

[Cite as *State v. Morales*, 2009-Ohio-1800.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-070776
		C-080214
Plaintiff-Appellee,	:	
		TRIAL NO. B-0702805
vs.	:	
		<i>DECISION.</i>
AURIA MORALES,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Appellant
Discharged in Part

Date of Judgment Entry on Appeal: April 17, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Appellee,

Robert R. Hastings, Jr., for Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Defendant-appellant Auria Morales was convicted of complicity in the murder of her boyfriend, Michael Brantley, and of conspiracy to commit Brantley's murder. Morales now appeals. We affirm her conviction for complicity to murder, but reverse her conspiracy conviction and discharge her from further prosecution on that count.

Morales and Her Boyfriend Fight

{¶2} During the late evening and early morning hours before Brantley was murdered, Morales and Brantley had had a heated argument at Morales's apartment over sexually explicit text messages that Brantley had received from another woman. Morales's friend Deshawn Grant testified that he and Morales had talked on the phone around 2:44 a.m, that Morales had sounded extremely angry and frustrated, and that she had asked him for a gun. Phone records admitted into evidence corroborated Grant's story. Grant did not have a gun, nor did he see Morales that morning. Around 3:00 a.m., Morales's mother, Michelle Clark, who also lived at the apartment, called for emergency assistance because Morales and Brantley's fighting had escalated.

{¶3} Some time after 3:00 a.m., Morales left her apartment and drove to a Shell gas station just up the street. At trial, the state used phone records to establish that, less than an hour before leaving for the gas station, Morales had called a man named Dante Harris. The state argued that she had called Harris to meet her. Shell worker Christopher Sisk testified that a group of young men had been "hanging out" at the Shell station for approximately 30 minutes when Morales arrived. Sisk further testified that Morales had appeared extremely distraught. According to Sisk, it appeared that Morales knew one of the men because she had hugged and leaned up

against him. After talking with Morales for a few minutes, Sisk saw the men get into a purplish-colored car and follow Morales out of the Shell station, turning in the direction of Morales's apartment. Brantley was at the apartment and was apparently outside waiting for a taxi cab to arrive.

Brantley is Shot and Calls for Help

{¶4} Brantley was shot in both legs while outside of Morales's apartment. At trial, the state played a recording of an emergency 9-1-1 call Brantley had made at 3:28 a.m. On it, he said that he had been shot, asked several times for immediate help, faded in and out of consciousness, and was unable to follow even simple instructions from the emergency operator. He died shortly thereafter from excessive blood loss. During the call, Brantley stated that his girlfriend had had him shot.

Morales and her Mother Give Conflicting Accounts

{¶5} Following Brantley's murder, police questioned Clark and Morales, as well as several neighbors. Investigating officers LeRay and Butler interviewed Clark at the scene. Clark initially denied that she or Morales had been home when Brantley was shot. She told police that she had been driving Morales to a "safe house" to get her away from Brantley, and that she had just returned. Clark later told police that she had been at home when the shooting had occurred. Clark also gave police other details from that evening, telling them that Morales and Brantley had fought. At trial, the defense unsuccessfully claimed that Clark's statements, which were testified to by several police officers, constituted inadmissible hearsay.

{¶6} Morales told police two different stories, and these stories were different from her mother's. She first stated that she and Brantley had been outside fighting when a stranger had walked up and had asked if she needed help. The stranger then, according to Morales, said, "Baby, you ain't gotta go through that,"

and shot Brantley. Morales later changed her story, telling police that she had been at the Shell station when this conversation had occurred, and that the shooter—a stranger—must have followed her home.

The Neighbors' Testimony

{¶7} Two of Morales's neighbors testified at trial. One, Connie Sisk, had witnessed Morales and Brantley fighting and had seen Morales drive off in the direction of the Shell station. She testified that, within five to ten minutes of Morales driving away, she had heard gunshots. Another neighbor, Carla Goines, testified that the sound of gunshots had awakened her, that she had seen a number of men running up the street, and that she had seen a man jump into the driver's seat of a dark colored car that was parked in a driveway a few doors down from Morales's apartment. Goines stated that she had heard one of the men say "come on, come on."

{¶8} A jury found Morales guilty of complicity to murder and of conspiracy to commit murder. Over defense counsel's objection, the trial court sentenced her on both counts, making the sentences concurrent, for a total of 15 years to life in prison.

Morales's Appeal

{¶9} Out of Morales's seven assignments of error, we find that only her sixth assignment of error has merit. We address it first.

{¶10} In her sixth assignment of error, Morales first argues that she was improperly convicted of both complicity to commit murder and of conspiracy to commit murder. She is correct. Under R.C. 2923.01(G), "[w]hen a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit the specific offense, the person shall not be convicted of conspiracy involving the same offense." We therefore sustain this

assignment of error in part, and we reverse Morales's conspiracy conviction. Morales is discharged from further prosecution on that count.

{¶11} Also in her sixth assignment of error, Morales contends that the trial court erred when it ordered her to pay court costs because she was indigent. We find no error. It is within the trial court's discretion to determine whether to remit costs for an indigent defendant.¹ Here, the court conducted a hearing on this issue, considered the arguments of counsel, and then indicated that it was going to assess costs despite Morales's lack of money, reasoning that Morales was the reason for the costs and should therefore be responsible for them. This argument has no merit. We overrule the balance of this assignment of error.

Morales's Remaining Assignments of Error

{¶12} Morales's remaining assignments of error are either moot or meritless.

{¶13} In her first assignment of error, Morales contends that her indictment did not properly charge conspiracy. Since we have reversed Morales's conspiracy conviction, this assignment of error is moot.²

Sufficient Evidence

{¶14} Morales's second assignment of error challenges the sufficiency of the evidence. Viewing the evidence in a light most favorable to the state, we hold that a rational trier of fact could have found beyond a reasonable doubt that Morales had encouraged, solicited, or aided Brantley's unknown assailant in committing murder.³ The state's evidence showed that Morales and Brantley had argued, that Morales had sought a gun, and that, after making some phone calls, Morales had left her

¹R.C. 2947.23; *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶23; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

² App.R.12(A)(1)(c).

³ See R.C. 2923.03 and 2903.02(B); *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

apartment and had met someone she seemed to know at a nearby Shell station. Several men who were at the Shell station followed Morales out of the Shell parking lot and, a short later, a neighbor had heard gunshots. Another neighbor, Goines, had heard the gunshots and then had witnessed men running and getting into a car similar to the one seen following Morales out of the Shell station. Also, Brantley had told the emergency operator that his girlfriend had had him shot. Finally, Morales had given police inconsistent accounts of what had occurred that night. This was sufficient evidence to convict Morales of complicity to commit murder. We therefore overrule this assignment of error.

Brantley's 9-1-1 Emergency Call

{¶15} In her third assignment of error, Morales claims that the tape of Brantley's 9-1-1 emergency call should not have been admitted into evidence. We hold otherwise.

{¶16} Brantley's statement that his girlfriend had had him shot was admitted as a dying declaration. A dying declaration is "a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death."⁴ Morales contends that the state had failed to establish that Brantley had believed that his death was "imminent." We note that it is often difficult to determine if a declarant sensed his or her death rapidly approaching. But we hold that the facts of this case were sufficient to provide a proper foundation for the admission of a Brantley's statement.⁵ Brantley had been shot twice. On the tape of the emergency call, he had asked over and over for immediate medical help, and he had faded in and

⁴ Evid.R. 804(B)(2).

⁵ Cf. *State v. Craft*, 4th Dist. No. 04CA589, 2005-Ohio-3944, ¶26-28.

out of consciousness several times. He had been unable to follow a simple instruction to remove his shirt and press on his wound. He was bleeding profusely. He died shortly thereafter. We therefore hold that the trial court did not abuse its discretion in admitting this statement as a dying declaration.⁶

{¶17} The dissent makes the point that the requirement that a declarant sensed that his or her death was “imminent” is a stringent one. We believe that this requirement was met here but, even if it was not, the statement could have been properly admitted as an “excited utterance.” Any error in the admission of the statement as a dying declaration, therefore, was harmless. Under Evid.R. 803(2), “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is admissible as a hearsay exception. The statement, however, must pertain to an occurrence that the declarant had an opportunity to personally observe.⁷ In this case, it can not be disputed that Brantley was under the stress of a startling condition—he had just been shot twice. And Morales admitted that she had been at the scene of the shooting. Under these circumstances, we do not find it to be a leap of logic, as the dissent does, that Brantley had personally observed that Morales had had someone shoot him.

{¶18} The trial court did not err in admitting the tape of Brantley’s emergency call. Morales’s third assignment of error is overruled.

Admissibility of Clark’s Statements

{¶19} In her fourth assignment of error, Morales claims that the trial court erred by admitting testimony from witnesses other than Clark concerning Clark’s statements to them. Clark was available as a witness, but four police officers—LeRay,

⁶ *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus.

⁷ *State v. Huertas* (1990), 51 Ohio St.3d 22, 31, 553 N.E.2d 1058; *Potter v. Baker* (1955) 162 Ohio St. 488, 124 N.E.2d 140, paragraph two of the syllabus.

Butler, Dudley, and Luke and state's witness DeShawn Grant each testified to her statements. Morales asserts that this testimony was inadmissible hearsay. We hold that some of the testimony should not have been admitted, but that the error was harmless.

Testimony of the Investigating Police Officers

{¶20} “There are situations where an officer may testify to the substance of what seems to be a hearsay statement in order to explain his or her conduct while investigating a crime.”⁸ Such statements are generally not hearsay because they are not being used to prove the truth of the matter asserted.⁹ But such testimony is not automatically admissible simply because it is not hearsay. To be admissible, the testifying officer must explain what he or she did as a result of the statement.¹⁰ “The potential for abuse in admitting such evidence is great, thus, the [officer’s] conduct to be explained must be relevant, unequivocal, and contemporaneous with the statement.”¹¹

{¶21} With these standards in mind, we conclude that the trial court properly admitted testimony by police officers LeRay and Butler. These officers had responded to the scene of the shooting. There, Clark had told them that Morales and Brantley had been fighting, and that she had been taking Morales to a “safe house” when the shooting had occurred. LeRay and Butler each testified that, based on Clark’s statements, they had had Clark take them to see Morales. We find no error in the admission of their testimony.

{¶22} But the trial court did err in admitting the testimony of officers Dudley and Luke. Dudley was not a part of the criminal investigation, per se. Instead, she was assigned to sit with Clark at the police station to make sure that Clark did not talk to

⁸ *State v. Davenport* (July 30, 1999), 1st Dist. No. C-980516.

⁹ See Evid.R. 801(C).

¹⁰ *Davenport*, supra.

¹¹ *Id.*, citing *State v. Blevins* (1987), 36 Ohio App.3d 147, 149, 521 N.E.2d 1105.

anyone about Brantley's murder. Clark had told the same story to Dudley as she had to officers LeRay and Butler. But her statement had had no immediate effect on Dudley.

{¶23} The same is true concerning Clark's statement to Luke. Luke testified that she had first interviewed Clark and then had interviewed Morales at the police station. After realizing that Morales and Clark had told different stories, Luke said that she had revisited Clark to ask why she had lied. Thus, Clark's statements to Dudley and to Luke did not have a "relevant, unequivocal, and contemporaneous" effect on the officers' conduct in investigating the crime.¹² But because Clark's statements were properly admitted through the testimony of LeRay and Butler, we hold that this improper testimony was cumulative and therefore that the error was harmless.¹³

Clark's Statement to Grant

{¶24} Morales also correctly argues that Grant's testimony to statements Clark had made should not have been admitted. Grant testified that he had telephoned Clark around 3:15 a.m. looking for Morales, and that Clark had told Grant that Morales was not at the apartment. This statement was offered for its truth, and no hearsay exception applied. But since Morales had admitted that she had left the apartment and had gone to the Shell gas station around this time, the trial court's error was harmless.¹⁴ Morales's fourth assignment of error is overruled.

Prosecutorial-Misconduct Claims

{¶25} In her fifth assignment of error, Morales claims prosecutorial misconduct during closing arguments. Because there was no objection below, we

¹² See *id.*

¹³ *Crim.R. 52(A); State v. Gonzales*, 154 Ohio App.3d 9, 2003-Ohio-4421, 796 N.E.2d 12, ¶65.

¹⁴ See *id.*

apply a plain-error standard of review. Plain error does not exist unless “but for” the error, the outcome of the trial would clearly have been different.¹⁵

{¶26} The state is given wide latitude during closing argument.¹⁶ A prosecutor may comment freely on what the evidence has shown and on what reasonable inferences may be drawn from the evidence.¹⁷ Counsel must, however, avoid insinuations and assertions that are calculated to mislead the jury and may not allude to matters that are not supported by admissible evidence.¹⁸ Further, a prosecutor should not make unfair personal references to opposing counsel.¹⁹

{¶27} Here, Morales lists 15 comments that she contends constituted prosecutorial misconduct. All but a few were supported by the evidence admitted at trial. The statements that were improper centered on the prosecution’s characterization of Harris as the likely assailant. No one had identified Harris as the shooter, but during closing arguments, the prosecutor argued that Harris had had a motive for killing Brantley because Harris “knew about the relationship between Morales and Brantley,” and because “Harris was mad” and was “ready to move in” on Brantley’s “territory.” While it was reasonable for the prosecution to imply that Harris may have been the shooter, references to what Harris knew or what his motive was were improper. We also take issue with the prosecutor’s comment that Morales’s attorney would have agreed that Morales had not initially told police the truth. A prosecutor should refrain from making comments about opposing counsel. None of these statements, however, rise to the level of plain error.²⁰ This assignment of error is overruled.

¹⁵ *State v. Wickline* (1990), 50 Ohio St.3d 114, 120, 552 N.E.2d 913; see, also, *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

¹⁶ *State v. Ballew*, 76 Ohio St.3d 244, 1996-Ohio-81, 667 N.E.2d 369.

¹⁷ *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, citing *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 263 N.E.2d 773.

¹⁸ *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

¹⁹ *Id.*

²⁰ See *Wickline*, supra; *Long*, supra.

No Newly Discovered Evidence

{¶28} In her seventh and final assignment of error, Morales claims that the trial court should have granted her motion for a new trial based on newly discovered evidence. Morales’s “newly discovered” evidence pertained to her cellular phone records from the day that Brantley had been murdered. Since this evidence could have been discovered before trial, we hold that the trial court did not abuse its discretion when it overruled Morales’s motion.²¹ This assignment of error is overruled.

{¶29} For all the foregoing reasons, we affirm Morales’s conviction for complicity to murder. But her conviction for conspiracy is reversed, and she is discharged from further prosecution for that offense.

Judgment accordingly.

HILDEBRANDT, J., concurs.

PAINTER, J., dissents.

PAINTER, J., dissenting.

{¶30} Brantley’s statement during his emergency call was not properly admitted as a dying declaration or an excited utterance.

No Showing that Brantley Believed his Death was Impending

{¶31} Dying declarations “are defined as statements of fact by the victim, concerning the cause and circumstances of a homicide. To make them admissible into evidence as dying declarations, an exception to the rule against hearsay evidence, it must appear that they are made by the victim under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance, when he has despaired of life and looks to death as inevitable and at hand.”²²

²¹ See Crim.R. 33(A)(6); *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

²² *People v. Tilley* (1950), 406 Ill. 398, 403, 94 N.E.2d 328.

{¶32} This is a stringent rule because “the statements of the deceased as to the cause of the injury from which death finally results, when dying declarations within the meaning of the law, are admitted in evidence on the ground of necessity, and the rule under which they are admitted, forms an exception in the law of evidence. The accused, under the rule has not the benefit of meeting the witness against him face to face; a constitutional right in all criminal trials with this solitary exception. He is deprived of the security of an oath attended with consequences of temporal punishment for perjury. He is deprived of the great safeguard against misrepresentation and misapprehension—the power of cross-examination. The evidence is hearsay in its character; the statements are liable to be misunderstood and to be misrepeated upon the trial, and the evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased, and of involuntary resentment against the accused.”²³

{¶33} In *State v. Demars*, the Eighth Appellate District adopted a four-prong test to determine the admissibility of dying declarations: “(1) the declarant is aware that death is impending; (2) the declarant has died since the dying declaration was made; (3) the dying declaration is offered in a criminal prosecution which involves a homicide; and (4) the dying declaration involves or relates to the cause of death.”²⁴

{¶34} It may be difficult to determine if a declarant sensed that he or she was near death. But the United States Supreme Court has stated that “[dying declarations] are only received when the court is satisfied *that the witness was fully aware of the fact that his recovery was impossible*, and in this particular the requirement of the law is very stringent.”²⁵ Further, the Ohio Supreme Court has stated that to admit dying declarations as evidence, “it should be made to appear to the court by preliminary evidence, not only that they were made *in articulo mortis* [at point of death], but also

²³ *Starkey v. People* (1855), 17 Ill. 16, 20.

²⁴ (Mar. 18, 1993), 8th Dist. No. 62148.

²⁵ *Carver v. United States* (1897), 164 U.S. 694, 697, 17 S.Ct. 228 (emphasis added).

made *under a sense of impending death*, which excluded from the mind of the dying person all hope or expectation of recovery.”²⁶

{¶35} Other courts have considered the external situation of the declarant at the time of the statement. The United States Supreme Court, in *Carver v. United States*, held that because the declarant had received the last rites, the declarant probably knew she was close to death.²⁷ In an Ohio case, evidence that the declarant was mortally wounded, that the hospital staff was working furiously to save the declarant, and that a police officer had told the declarant that he did not have long to live was sufficient to admit a dying declaration.²⁸ Another Ohio appellate district held admissible a dying declaration because the declarant’s last words, “Good-bye. I am dying,” demonstrated that he thought his death was impending.²⁹

{¶36} Ohio courts have held that serious injuries alone are not sufficient for a trial court to properly determine that a declarant thought that death was impending.³⁰ In *State v. Woods*, a statement was not admitted even though the declarant had been shot in the abdomen and taken to a hospital.³¹ The court reasoned that the record did not show that the declarant had sensed that his death was impending and had abandoned all hope of recovery.³² Although his wound was mortal and his condition at the time was critical, the court stated that “[w]hile these circumstances are important, they do not, in and of themselves, form a sufficient predicate to admit the statements as dying declarations.”³³

{¶37} In this case, the state did not show that Brantley had been fully aware that his recovery was impossible or that there was no hope or expectation of recovery. Like

²⁶ *Robbins v. State* (1857), 8 Ohio St. 131.

²⁷ *Carver v. US* (1897), 164 U.S. 694, 695, 17 S.Ct. 228, 229.

²⁸ *State v. Knight* (1984), 20 Ohio App.3d 289, 292, 485 N.E.2d 1064.

²⁹ *Colleti v. State* (1919), 12 Ohio App. 104, 113.

³⁰ *State v. Woods* (1972), 47 Ohio App.2d 144, 352 N.E.2d 598; *State v. Tesfagiorgis* (Aug. 12, 1999), 10th Dist. No. 98AP-1215.

³¹ *Woods*, supra, at 147.

³² *Id.*

³³ *Id.*

the declarant in *Woods*, Brantley suffered a serious injury. And like the declarant in *Woods*, nothing in the record shows that Brantley believed he was dying. These facts do not come close to meeting the “stringent” requirement necessary to demonstrate that Brantley believed that his death was imminent. Brantley was shot in the legs. Gunshots to the legs are generally not fatal. It is expected that someone who had been shot and is bleeding will make an emergency call to ask for immediate help. And it makes sense that someone who has been shot will be confused and will be bleeding. But in this case, none of these factors, alone or combined, demonstrated that Brantley believed he was dying. Thus, his emergency call should not have been admitted as a dying declaration.

There is no Evidence that Brantley Observed Who Had Shot Him

{¶38} An excited utterance is “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”³⁴

{¶39} The Ohio Supreme Court has created a four-prong test to determine whether a statement can be admitted as an excited utterance.³⁵ A statement or declaration may be admissible as an excited utterance if the trial judge reasonably finds “(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant * * * (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over declarant’s reflective faculties * * * (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an *opportunity to observe personally the matters asserted in his statement or declaration.*”³⁶

³⁴ Evid.R. 803(2).

³⁵ *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-301, 612 N.E.2d 316.

³⁶ *State v. Taylor* (1993), 66 Ohio St.3d 295, 300, 612 N.E.2d 316, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, 500-501, 124 N.E.2d 140 (emphasis added).

{¶40} Brantley's statement did not meet the fourth prong of the test. There is no evidence in the record to support the conclusion that he had personal knowledge that Morales had sent the gunmen to shoot him. If he had identified the actual shooter, then that statement would have been admissible. But there was no showing that he had *observed* that Morales had "sent" someone to shoot him. He did not tell the emergency operator that the shooters had told him that Morales had sent them. And it is absurd to think that Morales had warned him that she would send killers to his apartment. Though he might have believed that Morales had had him shot, he observed nothing of the sort. Thus, this statement should not have been admitted as an excited utterance.

{¶41} Because there was no evidence to demonstrate that Brantley believed that his death was impending, and there was no evidence to show that Brantley had personally observed what he asserted in his statement, his statement during the emergency call should not have been admitted as a dying declaration or as an excited utterance. Therefore, the trial court erred in admitting this statement, and I would reverse both of Morales's convictions.

Please Note:

The court has recorded its own entry on the date of this decision.