STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 246620 Wayne Circuit Court
ROBERT JEROME GREATHOUSE, Defendant-Appellant.	LC No. 02-001482

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, arising out of the shooting death of Kenya Ferguson. He was sentenced to a life term of imprisonment on the murder conviction and a consecutive two-year prison term on the felony-firearm conviction. Defendant appeals as of right, challenging the trial court's failure to grant a mistrial, where a juror was allegedly seen sleeping, and challenging the court's admission of the victim's dying declaration, identifying "Robert" as the shooter. This case is submitted without oral argument pursuant to MCR 7.214(E). We affirm.

I. BASIC FACTS

The victim was shot to death in Detroit near a drug house. Defendant had been a friend of the victim, whom defendant met through a mutual friend, James Wright. Wright worked with the victim cutting hair at a barbershop, and Wright had known defendant since high school. Defendant visited the barbershop about once a week and occasionally socialized with the victim and Wright. The three had become friends over the years, yet Wright insisted that the victim only knew defendant as "Boss."

Wright testified that on December 24, 2001, defendant met with the victim and Wright at the barbershop, and the three decided to meet later at a "weed" house to purchase some marijuana. According to Wright, he and defendant left the barbershop together, and the victim, who first wanted to do some Christmas shopping for his daughter before buying marijuana at the drug house for his mother as a birthday gift, left separately. Defendant and Wright arrived at the drug house, and defendant remained in the car while Wright went to the house in an effort to obtain some marijuana. Defendant and Wright had noticed a car already parked near the drug house that appeared to be the victim's vehicle, although they did not see the victim anywhere.

Wright testified that the person selling drugs from the home was panicky, claiming that he had just heard gunshots, and the drug dealer refused to make a marijuana sale. Wright, the dealer, and defendant then left the scene together, and subsequently the dealer was dropped off at another location. Wright testified that he and defendant proceeded to purchase marijuana at another weed house and then spent several hours at the home of a cousin. Wright learned of the victim's death the following day, and he maintained that defendant was not involved in any shooting while at the drug house.

Around the time Wright and defendant had been at the drug house, the victim was found by police lying on the ground a block or so away from the drug house shortly before the victim died from gunshot wounds. Four spent shell casings from the same nine-millimeter Ruger were located outside the drug house, and a trail of blood was found between the drug house and the location of the victim's body. The victim, on police questioning just before he died, responded twice that "Robert" was the shooter. We shall expand on the circumstances surrounding the statements and death in our discussion of the dying declaration issue presented on appeal. The murder weapon was not found, nor were there any usable fingerprints. There was no physical evidence tying defendant to the crime. The medical examiner testified that the victim died from two gunshot wounds. One bullet entered the left side of the back and damaged a major artery, and the other bullet entered the victim's right thigh and exited his buttocks area. The bullets were not fired from close range.

A homicide detective testified that he questioned defendant, and defendant provided a written statement after being thoroughly advised of his constitutional rights. Defendant denied any involvement in the shooting, and his statement closely mimicked Wright's testimony as reflected above. Defendant was subsequently interviewed again by another homicide detective. Following advisement and waiver of his constitutional rights, defendant, after initially denying involvement in the shooting, verbally acknowledged that he shot the victim because the victim owed him $60 and would not pay him back after several requests. Defendant then drafted a consistent written statement admitting to the shooting because of the debt. But he further indicated that he had also feared for his life and was sorry. The detective testified that he did not threaten the victim, nor make any promises of leniency.

A third homicide investigator, who arrested defendant, questioned him further, and defendant provided, in part, the following written statement:

> "When I pulled up on Alcoy[,] Ken [victim] was already out of his car and walking up to the weed house . . . . I walked up and asked him again about the $60 he owed me. He told me go f**k myself. I thought I seen him use his right hand and reach toward his side like he had a gun so I pulled out my gun and shot him."

Defendant stated that he fired four or five times with his nine-millimeter Ruger, and the victim took off running. Defendant, in writing, denied that any police promises or threats were made in order to procure his statement; the statement was voluntarily given.

Subsequently, another police officer interrogated defendant, and defendant again admitted to the shooting, which was over the victim's failure to repay the $60 debt. Defendant again claimed that the victim acted as if he was going to pull out a weapon before defendant

fired. We note that defendant also stated that the victim started running, at which point defendant aimed his gun and started firing. The officer denied making any threats or promises to defendant.

Defendant testified on his own behalf, and his testimony closely paralleled that of Wright. He had known the victim for a little over two years. Defendant denied any involvement in the shooting. He testified that the first statement he gave police, denying involvement, was true, and the later statements provided to police, admitting to the shooting, were false. Defendant claimed that he falsely admitted to the shooting because the police officers questioning him suggested that the criminal justice system would go easier on him if he just admitted to the shooting and gave his version of events. Defendant also claimed that he believed that if he just told the police what they wanted to hear, they would let him go. He further testified that, despite knowing the victim for a couple of years, the victim only knew defendant as "Boss" and did not know that his name was Robert. Defendant maintained that, although he loaned the victim $100 and was still owed $60, he told the victim not to worry about paying him back quite yet.

II. ANALYSIS

A. Mistrial Motion – Sleeping Juror

Defendant first argues that the trial court erred in failing to control a sleeping juror and failing to grant defendant's motion for a mistrial on the basis of the sleeping juror, thereby depriving defendant of his constitutional right to a fair trial by an impartial twelve-member jury.

The trial transcript reveals that following the testimony of the chief medical examiner midway through the second day of the three-day trial, defense counsel stated that "it's been brought to my attention . . . we have a juror that's nodding out or sleeping[.]" In response, the trial court stated: "Well, when I saw it he stopped, but that makes two." Counsel then indicated that she just wished to bring the matter to the court's attention. The trial court noted that it was aware of the situation and further stated that "we have two people that might cause us, you know, it's a matter of picking which one we pull, you know." The trial court's reference to a second juror concerned an individual who, according to the judge, was alert but fearful of retribution and "afraid to bring back a verdict . . . because she lives in the neighborhood."

After the initial discussion regarding the alleged "sleeping" juror, defense counsel again raised the matter at the conclusion of the proofs. The trial court found itself trying to decide whether to dismiss the "sleeping" juror or the "fearful" juror. The trial court stated:

> At least she ["sleeping" juror] was listening to some of it, but this lady ["fearful" juror] has been alert. She's heard it all and what she's telling us is she's not gonna make a verdict in this case no matter what the evidence is. That's what she said. At least the other lady hasn't made any commitment like that.

Defense counsel then reiterated that the "sleeping" juror had been seriously nodding out, to which the prosecutor responded that he was unsure whether she had actually been asleep. The trial court chimed in, stating that "[s]he's been nodding out." The court further indicated:

> I can't dismiss two jurors. I can only dismiss one because I'm not going to call a mistrial in this case. We have to dismiss somebody in here.

Defense counsel once again asserted that the juror had been sleeping, and, on reflection, the court noted it was unsure whether the juror had actually been sleeping. Defense counsel formerly requested the trial court to grant a mistrial. The court declined, concluding:

> I believe in asking juror number two ["fearful" juror], she's already stated her position. As far as number twelve ["sleeping" juror] is concerned, we take frequent breaks and I don't know if she dozed off for a second, I don't know what she didn't hear but we'll have to proceed. So Ms. Reed's objection and her motion is all stated on the record.

This Court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). The trial court's ruling on the mistrial motion must be so grossly in error as to deprive the defendant of a fair trial or to amount to a miscarriage of justice. *Id.* This case is analogous, with respect to the analytical framework, to cases addressing juror misconduct. In *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998), this Court stated:

> In *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960), our Supreme Court set forth the standard of review where there is an allegation of juror misconduct:
>
> "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice."
>
> The Court further stated that it had repeatedly recognized that to justify the granting of a new trial "error must appear affirmatively." *Id.* at 227. Prejudice must be shown, or facts clearly establishing the inference that it occurred from what was said or done. *Id.*; *People v Hayes*, 126 Mich App 721, 729; 337 NW2d 905 (1983). Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury. *People v Provost*, 77 Mich App 667, 671; 259 NW2d 183 (1977), rev'd on other grounds 403 Mich 843 (1978). [Alteration in original.]

Here, we find that defendant has failed to present evidence from which we may infer that defendant was prejudiced by the "sleeping" juror. We do initially note, however, that to the extent that the trial court predicated its decision on the lack of any alternate jurors to deliberate, it was improper. Had there been affirmative evidence that the juror was sleeping throughout the entire trial, constitutional mandates would require the dismissal of the juror without regard to the inability to proceed to a verdict with the remaining jurors.

The trial court, defense counsel, and the prosecutor did not unanimously agree that the juror was in fact sleeping. Moreover, we have no indication whatsoever from the record in regard to how long the juror may have been sleeping, if at all, whether she nodded off only momentarily, or the substance of any testimony potentially missed. Defendant has not met his burden of showing prejudice. Defendant made no attempt to have the trial court question the juror about the alleged sleeping, made no attempt to pursue the matter and have the juror questioned in a motion for new trial, and makes no attempt to seek remand from this Court for an evidentiary hearing. See *Fetterley, supra* at 544 (evidentiary hearing held on juror misconduct following grant of motion to remand); *People v Fox (After Remand),* 232 Mich App 541, 558; 591 NW2d 384 (1998)(new trial motion held where jurors testified). Pursuit of these avenues may have resulted in evidence showing prejudice, but on the record before us, we cannot so conclude. The trial court did not abuse its discretion in denying the request for a mistrial.

B. Dying Declaration

Defendant argues that the trial court erred in allowing police officer testimony concerning the victim's identification of "Robert" as the shooter voiced shortly before the victim died. Defendant objected to the introduction of the evidence, thereby preserving the issue for appeal. Defendant maintains that there was no evidence to demonstrate any consciousness of impending death as required by law.

Decisions regarding the admission of evidence are reviewed by this Court for an abuse of discretion. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo." *Id.*

MRE 804(b)(2) provides a hearsay exception where a declarant is unavailable because of death, (a)(4), and it applies to the following:

> In a prosecution for homicide . . ., 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.

This exception was explored in *People v Siler,* 171 Mich App 246, 251; 429 NW2d 865 (1988), wherein this Court stated that the exception requires that (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. Further, with respect to the "consciousness of impending death" requirement, the *Siler* panel stated:

> [It] requires, first, that it be established that the declarant was in fact *in extremis* at the time the statement was made and, secondly, that the decedent believed his death was impending. But, 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, supra* at 251 (citations omitted).]

It is appropriate to take the surrounding circumstances into account in determining whether the declarant was conscious of impending death. *People v Johnson*, 334 Mich 169, 173; 54 NW2d 206 (1952); *Siler*, *supra* at 252.

Here, the evidence supports the trial court's application of the dying declaration exception. One responding police officer testified:

> When I exited the scout car I went up to the complainant, attempted to talk to him, keep him awake. He seemed to be fading in and out of consciousness or opening – we tried to keep his eyes open, have him talk to us.

Another police officer who responded to the scene and who heard the victim utter twice under questioning that "Robert" was the shooter, testified that the victim's legs and lower body were saturated in blood, that the victim was lying on the ground, that the victim could not stand, and that the victim was rolling around in pain and gasping for breath. The officer further testified that the victim was going in and out of consciousness. Emergency medical workers pronounced the victim dead at the scene.

Taking into consideration this undisputed testimony regarding the surrounding circumstances of the victim's last moments of life, the evidence clearly supported a finding that there was a consciousness of impending death and supported the trial court's conclusion that the declarant's statements qualified as dying declarations pursuant to MRE 804(b)(2).

III. CONCLUSION

In regard to the argument that the trial court erred in denying defendant's request for a mistrial predicated on the claim that a juror was sleeping, we hold that defendant fails to meet his burden of showing prejudice; therefore, the trial court did not abuse its discretion in denying the request. In regard to the argument that the trial court erred in admitting the victim's hearsay statements that "Robert" was the shooter, the evidence supports the conclusion that the statements constituted dying declarations, falling under the hearsay exception found in MRE 804(b)(2). Accordingly, the trial court did not err in allowing admission of the evidence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski