STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2005
v	No. 256612 Wayne Circuit Court
SHERMAN ANTHONY AUSTIN, Defendant-Appellant.	LC No. 04-000765-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

COOPER, J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. Defense counsel should have challenged the admission of Earl Bowen's testimonial statements identifying defendant as the shooter. The only other evidence connecting defendant to this shooting was the testimony of a fellow inmate regarding confessions defendant allegedly made while awaiting trial. It is questionable that the jury would have found defendant guilty beyond a reasonable doubt, absent Mr. Bowen's identification. Accordingly, I would vacate defendant's convictions and remand for a new trial.[1]

Although a dying declaration identifying one's killer is testimonial in nature,[2] courts have historically admitted such statements as an exception to the hearsay rule.[3] In a criminal trial for

[1] I agree with the majority, however, that the trial court properly excluded the testimony of Mr. DeShazo and that defendant is not entitled to a new trial on the basis of prosecutorial misconduct.

[2] See Friedman, *Adjusting to Crawford: High court decision restores confrontation clause protection*, 19 Crim Just 4, 9 (2004):

> [A] declaration by a dying person identifying his or her killer should be considered testimonial even though the only person who hears it is a private individual; the purpose of the communication is presumably not merely to edify the listener, but rather to pass on to the authorities the victim's identification of the killer, and the understanding of both parties to the communication is that the listener will play his or her role.

homicide, a victim's statements made "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" are admissible to prove the truth of the matter asserted under the Michigan Rules of Evidence.[4] It is well established, however, that the victim *must* be conscious of his impending death when the statement is made in order to be characterized as a dying declaration.[5]

There is no evidence that Mr. Bowen was aware that he was dying when his cousin called 911. In fact, he requested something to eat while waiting for the ambulance to arrive. Yet defense counsel expressly waived any objection to the admission of the 911 audiotape. As Mr. Bowen's statement would not be admissible under any other exception to the hearsay rule, defendant was clearly prejudiced by counsel's error.[6]

Mr. Bowen's statement at the hospital implicating defendant was made at the instigation of law enforcement and was clearly testimonial in nature.[7] It is not clear from the record, however, that Mr. Bowen was aware that he was dying while he was being treated in the hospital. Detroit police officer Khary Mason testified that *he* believed that Mr. Bowen's injuries were fatal. He testified that he told Mr. Bowen that "he looked pretty bad." However, Mr. Bowen was able to answer Officer Mason's questions and nothing in the record suggests that he was informed of the actual extent of his injuries. Had defense counsel objected to the admission of this statement, the prosecution would have been required to support the admission of the proffered testimony.

(…continued)

[3] *Crawford v Washington*, 541 US 36, 56 n 6; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("Although many dying declarations may not be testimonial in nature there is authority for admitting even those that clearly are.").

[4] MRE 804(b)(2).

[5] See *People v Johnson*, 334 Mich 169, 173; 54 NW2d 206 (1952); *People v Parney*, 98 Mich App 571, 583; 296 NW2d 568 (1979).

[6] I would specifically note that Mr. Bowen's statement could not be characterized as an excited utterance under to MRE 803(2). Mr. Bowen only identified his shooter upon the encouragement of the 911 operator, not upon a spontaneous impulse while under the stress of his recent shooting. See *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19 (a person "still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy'"). Furthermore, the continued admissibility of testimonial statements otherwise falling into the hearsay exception for excited utterances is not clear under Michigan or federal law in light of the United States Supreme Court's recent grant of certiorari to consider this issue. *Davis v Washington*, ___ US ___; 126 S Ct 547; ___ L Ed 2d ___ (2005) (specifically addressing whether statements to a 911 operator are testimonial in nature); *Hammon v Indiana*, ___ US ___; 126 S Ct 552; ___ L Ed 2d ___ (2005). See also *People v Walker*, ___ Mich ___; ___ NW2d ___ (2005) (leave to appeal held in abeyance pending the United States Supreme Court's resolution of these appeals).

[7] *Crawford*, *supra* at 52-53.

Mr. Bowen's statements were testimonial in nature and were not clearly admissible under any hearsay exception. Mr. Bowen was obviously unavailable for trial and defendant had no prior opportunity for cross-examination.[8] Therefore, defense counsel could have established that the admission of these statements violated defendant's Sixth Amendment right to confront the witnesses against him. As the remaining evidence against defendant is extremely weak, this error was not harmless.[9] Accordingly, I would find that defendant's convictions must be vacated.

/s/ Jessica R. Cooper

[8] *Id.* at 55-56.

[9] See *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 528 (1994).