STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEE DUNCAN,

Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 200766
Muskegon Circuit Court
LC No. 95-038111 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316; MSA 28.548, and two counts of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). Accordingly, the trial court sentenced defendant to the mandatory terms of life imprisonment without possibility of parole for the murder convictions to be preceded by two-year sentences for the felony-firearm convictions.[1] Defendant appeals by right. The convictions arose from the shooting deaths of defendant's ex-wife Janice Duncan and her first husband O.L. Stewart. We affirm.

I. Factual Background

Defendant and Janice Duncan were married and subsequently divorced prior to the killings in this case. Previous to this marriage, Janice Duncan had been married to O.L. Stewart. On the night of November 28, 1994, defendant fatally shot Janice Duncan and O.L. Stewart at Janice Duncan's house at 2404 Peck Street in Muskegon Heights.

Roger Rolf, who worked for the Muskegon Central Dispatch, indicated that there was a call, evidently a "911" call, placed to central dispatch at about 11:04 p.m. on November 28, 1994 from 2404 Peck Street. A tape of this call was played for the jury. The female voice on this tape (undisputedly that of Janice Duncan) said, "There's a shooting. He's going to kill me, too." Janice Duncan told the dispatcher that O.L. Stewart had been shot. After some time passed, a male voice (defendant) was recorded on the tape. Janice Duncan said to defendant, "I won't do it no more, Tim" to which he replied, "You're damn right, then." Defendant also said to Janice Duncan, "You ain't doing

no shit no more." Apparently, this tape recording captured the sound of defendant firing the fatal shot into Janice Duncan.

Muskegon Heights police officer Steve White testified that, on November 28, 1994 at about 11:04 p.m., he was dispatched to 2404 Peck Street. Eventually, Officer White saw defendant leaving the house while carrying a shotgun and ordered defendant to drop the gun. According to Officer White, defendant thereafter ran. After a rather extended chase, Officer White subdued defendant. The police found the bodies of Janice Duncan and O.L. Stewart, who had both suffered severe shotgun wounds, in a back bedroom inside the house at 2404 Peck Street. Apparently, Janice Duncan's body was lying on the floor on her left side just inside a door to the bedroom. When Officer Kresnak checked her body for a pulse, he found none. O.L. Stewart was kneeling between an end table and the bed with a large amount of bleeding from his neck area where he had been shot. At that time, O.L. Stewart was still breathing. Officer Kresnak testified that he tried to talk to O.L. Stewart but that O.L. Stewart could not talk. O.L. Stewart was taken to a hospital where he was eventually pronounced dead.

Officer Kresnak testified that the door at the front entrance to the house appeared to have been forced open and that its molding was pulled away from its framing. According to Officer Roger Kitchen, "[t]he front door casing inside the house had been kicked off." Officer George Hubbard testified that he found two unfired 12-gauge shotgun rounds on the floor of the bedroom.

After the police apprehended defendant, Officer Kitchen transported him to police headquarters. Officer Kitchen testified that he had prior contact with defendant. According to Officer Kitchen, defendant started talking to himself while he was in the back of the police car; defendant said "[t]hat should have been all three of them in the house; that the gun wouldn't fire." Officer Kitchen testified that defendant then said, "Kitch [a nickname for Officer Kitchen], you know I ain't cut out for no prison time." Officer Kitchen indicated that, after taking defendant to the police headquarters, he found a spent 12-gauge shotgun shell in the left front pocket of defendant's jacket.

II. Challenged, Allegedly Inadmissible Hearsay Testimony

Ozella Stewart, the mother of O.L. Stewart, testified at trial that on the afternoon of Sunday, November 27, 1994, Janice Duncan telephoned her and asked if someone would take her to the hospital. Ozella Stewart testified that Janice Duncan said, "Tim had stabbed her and she needed to go to the hospital." When asked what time she received the telephone call, Ozella Stewart replied, "Sometime, I guess, between 1:00 and 2:00 or 2:00 and 3:00 – something like that. I can't just recall the time." Ozella Stewart indicated that, after Janice Duncan drove her car to Ozella Stewart's home, Ozella Stewart, Ozella Stewart's great-granddaughter "Sharee," O.L. Stewart and Janice Duncan rode to the hospital together. Ozella Stewart testified that, in the car, "O.L. asked [Janice]: why did he stab Jan, and she said: because I told him I wasn't going to stop seeing you, O.L. That's why he stabbed me."

Officer Geraldine Ziarnko testified at trial that she was dispatched to Mercy Hospital on Sunday, November 27, 1994 to take a stabbing report and that she interviewed Janice Duncan at about 4:19 p.m.. Apparently, when Officer Ziarnko arrived at the hospital, Janice Duncan and O.L. Stewart

were in the examining room while Janice Duncan was waiting to be treated. Officer Ziarnko testified that Janice Duncan "told me [Officer Ziarnko] that she had been picked up at her home by her ex-husband, Timothy Duncan [defendant], at about midnight. He drove her to his home on Pine Street which she believed to be in the 1400 block. They argued." Officer Ziarnko further testified that Janice Duncan further stated "that she had gotten into an argument and that he [defendant] threatened to kill her and stabbed her in the leg." Officer Ziarnko also testified that Janice Duncan told her that defendant "began to hit her in the head, in the chest with his open hand and fist" and that "he took out a gold or silver folding knife and stabbed her in the upper left thigh."

Officer Ziarnko also related that Janice Duncan told her the following about defendant's actions after the stabbing: that he came to her side of the car and pushed her to the ground and then grabbed her by the sweater and pulled her into the house, that he still threatened to kill her and that he held the knife to her throat at one point. Officer Ziarnko testified that Janice Duncan "also told me that it was at that time that she believed that he was going to kill her." According to Officer Ziarnko, Janice Duncan told her that defendant said to Janice Duncan "that she was going to come into the house with him and that she was not going to cry."

Officer Ziarnko testified that Janice Duncan told her that after the stabbing "she bled through several pairs of pants and finally she got to the bathtub and tied off her leg, poured alcohol and peroxide on the wound." Officer Ziarnko also testified that Janice Duncan "said after she had gotten into the bathtub and tried to treat the wound, that she thought Timothy [defendant] realized how bad she was injured and that he drove her home and apologized." Officer Ziarnko said that Janice Duncan told her that she believed defendant had taken a gun from her house. According to Officer Ziarnko, Janice Duncan said there was a similar incident with defendant about four years earlier but that she did not press charges against him at that time.

Dr. Ferrer testified that he treated Janice Duncan at the emergency room of Mercy Hospital on November 27, 1994 and that he saw her sometime between 4:30 and 5:00 p.m. Dr. Ferrer testified that, "the patient [Janice Duncan] was crying, slightly upset that I can recall, and she was complaining of a stab wound to the left thigh." Dr. Ferrer testified that he observed a laceration to Janice Duncan's left thigh that was consistent with a stabbing. However, Dr. Ferrer indicated in his testimony that either Janice Duncan did not tell him who stabbed her or that he could not recall who she had said stabbed her.

III. Harmless Error Analysis of Alleged Inadmissable Hearsay

Defendant argues that the admission of the above trial testimony from Ozella Stewart, Officer Ziarnko and Dr. Ferrer included inadmissible hearsay, the admission of which violated the constitutional right to confrontation. It is unnecessary to reach the merits of this assertion as any error was harmless beyond a reasonable doubt in light of the other, overwhelming evidence of defendant's guilt. *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994) (violation of Confrontation Clause may be harmless if appellate court can confidently conclude beyond a reasonable doubt that the error did not affect the jury verdict).

There is no reasonable question that defendant killed O.L. Stewart and Janice Duncan by shooting each of them at close range with a shotgun.[2] However, defendant argues that the improper admission of the hearsay testimony may have prejudiced him by its impact on the jury's evaluation of his intent or state of mind at the time of the killings. Nevertheless, apart from the alleged improperly admitted hearsay evidence, there was overwhelming evidence that defendant premeditated and deliberated the killings of O.L. Stewart and Janice Duncan. See *People v Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997) (first-degree premeditated murder requires an intentional killing and that the act of killing was premeditated and deliberated).

First, John McColl, Jr., who apparently was a friend of defendant, testified that defendant came to his home at about 5:30 or 6:00 p.m. on November 28, 1994, the day on which defendant later killed Janice Duncan and O.L. Stewart. According to McColl, defendant told him that he had gotten back together with Janice Duncan. McColl also testified that defendant told him "that [defendant] thought O.L. had taken [Janice's] gun, and that [defendant] had to do some work – some painting in the house, and that he was afraid to be there without any protection" and asked to borrow one of McColl's guns. McColl indicated that he loaned defendant a 12-gauge Mossberg pump shotgun as well as ammunition and identified the shotgun recovered by Officer White soon after he apprehended defendant as this shotgun. McColl testified that he showed defendant, at least briefly, how to use the shotgun. That defendant lied to McColl to obtain a gun is a strong indication that defendant planned to use the gun for an improper purpose. Moreover, there were signs of forced entry into the house where defendant committed the killings. This evidence further indicates that the killings did not occur on the "spur of the moment" during an initially consensual encounter between defendant and the victims.

Second, Officer Kitchen testified that defendant started talking to himself while he was in the back of the police car and said "[t]hat should have been all three of them in the house; that the gun wouldn't fire." This is further evidence of planning on defendant's part, as it amounts to an assertion by defendant that the killings were committed in the course of an attempted double homicide and suicide scenario.

Third, and even more strikingly, Officer White, who subdued defendant, noticed that defendant had an odor of gasoline on his person. Officer Kitchen also testified that he smelled the odor of gasoline on defendant after he escorted defendant inside the police headquarters. He described the odor of gasoline as smelling "like it was coming from his upper body – jacket, clothes." Officer White noticed two beer bottles containing what appeared to him to be gasoline, with some type of cloth in the bottles, outside the house at 2404 Peck Street. Officer Hubbard testified about finding two bottles outside the home that contained a liquid with the smell of gasoline and that had rags inside them "as if it was [sic] made up for a Molotov cocktail." Testing by Robert Birr, a crime laboratory scientist, confirmed the presence of gasoline in the beer bottles as well as on the jacket seized from defendant. As (1) it would be unreasonable to presume that these bottles of gasoline magically appeared and (2) defendant smelled of gasoline and had gasoline on his jacket, the only reasonable inference is that defendant was responsible for preparing those bottles and leaving them outside the house. At minimum, this shows that defendant entertained the idea of setting fire to the house containing Janice Duncan and O.L. Stewart. In light of defendant's actual conduct toward the victims, it is overwhelmingly apparent that he prepared

these gasoline filled bottles, or "Molotov cocktails," as a possible means of carrying out his intent to kill them. Obviously, the act of pouring gasoline into the bottles and equipping them with rags that could be set on fire prior to throwing the "Molotov cocktails" involved considerable thought and planning.[3]

Fourth, Detective Arthur McLaurin testified that he interviewed defendant at about 12:45 a.m. on November 29, 1994. According to Detective McLaurin, defendant would not agree to having this interview tape recorded; defendant said, "I don't want no tape because I know I'm guilty. I'm not stupid, but I know I'm guilty." Detective McLaurin testified that defendant stated "he took their lives and they had a right to live" and that "he wanted to take his life, also." Defendant also told Detective McLaurin that he owned the shotgun used in the incident for about seven years. However, defendant acknowledged in his trial testimony that he borrowed the shotgun from McColl. That defendant lied to Detective McLaurin about how he acquired the shotgun so soon after the incident is strong evidence that defendant was attempting to conceal the premeditated nature of the killings.

Fifth, defendant's testimony at trial contained assertions that were highly tenuous. Defendant basically said that, on the night of the incident, he wanted to talk to Janice Duncan "one last time" before he committed suicide by cutting his wrists with a razor blade. He asserted that he had the shotgun "for protection" because he knew that O.L. Stewart had Janice Duncan's .32 caliber gun. Defendant denied obtaining the shotgun with the plan, design, motive or "premeditation" of killing Janice Duncan or O.L. Stewart This part of defendant's version of events makes little sense; defendant essentially claims that he carried a gun for protection when he was planning to commit suicide. It is difficult to understand why a man who is about to commit suicide would take extensive precautions to protect his life. Moreover, on cross-examination, defendant denied being able to tell the jury anything about the beer bottles with gasoline and rags behind the side entrance of the house. This denial was despite the evidence of gasoline being on defendant's clothing.

Sixth, and finally, even disregarding the compelling evidence of premeditation and deliberation, defendant's own trial testimony evinced the premeditated and deliberated nature of the killings. Defendant claimed on cross-examination that "Jan [Janice Duncan] told [O.L. Stewart] not to get the gun, and I stepped in, took a few steps to the right, and I pulled the shotgun up, and I shot him" and that O.L. Stewart was reaching for something that defendant thought was a gun. Killing another person constitutes justifiable homicide in self-defense if a defendant honestly and *reasonably* believes that the defendant's life was in *imminent* danger or that there is a threat of serious bodily harm. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). However, a defendant's right to claim self-defense is greatly restricted where the defendant has used deadly force. *People v Pace*, 102 Mich App 522, 535; 302 NW2d 216 (1980).[4] In such a circumstance, a person is required "'to avoid using deadly force if he can safely do so.'" See *People v Dabish*, 181 Mich App 469, 477-479; 450 NW2d 44 (1989). For example, generally, a person must retreat if safely possibly rather than using deadly force to repel an attack. *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). Even if there was a gun near O.L. Stewart, that does not provide a basis for a *reasonable* belief on defendant's part that he had to use deadly force against O.L. Stewart. Rather, defendant could have taken less extreme measures before using deadly force. The time that it took for defendant,

according to his version of events, to remove the shotgun from behind his back and aim and fire at O.L. Stewart provided ample time for premeditation and deliberation.

Defendant indicated on cross-examination that he left after having shot O.L. Stewart. However, defendant testified that he did not remember where he went. He said that "[a]fter I shot O.L., my mind went blank." When asked if he remembered re-entering the home after shooting O.L. Stewart, defendant said, "I don't remember entering, but I remember telling my wife [Janice Duncan, defendant's ex-wife] to get off me, get off me. I remember the gunshot." Defendant said that he did not remember where Janice Duncan was when he shot her or what she was saying when he shot her. Nevertheless, it is manifest from defendant's own testimony, coupled with the undisputed facts at trial, that defendant left the bedroom where the killings took place and, thereafter, returned and fatally shot Janice Duncan. Dr. DeLeeuw testified, based on his findings from examining Janice Duncan's body, that he thought her arms were down and probably against her body when she was shot, indicating that defendant shot her without direct provocation. These circumstances give rise to a strong inference that defendant killed Janice Duncan with premeditation after he killed O.L. Stewart

When all of the evidence independent of the challenged testimony at issue is considered together, it is clear beyond a reasonable doubt that defendant premeditated and deliberated the killings of Janice Duncan and O.L. Stewart. The alleged improper admission, if any, of hearsay evidence in question was therefore harmless beyond a reasonable doubt, as there is no reasonable possibility that it affected the verdict. Thus, we do not disturb defendant's convictions based on this issue.

IV. Denial of Mistrial Based on an Emotional Outburst

Defendant argues that the trial court abused its discretion, *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996), by denying his motion for a mistrial based on an outburst in the courtroom by the daughter of the two murder victims. During the trial a tape recording of a telephone call by Janice Duncan for emergency aid was played. Defendant's voice was apparently captured on this tape as was the fatal shot that he fired into Janice Duncan. During the playing of the tape, Nina Stewart, the daughter of both murder victims, disrupted the court proceedings with certain remarks.

A trial court should only grant a motion for a mistrial for an irregularity that is prejudicial to the defendant's rights and that impairs the defendant's ability to have a fair trial. *People v Griffis*, 218 Mich App 95, 99-100; 553 NW2d 642 (1996). *People v Gonzales*, 193 Mich App 263; 483 NW2d 458 (1992) is instructive. The defendant in *Gonzales* was convicted of first-degree criminal sexual conduct. *Id.* at 264. During cross-examination of the complainant in *Gonzales* by defense counsel, the complainant made a non-responsive outburst that alluded to the defendant's prior second-degree murder conviction. *Id.* at 264-265. The defendant in *Gonzales* asserted that this required reversal because the victim's outburst brought inadmissible evidence of a prior conviction to the jury's attention. *Id.* This Court, noting in part that the trial court properly instructed the jury to disregard the complainant's statement, concluded that the trial court did not abuse its discretion by denying the motion for a mistrial. *Id.* at 266-267.

The outburst in this case was less severe than that in *Gonzales* because it did not reference any specific inadmissible misconduct by defendant. Rather, it was on its face simply an expression of extreme outrage and anger by Nina Stewart. The outburst was similar to the outrage and anger expressed by the complainant in *Gonzales* against the defendant in that case. As in *Gonzales*, here the trial court instructed the jury to disregard the outburst. Further, the jurors in this case replied affirmatively when they were asked if they understood that they should disregard the outburst. There is even less reason to fear that defendant's right to a fair trial was prejudiced by the outburst in this case than there was in *Gonzales*. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Cunningham, supra.*

V. Failure to Instruct on the Elements of Felony-Firearm

Defendant argues that we should reverse his felony-firearm convictions because the trial court failed to instruct the jury on the essential elements of felony-firearm. The trial court, without objection from defendant, did not define the elements of felony-firearm in its instructions to the jury preceding the start of deliberations. Jury instructions must include all elements of a charged crime. *People v Cummings,* ___ Mich App ___, slip op, pp 1-2 (No. 199226, rel'd 3/31/98); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even without a request from a party, a trial court has a duty to instruct the jury on all elements of a charged crime. *People v Rone (On Second Remand),* 109 Mich App 702, 711; 311 NW2d 835 (1981).

The trial court did state during remarks to the potential jurors, including those who actually served on the jury, at the time of jury selection:

> Then there's [sic] two other added counts, says that on or about November 28th, 1994, in the City of Muskegon Heights, 2402 Peck Street, Count 3, *Timothy Duncan did carry or have in his possession a firearm – to-wit: a shotgun – at the time he committed or attempted to commit a felony – to-wit: premeditated murder. It's known as felony firearm*.
>
> Count 4 is the same. Timothy Lee Duncan did carry or have in his possession a firearm – to-wit: a shotgun – at the time he committed or attempted to commit a felony – to-wit: premeditated murder, felony firearm. [Emphasis added.]

The prosecution argues that these comments constituted an adequate instruction on the elements of felony-firearm. We disagree. The trial court made these comments during the jury selection stage of the trial proceeding and do not authoritatively state the elements that the prosecution was required to prove to establish that defendant committed the crime of felony-firearm. In accordance with well-established practice, we conclude that the trial court's duty to sua sponte instruct the jury on all elements of a charged crime must be discharged during its final instructions to the jury. Thus, the trial court erred by failing to instruct the jury on the elements of felony-firearm during its final jury instructions.

However, the trial court's error is subject to harmless error analysis. Defendant, citing *People v Reed,* 393 Mich 342, 351; 224 NW2d 867 (1975), asserts that any error in failing to instruct on an

essential element of a crime cannot be considered harmless. That is not accurate. Rather, under *Reed*, when a trial judge "instructs that an essential element of a criminal offenses exists, as a matter of law," harmless error analysis is inappropriate. See also *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996) ("[w]hen a trial court instructs that an essential element of a criminal offense exists as a matter of law, error requiring reversal will be found.") In this case, the trial court did not instruct the jury that any element of felony-firearm existed as a matter of law but rather failed to include a statement of the elements of that crime. Thus, *Reed* and *Tice* do not require automatic reversal.

On the contrary, although there was no majority opinion in *People v Vaughn*, 447 Mich 217; 524 NW2d 217 (1994), a majority of the Michigan Supreme Court held that an error in jury instructions regarding an essential element of a crime is subject to harmless error analysis. Under Justice Brickley's lead opinion in *Vaughn*, joined in by now Chief Justice Mallett, an erroneous jury instruction on an essential element does not require reversal if a properly instructed jury could not "have reached a different verdict had the error not occurred." *Id.* at 238 (Brickley, J., joined by Mallett, J.). In a footnote, Justice Brickley referred to the harmless beyond a reasonable doubt standard generally applied to federal constitutional errors in the course of a criminal case that are classified as "trial errors." See *id.* at 238-239 n 17. We understand Justice Brickley's test for harmless error in a jury instruction on an essential element of a crime to be whether the error was harmless beyond a reasonable doubt assuming that the jury endeavored to comply with the instructions actually given by the trial court.[5] Justice Levin concluded that an erroneous instruction on an essential element of a crime should be considered harmless if an appellate court determines beyond a reasonable doubt, from the verdict returned in light of the instructions actually given, that the jury, assumed to have acted rationally, "actually found the element on which it was not instructed." *Id.* at 270-272 (Levin, J., dissenting). Then-Chief Justice Cavanagh endorsed the harmless error standard articulated by Justice Levin, although he disagreed with Justice Levin's application of that standard to the facts of *Vaughn*. *Id.* at 256-257 (Cavanagh, C.J., concurring in part and dissenting in part).

In the circumstances of this case, we conclude that, if the jury acted rationally, it actually and necessarily found the elements of felony-firearm. The elements of felony-firearm are (1) possession of a firearm (2) during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The jury convicted defendant of two felony counts of first-degree premeditated murder based on his killing Janice Duncan and O.L. Stewart. In light of the testimony at trial, the only reasonably conceivable way that the jury could have found that defendant committed the murders was with the use – and, thus, the possession – of a firearm. Assuming that the jury acted rationally, it must have found both essential elements of felony-firearm with regard to both of defendant's felony-firearm convictions; that is, that (1) defendant committed two felonies (the first-degree murders of Janice Duncan and O.L. Stewart) and (2) he possessed a firearm at the time that he committed both felonies. Thus, under either the test for harmless error with regard to an erroneous or absent instruction on an essential element of a crime articulated by Justice Brickley and now-Chief Justice Mallett in *Vaughn* or under the test advanced by Justice Levin and endorsed by then-Chief Justice Cavanagh in *Vaughn*, the trial court's failure to instruct the jury on the elements of felony-firearm constituted harmless error.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] While the felony-firearm sentences are consecutive to the murder sentences, they are of course concurrent to each other.

[2] Indeed, defendant's trial counsel did not ask the jury for an outright acquittal in his closing argument, but rather asked for a conviction of the lesser crime of voluntary manslaughter.

[3] Although already evident from the circumstances, this conclusion is further strengthened by Officer Kitchen's testimony that he found a lighter on defendant's person. McColl, who testified about having socialized with defendant, said that he had never seen defendant smoke.

[4] "[D]eadly force has been used where the defendant's acts are such that the natural, probable, and foreseeable consequence of said acts is death." *Pace, supra* at 534.

[5] Justice Brickley's statement to assess whether a properly instructed jury "could" have reached a different verdict cannot reasonably be taken too literally. A jury *could* always reach a verdict inconsistent with the instructions on the law given by the trial court. The Sixth and Fourteenth Amendments prohibit directed verdicts of guilt in criminal jury trials. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

> Certainly no one would deny the jury's absolute right to disbelieve *all* the "undisputed evidence" and acquit the defendant altogether. A "jury has the power to bring in a verdict in the teeth of both law and facts." [*Id.* at 238-239; citation omitted (emphasis in original).]