea preserves all issues that have been raised up to this point and presumably others at sentencing." The issues presented here were neither raised before nor addressed by the district or circuit court. Issues not specified as reserved are waived. *People v Wynn*, 197 Mich App 509, 510; 496 NW2d 799 (1992). Because defendant did not preserve these issues, his right to appellate review has been waived.

## III

Next, defendant contends that he was prejudiced because the district court did not require the prosecutor to furnish a bill of particulars before the conclusion of the preliminary examination.

MCL 767.44; MSA 28.984 provides that "the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged." When a statutory short-form information is used, a defendant has a statutory right to a bill of particulars. *People v Johnson*, 427 Mich 98, 109-110; 398 NW2d 219 (1986).

Defendant stated at the preliminary examination that he was specifically requesting the district court to require the prosecutor to specify the degree of murder charged in the bill of particulars. The district court made the specific finding that the prosecutor was not required to specify the degree of murder charged at this stage of the proceeding and that the court was not required to make a finding

regarding premeditation. Our Supreme Court has held that "neither statute nor case law requires specification of the degree of murder at a preliminary examination where open murder is charged in the information." *Johnson, supra* at 107. Therefore, because defendant specifically requested a bill of particulars for the purposes of requiring the prosecutor to specify the degree of murder charged, and the district court properly held that the prosecutor is under no such obligation, defendant was not prejudiced by the district court's denial of his request for a bill of particulars.

Because defendant was not prejudiced by the district court's denial of his request for a bill of particulars, the district court did not abuse its discretion in binding defendant over to the circuit court.

#### IV

Finally, defendant contends that in order to bind him over on an open murder charge, the prosecutor is required to establish probable cause that defendant committed each of the elements of first-degree murder. Therefore, argues defendant, because insufficient evidence of willfulness, deliberation and premeditation was presented at the preliminary examination, the district court abused its discretion in binding defendant over to circuit court.

Our Supreme Court has held that "[t]he meaning of the 'open murder' charge in Michigan statutory criminal procedure is that no evidence of premeditation and deliberation need be adduced at the preliminary examination." *Johnson, supra* at 108. Therefore, a finding of probable cause on the element of premeditation is not required to bind defendant over on the charge of open murder, and the district court did not abuse its discretion.

Affirmed.

/s/ Hilda R. Gage

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald