

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL LEE PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 245142
Washtenaw Circuit Court
LC No. 02-000140-FH

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a short-barreled shotgun, MCL 750.224b; two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of fourteen months to 7-1/2 years for the convictions of possession of a short-barreled shotgun and felon in possession, and to a concurrent sentence of two years for the felony-firearm convictions. Defendant's motions for a mistrial and for a new trial were denied. Defendant appeals as of right. We affirm.

Defendant's case went to the jury with a special instruction on possession. The jury, through the bailiff, requested definitions of the terms "reasonably accessible," "possession," "acting in concert," and "right to control," as used in the possession instruction. The court responded through the bailiff that the jury was to rely on the jury instruction as it was given and that "we might be able to come up with some more information from jury instructions on that." The jury then asked for a copy of the instruction on possession and a dictionary, both of which the court provided.

Defendant first argues that the trial court erred by allowing the jury to use a dictionary to define legal terms because the jury was permitted to "reject the definitions given in the instructions and search for a definition that better fit their own notions of what the law should be."¹ The trial court determined that the jury used the dictionary to assist in defining undefined

¹ Notably, defendant does not make an argument regarding the ex parte nature of the communications with the jury.

terms in the jury instructions and that defendant was not prejudiced by the jury's use of the dictionary.

A jury's use of a dictionary to define a relevant legal term is error, but it is not prejudicial per se. *United States v Gillespie*, 61 F3d 457, 459 (CA6, 1995). In such a situation, the trial court should first determine whether the jury actually substituted the dictionary definition for that given in the instructions. If so, the court must then determine whether any use of the dictionary definition resulted in prejudice to the defendant. *Id.*

Here, the terms for which the jury sought definitions were not defined in the jury instructions. Thus, this case is distinguishable from *Gillespie, supra* where the jury utilized a dictionary to define the term "reasonable doubt" despite the fact that the term was defined in the instructions to the jury. In *People v Messenger*, 221 Mich App 171; 561 NW2d 463 (1997), the jury consulted a dictionary to aid in defining the term "premeditated." This Court stated:

In the present case, the trial court did not make explicit findings regarding whether the jurors actually substituted the definition in the note for the definition given in the instructions. However, even if the jurors utilized the dictionary definition, defendant was not prejudiced. This is because the court's instructions regarding premeditation were substantively identical to the dictionary definition. Under such circumstances, there was no prejudice even if the jurors may have used the dictionary definition. See *Franks v State*, 306 Ark 75, 80-81, 811 SW2d 301 (1991) (jurors' use of dictionary definition of "premeditated" was not prejudicial error because the dictionary definition was clearer than the words contained in the instructions); *State v Melton*, 102 NM 120, 124, 692 P2d 45 (1984) (no error where dictionary definitions did not vary from usual ordinary meanings of words or from meanings contained in trial court's instructions); *State v McNichols*, 188 Ka 582, 588-590, 363 P2d 467 (1961) (no error where jurors consulted dictionary for definition of "culpable" where that term was not defined by the court and enabled the jurors to better understand the court's definition of "culpable negligence"). [*Messenger, supra* at 177.]

Here, the jury was given a copy of the jury instructions for use in defining the term "possession." It was only thereafter that the jury requested a dictionary, thus implying that the jury sought definitions of the terms "acting in concert," "readily accessible," and "right to control." These terms were not defined in the jury instructions, and therefore the use of the dictionary definitions did not conflict with any of the trial court's instructions. Defendant has shown no prejudice from the use of the dictionary definitions.

Defendant also argues that the trial court erred when it allowed into the jury room a ruler used at trial to measure the length of the barrel of the shotgun but not admitted into evidence. He contends that supplying the jury with the ruler permitted the jury to conduct its own investigation regarding the length of the barrel and amounted to introduction of an "extraneous fact not introduced in evidence." We disagree.

A trial court cannot provide a jury with unadmitted evidence. *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), citing *People v Williams*, 179 Mich App 15, 22-23; 445 NW2d 894 (1989), rev'd on other grounds 434 Mich 894 (1990). While it is undisputed that the court

permitted the ruler in the jury room, defendant has failed to establish that the error actually affected the verdict. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A “short-barreled shotgun” is defined as a shotgun having one or more barrels less than eighteen inches in length or a weapon made from a shotgun . . . if the weapon as modified has an overall length of less than twenty-six inches. MCL 750.222(i). At trial, Officer Sean McCormick testified that the length of the barrel of the shotgun was 12-1/8 inches, and the prosecutor then measured the barrel with a twelve-inch ruler to demonstrate to the jury that the barrel was approximately the length of the ruler. Even if providing the jury with the ruler was error, the error was harmless, as it did not provide information that had not already been submitted to the jury at trial. The undisputed evidence presented at trial established that the shotgun was a short-barreled shotgun.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot