

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0937**

State of Minnesota,
Respondent,

vs.

Justyn Tyler Hosley,
Appellant.

**Filed March 27, 2023
Affirmed in part, reversed in part, and remanded
Cleary, Judge***

Ramsey County District Court
File No. 62-CR-20-7148

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant
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Considered and decided by Bjorkman, Presiding Judge; Frisch, Judge; and Cleary,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant challenges his convictions for intentional second-degree murder and unintentional second-degree felony murder. He contends that the district court erred by (1) admitting a statement from the victim identifying him under the dying declaration hearsay exception, and (2) convicting him of a lesser-included offense. Because the district court did not abuse its discretion in admitting the statement under the dying declaration hearsay exception, we affirm. But because the district court improperly convicted Hosley of a lesser-included offense, we reverse and remand to the district court to correct the warrant of commitment.

FACTS

On a November evening in St. Paul, the victim was shot twice and died approximately five hours later in the hospital. A few days later, police arrested the shooter, and he confessed. A week after the shooting, respondent State of Minnesota charged appellant Justyn Tyler Hosley with intentional second-degree murder¹ and unintentional second-degree felony murder² for his role in victim's death.

Before trial, the state indicated that it would introduce body-camera footage from an officer who responded to the scene that included statements from victim. Hosley filed a motion requesting suppression of the victim's statements in that footage. The state filed

¹ In violation of Minnesota Statutes section 609.19, subdivision 1(1) (2020).

² In violation of Minnesota Statutes section 609.19, subdivision 2(1) (2020).

a responsive brief opposing Hosley's motion to suppress, arguing that the victim's statements were dying declarations. The district court denied Hosley's motion to suppress.

During Hosley's jury trial, the state presented evidence to support the two charges against Hosley. The state opened its case with the body-camera footage, which captured a responding officer's interactions with the victim when the officer responded to a 911 call. The body-camera footage shows victim lying face down on the sidewalk with a gunshot wound in his shoulder as officers ask him questions about who shot him, where the shooter went, and what car the shooter was driving.

Most relevant to the appeal, when the officers asked the victim "Who did this to you?" he initially answered, "I don't know." About a minute later, the victim said, "I'm finna die" to which the officer responded, "No you're not gonna die." After ten seconds of silence, the victim stated: "It was Justyn. Little Justyn." Another minute later, the victim said: "I'm dyin'." The state used the quote from the victim identifying Justyn Hosley in its opening and closing argument, but did not mention it during the testimony of any witnesses other than the officer whose body-camera footage included the statements.

The state's evidence tying Hosley to the crime came from the testimony of two witnesses: the shooter and the 911 caller. The shooter testified that on the evening of the shooting, he was on the east side of St. Paul with Hosley. Hosley found someone to go rob, and the shooter went with him. The shooter had a gun and an extended magazine³

³ An extended magazine is a device that can be attached to a firearm, usually a handgun, which enables it to hold more rounds of bullets and fire more shots before needing to reload.

with him, and Hosley was aware of that. Facebook messages between Hosley and the eventual 911 caller show Hosley responding to a Facebook post offering pills for sale and negotiating a price, quantity, and place for pickup. The shooter testified that Hosley drove him and another individual to the agreed location, and Hosley and the shooter met the victim in the middle of the street. The victim gave Hosley the pills, Hosley indicated that he thought the pills were fake. Hosley told the shooter to shoot the victim, the victim tried to run back to his car, and the shooter shot twice. The shooter saw the victim fall to the ground, then got in the car with Hosley and drove away. Hosley posted on Facebook about the shooting later that night.

The 911 caller also testified at trial. She corroborated the Facebook messages about setting up the transaction for pills and confirmed that the victim, Hosley, and the shooter met in the middle of the street because she was in the car that the victim arrived in. She stated that she saw the victim give Hosley the pills, but Hosley did not give the victim any money in return. Hosley came up to the car the 911 caller was in and stated that the pills were fake, and she responded that they were not. She testified, “And then after he showed us, he was skipping back to the car and told whoever the boy he was with to pop” the victim. The shooter then shot the victim twice. The 911 caller fled the scene, and then returned to call 911 and wait for police and medical assistance.

The jury returned a guilty verdict after about two hours of deliberation, finding Hosley guilty of both intentional and unintentional (during the commission of a felony) second-degree murder. The district court sentenced Hosley to 418 months’ imprisonment.

Hosley appeals.

DECISION

Hosley appeals the district court's admission of the victim's statement as a dying declaration and contends that the district court erred by entering a conviction on both charges. We address each argument in turn.

I. The district court did not abuse its discretion by admitting the victim's dying declaration under the hearsay exception.

Hosley argues that the district court abused its discretion by admitting the body-camera footage that included the victim's statement "It was Justyn. Little Justyn" under the dying-declaration hearsay exception because the state did not prove that the victim had given up all hope of survival when he made the statement. A determination [by the district court] that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). Because of the nature of dying declarations, this court has strictly construed the dying-declaration hearsay exception. *State v. Bergeron*, 452 N.W.2d 918, 923 (Minn. 1990).

Under rule 804(b)(2) of the Minnesota Rules of Evidence, "a statement made by a declarant while believing that [their] death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" is admissible in the prosecution for a homicide when the declarant is unavailable to testify. The offeror of such a statement must show that the declarant was in actual danger of death and had lost all hope of recovery. *State v. Lubenow*, 310 N.W.2d 52, 55-56 (Minn. 1981). The state of mind of the declarant is the key to admissibility of a dying declaration. *State v. Ferguson*, 581

N.W.2d 824, 831-32 (Minn. 1998). As a result, the prosecution must demonstrate this state of mind through competent evidence, and it must not be left to speculation and conjecture. *Id.* The declarant's state of mind may be shown not only through direct evidence, such as a statement expressing the declarant's belief that they are dying, but it also may be inferred from the surrounding circumstances. *Bergeron*, 452 N.W.2d at 923; *State v. Buggs*, 581 N.W.2d 329, 335 (Minn. 1998).

The district court found that both direct and circumstantial evidence supported that the victim believed he was in actual danger of death at the time he made the statement to law enforcement. The district court's determination is correct because the victim's statement, "It was Justyn. Little Justyn." was made between two statements suggesting that the victim thought he was about to die. He said, "I'm finna die" about ten seconds before he identified Hosley and then roughly a minute afterward, he said, "I'm dyin'." This is direct evidence from the victim about his state of mind. And circumstantial evidence includes the victim's distress as he waited for the ambulance and that the victim died about five hours after he was shot. Based on the victim's statement and the severity of his wound, we conclude that he had lost all hope of recovery at the time he made the statement identifying Hosley.

To persuade this court otherwise, Hosley argues that the state did not establish that the victim had given up all hope of survival when he made the statement. Specifically, he characterizes the victim's statements as demonstrating that the victim was concerned that he would die if he did not receive prompt medical attention. Hosley emphasizes the victim's multiple requests for the ambulance and statements asking when help was coming.

Hosley also posits that because the victim had been shot in the abdomen once before and survived, he would not have given up hope of survival in this instance.

Minnesota caselaw demonstrates that the factors a court should consider when determining whether a victim has given up all hope of survival include (1) the words the victim says, (2) the severity of their wounds, and (3) the time between the incident and their death. *Bergeron*, 452 N.W.2d at 923; *Ferguson*, 581 N.W.2d at 832. Here, the victim stated twice that he was going to die, suffered a fatal gunshot wound to the shoulder, and died within about five hours of being shot. Though five hours is a bit longer than other Minnesota dying declarations,⁴ the combination of these three factors is sufficient to demonstrate that the district court did not abuse its discretion in admitting the victim's statement under the dying-declaration hearsay exception because the victim believed he would not survive his injuries. Though the victim may also have been concerned about dying if he did not receive medical care, direct evidence and the surrounding circumstances demonstrate that the victim thought he was in danger of dying even if he did receive medical attention.

II. The district court erred in entering judgment of conviction for Hosley for a lesser-included offense.

Finally, Hosley argues that because his two convictions are based on the same act, his conviction for second-degree unintentional felony murder must be vacated. The state

⁴ *State v. Martin*, 695 N.W.2d 578, 581 (Minn. 2005) (the victim died within an hour of arriving at the hospital); *Bergeron*, 452 N.W.2d at 923 (the victim died within two hours of making the statement that the district court found was a dying declaration); *State v. Eubanks*, 152 N.W.2d 453, 455-56 (Minn. 1967) (victim died more than three hours after being stabbed and less than two hours after her "dying declaration").

agrees. A criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2020). Section 609.04 also “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). The application of section 609.04 is a question of law we review de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The jury found Hosley guilty of second-degree intentional murder in violation of Minnesota Statute section 609.19, subdivision 1(1); and second-degree murder, without intent while committing a felony, in violation of Minnesota Statute section 609.19, subdivision 2(1). At the sentencing hearing, the district court entered judgment of conviction for Hosley for intentional murder and imposed a 418-month prison sentence for this crime. As for the second count, the district court entered a judgment of conviction for felony murder but did not impose a sentence. The warrant of commitment reflects that Hosley was convicted of both crimes.

Felony murder is a lesser-included offense of intentional murder. *See State v. Lory*, 559 N.W.2d 425, 428 (Minn. App. 1997), *rev. denied* (Minn. Apr. 15, 1997). Because intentional murder and felony murder are different sections of the same criminal statute, and because *Lory* instructs us that felony murder is a lesser-included offense of intentional murder, the district court erred by issuing a warrant of commitment convicting Hosley of both crimes. *See State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (“Section 609.04 forbids multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident” (quotation omitted)).

We reverse and remand to the district court with instructions to vacate the felony murder conviction and correct the warrant of commitment, leaving the jury's finding of guilt on the vacated count in place.

Affirmed in part, reversed in part, and remanded.