# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TASHIENA L. COMBS,

Defendant-Appellant.

UNPUBLISHED
June 14, 2002

No. 226549
Oakland Circuit Court
LC No. 99-167507-FC

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, carrying a concealed weapon in a vehicle, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to mandatory life imprisonment for the murder conviction, one to five years' imprisonment for the CCW conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion in denying her motion for a new trial on the basis of juror misconduct. We disagree.

Defendant contends that she is entitled to a new trial because Juror 580 did not reveal that his wife is an employee at the district court where defendant had been convicted of misdemeanor offenses, and also that he is a member of the National Rifle Association (NRA). According to defendant, Juror 580 concealed facts from the court that, if he had revealed them, would have led defense counsel to challenge him for cause. The trial court denied defendant's motion for a new trial on this issue. We review the trial court's decision for an abuse of discretion, and the trial court's factual findings for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

A lower court may grant a new trial on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). To justify a new trial on the basis of juror misconduct, the defendant must show actual prejudice resulting from the presence of the juror, or that the juror was excusable for cause. *Crear*, *supra* at 167; *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179

(1998). The level of juror misconduct must be such as to affect the impartiality of the juror or to disqualify him from exercising the powers of reason and judgment. *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960); *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

Here, contrary to defendant's claim, the record does not demonstrate that Juror 580 was excusable for cause or that defendant was actually prejudiced by the juror's presence on the jury. Defendant correctly argues that jurors have a duty to reveal relevant information. *People v DeHaven*, 321 Mich 327, 334; 32 NW2d 468 (1948). Nevertheless, there has been no showing that Juror 580 knowingly concealed, misled or gave false information during voir dire. First, the record does not support defendant's claim that Juror 580 concealed his wife's occupation or his membership in the NRA. Rather, Juror 580 was not asked during voir dire whether his wife or any member of his family worked for a court, nor was Juror 580 directly asked whether he was a member of any gun-related organizations. Further, Juror 580 wrote on his jury questionnaire that his wife was employed by the district court as a criminal division supervisor, and trial counsel was able to review the questionnaire pursuant to MCR 2.510(C).

Moreover, there is no indication that the juror's wife's occupation or his NRA affiliation affected his impartiality or disqualified him from exercising the powers of reason and judgment. There is no indication that the juror's wife had any personal knowledge of defendant or her misdemeanor convictions, or that the juror and his wife discussed the case. Further, defendant's general claim that the juror's affiliation with the NRA evidences bias because the organization favors harsh punishment for individuals who "misuse[] gun ownership" is unpersuasive. It can be presumed that all law-abiding citizens are in favor of punishment for the illegal use of guns, regardless of their affiliation with the NRA. In addition, Juror 580 stated that he could be fair, would maintain an open mind, and would take seriously the prosecutor's burden of proof beyond a reasonable doubt. In light of defendant's failure to further question Juror 580, and the juror's indication that he could be fair, defendant did not meet her burden of showing that she was prejudiced as a result of the juror's alleged misconduct. See *People v Johnson*, 245 Mich App 243; 631 NW2d 1 (2001). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Within this issue, defendant argues that trial counsel was ineffective for failing to review the jury questionnaires. We decline to review this argument because it is not identified in defendant's statement of questions. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). We briefly note, however, that an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight. *Johnson, supra* at 259. Further, based on Juror 580's indication that he could be fair and impartial, and defendant's failure to establish actual prejudice or that the juror was excusable for cause, there is no reasonable probability that, but for counsel's omission, the outcome of the case would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

II

Defendant also argues that the trial court erred in denying her request to instruct the jury on the lesser included misdemeanor offense of careless, reckless, or negligent discharge of a firearm causing death. See MCL 752.861 and CJI2d 11.20. We disagree.

A trial court must instruct on a lesser included misdemeanor when, *inter alia*, the instruction is supported by a rational view of the evidence adduced at trial. *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). This requires not only that there be some evidence that would justify a conviction on the lesser offense, but that proof on the elements distinguishing the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater offense and guilty of the lesser offense. *Stephens, supra* at 262-263. The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

A conviction for the offense of careless, reckless, or negligent discharge of a firearm requires proof that the firearm was discharged as a result of the defendant's carelessness, recklessness, or negligence. MCL 752.861; CJI2d 11.20(6). Contrary to defendant's contention, no evidence was presented to suggest that defendant's discharge of the firearm was careless, reckless or negligent. Defendant relies on her testimony that, after she fired the gun twice into the air, the gun jammed and discharged again as she was re-hacking it. However, defendant acknowledged during trial that she pulled the trigger in order to cause the gun to discharge. Because defendant's testimony established that the firing of the weapon was intentional, her conduct did not fall within the scope of the conduct prohibited by the statute. *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998). Moreover, in light of the other evidence presented at trial, the instruction was not supported by a rational view of the evidence as defined in *Stephens, supra* at 262-263. Therefore, the trial court did not err in refusing to give the requested instruction.[1]

III

Defendant's final argument is that the evidence was insufficient to support her conviction of first-degree premeditated murder because there was no evidence of premeditation and deliberation. We disagree.

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[1] We note that the trial court instructed the jury on the charged offense of first-degree premeditated murder, and the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter – firearm intentionally aimed. The court also instructed on the defense of accident. The jury's rejection of several lesser offenses in favor of first-degree murder reflects an unwillingness to convict on a lesser included offense, such as careless and reckless discharge of a weapon. See *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Thus, any error in failing to give the instruction would have been harmless. Although not entirely clear in defendant's brief, it appears that he argues that the court should also have instructed the jury on simple involuntary manslaughter, CJI2d 7.3 and 16.10. We reject the argument because the evidence did not support such an instruction, and assuming error, it was harmless in light of the jury's decision to convict on first-degree murder and not on the other lesser offenses which the jury was instructed on.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515.

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: (1) the previous relationship between the victim and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In this case, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer premeditation and deliberation. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Here, there was evidence that defendant and the decedent were linked through defendant's younger sister. Defendant's sister and the decedent's boyfriend, Eugene, had relations, resulting in defendant's sister becoming pregnant. Defendant and her sister were angered by Eugene's alleged disregard of the pregnancy and his relationship with the decedent. On the day of the incident, defendant's sister called Eugene several times, and he failed to come to her house. Eventually, defendant, her sister, and their cousin, Marsha, went to a bowling alley expecting to find Eugene and the decedent. Defendant took a gun and ammunition, which she had obtained from her boyfriend's house. Given defendant's anger with Eugene and the decedent and the fact that she went looking for them, defendant's procurement of a deadly weapon in advance of the murder is a fact from which premeditation and deliberation may be inferred, although insufficient in and of itself. *People v Waters*, 118 Mich App 176, 186-187; 324 NW2d 564 (1982); *People v Livingston*, 63 Mich App 129, 133; 234 NW2d 176 (1975).

Further, there was testimony that, upon entering the bowling alley, the women appeared angry and started arguing with the decedent and other parties in Eugene's group. A bowling alley security guard, who knew defendant and her sister, described the two as looking "rough, like they were ready to fight." There was also testimony that defendant said, "I am going to kill you," "I am going to f*** you up," and "It's going down tonight." Prior threats are indicia of premeditation. See *People v Lewis*, 95 Mich App 513, 515; 291 NW2d 100 (1980).

After being asked to leave and being escorted out of the bowling alley, defendant and her associates waited in the parking lot in a Ford Explorer. Approximately a half hour later, the decedent came out of the bowling alley, and got into the front passenger seat of a Cavalier with

three female friends. After the cars left the parking lot and were on a road, defendant, who was seated in the backseat of the Explorer, fired two shots out of the window. Defendant testified that, before using the gun, she put on a glove to avoid leaving any fingerprints on the weapon. At one point, the Explorer, along with the Cavalier and Eugene's car, stopped aligned at a traffic light and several parties began arguing. A fistfight ensued between the decedent and Marsha on the street. While the fight was going on between Marsha and the decedent, a witness saw defendant loading the gun as she sat in the rear of the Explorer. There was testimony that, after the fight between Marsha and the decedent ended and the decedent was walking towards the Cavalier, defendant leaned out of the backseat of the Explorer, pointed the gun at the decedent, and fired four to five shots, causing the decedent's death. Defendant was twelve to fifteen feet from the decedent. Defendant then fled the scene and, when apprehended, gave false statements to the police. In sum, this evidence, viewed in a light most favorable to the prosecution, is sufficient for a rational trier of fact to conclude that the elements of first-degree murder, including premeditation and deliberation, were proved beyond a reasonable doubt.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray