

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG D. GILMORE,

Defendant-Appellant.

---

UNPUBLISHED

February 26, 1999

No. 204718

Recorder's Court

LC No. 96-007412

Before: Markman, P.J., and Jansen and J. B. Sullivan\*, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury acquitted defendant of second-degree murder, but convicted him of felony-firearm. He was sentenced to two years' imprisonment and granted bond pending appeal. Defendant appeals as of right and we affirm.

This case arises from an incident that occurred on Labor Day of 1996. Ongoing conflicts and tensions between neighbors culminated that night in defendant shooting Martha Finklea in the back and killing her.

Defendant first argues that the jury instructions failed to inform the jury that it could not convict defendant of felony-firearm unless it found that he committed or attempted to commit the underlying felony. Because defendant failed to object to the trial court's instructions in this regard, relief may be granted only in a case of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993).

The elements of the crime of felony-firearm are (1) that the defendant possessed a firearm, (2) while committing or attempting to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The jury "may and should" be instructed that it may not convict a defendant of felony-firearm unless it finds that he committed or attempted the underlying felony. *People v Lewis*,

---

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

415 Mich 443, 455; 330 NW2d 16 (1982). However, it would be error to instruct the jury that there must be a conviction on the underlying felony before the jury can convict a defendant of felony-firearm. *Id.* at 454.

Contrary to defendant's contention, the jury instruction regarding the felony-firearm charge in this case complies with the Supreme Court's mandate in *Lewis*. The trial court instructed the jury that it could not convict defendant of felony-firearm unless it found that he either attempted or committed a felony. The trial court read the felony-firearm instruction almost verbatim, omitting only the sentence that states it is not necessary for a defendant to be actually convicted of the underlying crime. This omission could not have prejudiced defendant. Thus, the trial court did not err in its felony-firearm instruction. Therefore, the jury instructions did not result in manifest injustice.

Defendant next argues that his felony-firearm conviction was improper because the jury's finding of not guilty on the second-degree murder charge clearly revealed that the jury believed the underlying felony had not been attempted or committed.

As has been stated, a felony-firearm conviction requires a finding that the defendant either committed the underlying felony, or attempted to do so. *Davis, supra*, p 53. However, the mere fact that a jury acquits on the underlying felony does not preclude it from finding a defendant guilty of felony-firearm. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984). This is because Michigan law does not require consistency of jury verdicts in criminal cases. *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996). The rationale behind allowing inconsistent jury verdicts is that demanding rationally consistent verdicts would interfere with the jury's power to exercise leniency. *Id.*

The Michigan Supreme Court addressed this issue at length in *Lewis, supra* at 446. In *Lewis*, the Court rejected the exact argument that defendant now makes, holding that the jury's acquittal on the underlying felony did not necessarily mean the jury found that the defendant did not commit or attempt the felony. *Id.* The Court explained that the inconsistent verdict could just as easily be read as an implicit finding that the defendants did commit the felonies with which they were charged, but the juries wished to be lenient. *Id.* at 452. Therefore, the argument that an element of felony-firearm is missing because the jury never found a committed or attempted felony is not one requiring reversal. *Id.* at 455. Conviction of an underlying felony is not an element of felony-firearm. *Id.* The jury in this case may have been extending leniency to defendant, but it does not follow that it intended defendant to be freed from all consequences of killing the victim. See *id.* at 449-450.

Defendant relies on *Burgess, supra* at 305 to support his argument. However, *Burgess* is inapposite to the case at bar because there, the jury verdict had rendered a consistent verdict when it convicted the defendant of both assault and felony-firearm. *Id.* at 306. This Court affirmed the felony-firearm charge despite the error that required reversal on the underlying felony. The Supreme Court held that an appellate court cannot reverse a substantive felony conviction and allow the felony-firearm conviction to stand when the error pertaining to the substantive conviction means that the jury's finding of fact that the defendant committed the underlying felony can no longer be relied upon. *Id.* at 312. By allowing the felony-firearm conviction to stand after the assault charge had been reversed due to error, it was the appellate court, and not the jury, that created the inconsistency. *Id.* at 310-312. The rule of

law in *Burgess* is, quite simply, that an appellate court may not create an inconsistency in the verdict where none existed before. In this case, the jury created any inconsistent verdict, which it has the power to do, and affirmation of defendant's felony-firearm conviction does not violate *Burgess*. Accordingly, defendant's argument that his acquittal on the underlying felony invalidates his felony-firearm conviction is without merit.

Defendant also argues that *Lewis* was wrongly decided and should be overturned. This Court, and all lower courts, are bound by decisions of the Supreme Court until those decisions are overruled or modified by the Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). This Court does not have the power or authority to overrule the Supreme Court's decision in *Lewis*. Because the Supreme Court has not overruled *Lewis*, it is valid and binding precedent and must be applied to this case. *Boyd, supra* at 523. Thus, any argument in this regard must be directed to the Supreme Court.

Finally, we order that defendant's bond pending appeal be revoked immediately.

Affirmed.

/s/ Stephen J. Markman

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan