STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2007
v	No. 271805 Oakland Circuit Court
ROBERT DAWAYNE JACKSON, Defendant-Appellant.	LC No. 2005-204831-FC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life imprisonment without parole for each conviction. Defendant appeals as of right. We affirm.

The victims, Lloyd Smith, Jr., and his wife, Dorothy, lived in Farmington. They met and befriended defendant in 1991 while participating in a church-sponsored outreach program that provided shelter for the homeless. According to trial testimony by the Smiths' eldest son, Dorothy Smith invited defendant "into their lives." Defendant robbed the Smiths in 1998, put them in their basement, and fled. He was prosecuted and imprisoned for that crime.

After defendant's release from prison, Dorothy Smith again provided him with assistance, and allowed him to stay overnight at the Smith's home once or twice a week. The Smiths' eldest son recalled that Lloyd Smith, Jr. had "deep concerns" about his wife's decision to reinitiate contact with defendant, and that he felt "very, very nervous about it."

On the morning of September 8, 2005, Samuel Pettinato, a friend and neighbor of the Smiths, went to their home to take Lloyd, Jr. to a Kiwanis Club meeting. Lloyd, Jr. required assistance because he was physically weak and confined to a wheelchair. Pettinato entered the home through an unlocked front door and discovered Lloyd, Jr. and Dorothy Smith lying on the floor in different rooms. Pettinato observed a pool of blood around Dorothy, and called her name but got no response. Pettinato also noticed blood on Lloyd, Jr., whom Pettinato described as "partially awake." Pettinato recounted that Lloyd, Jr. tried to speak, "but his voice was weak." Pettinato testified that there was "nothing coherent that I could decipher from what he was saying."

A police detective arrived within five to ten minutes after Pettinato telephoned 911. The detective established that Dorothy Smith was dead and that Lloyd, Jr. was "in and out of consciousness." The detective testified that he talked to Lloyd, Jr. "to find out what [had] happened." The detective's questioning of Lloyd, Jr. occurred approximately 10 minutes after the detective arrived at the scene. According to the detective, Lloyd, Jr. said that "[h]im and his wife were attacked by Robert." The detective asked Lloyd, Jr. who Robert was, and Smith described Robert as "a friend, a black male in his 40's." A paramedic at the scene testified that Lloyd, Jr. "seemed to be a little bit confused about what was going on," felt cold, and appeared pale and weak. The paramedic assisted the police in questioning Lloyd, Jr. because he did not know whether Lloyd, Jr. could hear the officers. The paramedic testified that he asked Lloyd, Jr., "[W]ho did this to you? Who beat you up?" and that Lloyd, Jr. replied, "Robert did it." A second paramedic testified that he also asked Lloyd, Jr. what happened, and that "he said the name Robert."

The medical examiner testified that Dorothy died from "multiple blunt and sharp force injuries," including three stab wounds to her neck and a large area of blunt force trauma to the left side of her head. The examiner described that Lloyd, Jr. had suffered four stab wounds to his neck, and that after arrival at the hospital his "vital signs diminished relatively quickly." Surgeons repaired Lloyd, Jr.'s stab wounds, but post operatively he developed pneumonia, kidney failure and respiratory failure. He died on September 23, 2005. The medical examiner opined that the cause of Lloyd, Jr.'s death was "multiple stab wounds to the neck and complications."

Police investigators identified defendant as "Robert" and took him into custody. Defendant waived his Miranda rights and confessed to beating and stabbing Dorothy and Lloyd Smith, Jr.

Defendant first contends that the trial court erred in admitting the statements Lloyd, Jr. allegedly made to the police and paramedics identifying him as the assailant. According to defendant, the statements do not qualify as either dying declarations or excited utterances, and defendant's pretrial motion to exclude the statements on these grounds should have been granted. This Court reviews for an abuse of discretion a trial court's ultimate decision whether to admit evidence. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). We review de novo decisions involving a preliminary question of law, such as whether a statute or rule of evidence precludes the admissibility of particular evidence. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The "dying declaration" hearsay exception in MRE 804(b)(2) provides as follows:

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

Before a court may admit a statement as a dying declaration, it must meet three prerequisites: "(1) The declarant must have been conscious of impending death; . . . [2] The statements are sought to be admitted in a criminal prosecution against the individual who killed the decedent; and [3] The statements must relate to the circumstances of the killing." *People v Parney*, 98 Mich App 571, 581-582; 296 NW2d 568 (1979). In *People v Orr*, 275 Mich App 587, 596; ___ NW2d ___ (2007), this Court eliminated one element of the common law dying declaration requirements, holding that MRE 804(b)(2) "imposes no requirement that the declarant actually died in order for a statement to be admissible as a dying declaration." According to defendant, no evidence shows that Lloyd Jr. believed he faced imminent death when he made the statements.

"It is fundamental that a 'dying declaration' is inadmissible in evidence, unless made under a solemn belief of impending death." *People v Johnson*, 334 Mich 169, 173; 54 NW2d 206 (1952). "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." *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988).

> That the declarer lived for several days after making the statement is not controlling. Neither is it necessary that such statement be taken immediately after the injury nor that notice of an intention to take the statement be given the accused. Before admitting the hearsay statement as a dying declaration, the court must make a preliminary investigation in order to determine whether the person making the statement was in fact *in extremis* at the time and believed that his death was impending. These essential facts may be proved like any other facts in the case and in light of the existing and surrounding circumstances. [*Johnson*, *supra* at 173.]

Some relevant circumstances demonstrating a declarant's belief that he faces an imminent demise include "the apparent fatal quality of the wound, . . . statements made to the declarant by the doctor or by others that his condition is hopeless, and . . . other circumstances." *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev'd in part on other grounds 406 Mich 888 (1979). This Court reviews for clear error a lower court's factual findings concerning whether the record supports the three dying declaration prerequisites. *Parney*, *supra* at 573-574.

The instant record establishes that Lloyd Smith, Jr., who was a physically weak, wheelchair-bound, 87-year-old man, endured four stab wounds to his neck. According to trial testimony, Lloyd, Jr. bled for a number of hours before assistance arrived. The paramedics recounted that when they discovered Lloyd, Jr. on the morning of September 8, 2005, he felt very cold, looked pale, and drifted "in and out of consciousness." After Lloyd, Jr. arrived at the hospital, his vital signs rapidly deteriorated, necessitating intubation, after which he never regained his ability to breathe without mechanical assistance. Notwithstanding that Lloyd, Jr. never voiced his cognizance that he had sustained a grave or mortal injury, the totality of the circumstances surrounding his statements identifying defendant as his assailant support the reasonable inference that he made the statements while believing that he faced impending death. We conclude that the trial court did not clearly err in finding that Lloyd, Jr.'s statements satisfied

the dying declaration prerequisites, and that the court did not abuse its discretion in ultimately admitting the statements as dying declarations.

Defendant additionally claims that the statements were inadmissible pursuant to *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and that their introduction violated his right to confrontation guaranteed by the United States Constitution. US Const, Ams VI, XIV. In *Crawford*, the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id*. at 68. Statements qualify as testimonial when the surrounding circumstances indicate that they were elicited primarily to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, ___ US____; 126 S Ct 2266, 2274; 165 L Ed 2d 224 (2006).

The Supreme Court in *Crawford* declined to decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations. It noted, however, that if the dying declaration exception to the hearsay rule exists "based on historical grounds, it is *sui generis*." *Crawford*, *supra* at 56 n 6.

In *People v Taylor*, 275 Mich App 177, 183; 737 NW2d 790 (2007), this Court held that dying declarations are admissible "as an historical exception to the Confrontation Clause." On the basis of *Taylor*, we conclude that the Sixth Amendment does not preclude the admission of Lloyd, Jr.'s statements as dying declarations. Furthermore, this court's adoption of the forfeiture by wrongdoing doctrine in *People v Bauder*, 269 Mich App 174, 182-187; 712 NW2d 506 (2005), provides another basis for our rejection of defendant's Confrontation Clause claim.

Moreover, defendant has failed to show that the admission of Lloyd, Jr.'s statements prejudiced him. The function of Lloyd, Jr.'s statements was to link defendant to the crime. But abundant additional evidence established that defendant beat and stabbed Dorothy and Lloyd Smith, Jr. When the police took defendant into custody, the arresting officers asked defendant if he knew why they were there. Defendant replied, "[I]t was the Farmington thing." At trial, the prosecution played for the jury defendant's videotaped interview with the police. In that interview, defendant admitted that he hit Dorothy, knocked her to the floor, and then hit her several more times. He also admitted that when he heard Lloyd, Jr. inquire what was going on, he went into the kitchen, retrieved a knife, stabbed Lloyd, Jr., and threw him from his bed onto the floor. According to his recorded statement, defendant then returned to Dorothy and stabbed her several times in the throat. Defendant also created a written statement containing information substantially similar to that provided in his videotaped interview. The prosecution introduced the written statement into evidence.[1] Additionally, a "footwear impression" analysis matched defendant's uniquely worn Reebok athletic shoe to a bloody footprint discovered in the Smith's kitchen.

[1] Defendant filed a motion in the trial court to exclude these statements to the police. The trial court conducted an evidentiary hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), and held that defendant's statements were admissible. Defendant does not challenge this ruling on appeal.

Because overwhelming evidence tied defendant to the crime even in the absence of the statements made by Lloyd, Jr., we conclude that any error qualifies as harmless, irrespective whether we apply the standard of review applicable to preserved nonconstitutional errors or preserved, nonstructural constitutional errors. Defendant has failed to demonstrate that any alleged evidentiary error more probably than not resulted in a miscarriage of justice, *Lukity*, *supra* at 493-495, and our review of the record leads us to conclude beyond a reasonable doubt that despite any purported constitutional error involved in the admission of Lloyd Jr.'s dying declarations, the jury clearly would have found defendant guilty of killing both the victims. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005).

Defendant next argues that his trial counsel was ineffective for failing to request a continuance in the trial after defendant said he wished to testify, and for failing to discourage defendant from testifying. Because defendant failed to move for a new trial or an evidentiary hearing on this basis, appellate review is "limited to mistakes apparent on the record." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). The record in this case contains sufficient detail for us to decide whether defendant's counsel was ineffective.

To demonstrate ineffectiveness of counsel, a defendant must satisfy the two-part test described by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of that test mandates a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. The effective assistance of counsel is presumed, and the defendant must overcome a heavy burden to demonstrate otherwise. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, *supra* at 600.

In this case, the record indicates that defendant's trial counsel discussed with him his decision to testify on several occasions. At the beginning of the trial, counsel put on the record defendant's decision not to testify. Counsel asked defendant if he understood that the decision whether to testify was his to make, and defendant replied that he did. At the end of the second day of trial, defendant told his attorney he had changed his mind and wished to testify. Counsel advised defendant on the record to think about it and make a decision when the trial resumed. The following day, before he took the stand, defendant affirmed on the record that he understood that he had a right not to testify and that, once he did, the prosecution could question him about anything in the case. In light of this record, defendant has failed to overcome the presumption of effective assistance.

Moreover, defendant has not established that counsel's claimed error prejudiced him. There is no evidence that, even if counsel had persuaded defendant not to testify, the result of the trial would have been different. Defendant argues that his own testimony was the only substantial evidence linking him to the crime, and also suggests that it supplied the only basis on which to infer premeditation. However, defendant's written statement both links defendant to the crime and supports a reasonable inference of premeditation. In his statement, defendant admitted that when he drove to the Smith's home on the evening of September 7, 2005, he was high on crack cocaine and did not want to return to the treatment center where he was staying.

According to the statement, defendant intended to spend the night at the Smith's home, and "for some reason" he hit Dorothy Smith. Defendant's statement continued: "[And] when she was on the floor, I hit her … more times." In the statement, defendant described stabbing Lloyd, Jr. in the neck after hearing him "call out." Defendant wrote in the statement that he pulled Lloyd, Jr. out of his bed and onto the floor, returned "to where Dorothy was lying on the floor," and stabbed her several times in the neck.

To establish premeditation, there must have been an amount of time between intent and action sufficient to give a reasonable person the opportunity to take a "second look." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Premeditation and deliberation can be inferred from the surrounding circumstances, *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001), and minimal circumstantial evidence suffices to prove a defendant's state of mind. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Defendant's written statement provides sufficient evidence of premeditation because it establishes that he had an ample opportunity to take a "second look" before stabbing both victims. *Gonzalez*, *supra* at 641. Defendant first hit Dorothy several times, walked over to the kitchen sink to get a knife, approached Lloyd Jr.'s bedroom and repeatedly stabbed Lloyd, Jr. in the neck. Defendant pulled Lloyd Jr. out of bed and onto the floor, suggesting an attempt to move Lloyd Jr. away from a nearby telephone, and thus raising a reasonable inference of premeditation and deliberation. Defendant had more time to deliberate as he walked back to Dorothy and stabbed her in the neck. Because defendant's written statement strongly supports an inference of premeditation, he has failed to establish that the outcome of the trial would have been different absent his counsel's claimed error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher