STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 293968 Wayne Circuit Court
JOHN HENRY SIMS, Defendant-Appellant.	LC No. 09-8114-01

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In this second-degree murder case, defendant was found not guilty of second-degree murder (MCL 750.317), and guilty of possession of a firearm during the commission of a felony (felony-firearm) (MCL 750.227b). Defendant was sentenced to a mandatory 2 years in prison and now appeals as of right. We affirm.

I. FACTS

On January 21, 2009, Yanique Gaines was engaging in sexual relations with defendant on the couch in Gaines' rented house, when the headlights of her ex-boyfriend Delano Thomas's car unexpectedly shone through the living room window. Defendant testified that Gaines told him Delano Thomas would kill them and that there was a gun in the back room. He testified that the house was dark and that he ran to the back bedroom and tried to open the window. He stated that when he could not open the window, he grabbed a gun out of a box on the bed. When he turned around, Thomas was charging at him, and he started shooting. Thomas was shot seven times and died at the scene.

Because defendant claimed that he acted in self-defense, the trial court instructed the jury on second-degree murder, self-defense, and felony firearm. Defense counsel indicated that he had no objection to the instructions.

II. STANDARD OF REVIEW

Defendant argues that defense counsel's various errors deprived him of the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing in the trial court, our review is limited to mistakes apparent

from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994); see also *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first contends that trial counsel was ineffective for failing to object when the trial court (1) instructed the jury that its verdict on felony-firearm need not be consistent with its verdict in the underlying felony, second-degree murder, and (2) failed to include a separate instruction on self-defense for felony-firearm. We disagree.

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 309, 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 689. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The trial court gave the following instruction on self-defense:

> The Defendant claims that he acted in lawful self-defense. A person has the right to use force or even take a life to defend himself under certain circumstances. If a person acts in lawful self-defense his actions are justified and he is not guilty of murder second degree.
>
> You should consider all the evidence and use the following rules to decide whether the Defendant acted in lawful self-defense. Remember to judge Defendant's conduct according to how the circumstances appeared to him at the time he acted.
>
> First, at the time he acted the Defendant must have honestly and reasonably believed that he was in danger of being killed and/or seriously injured. If his belief was honest and reasonable he could act immediately to defend himself even if it turned out later that he was wrong about how much danger he was in.

The failure to object to jury instructions waives the alleged error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). "A jury in a criminal case may reach different conclusions concerning an identical element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original).

Defendant argues that the felony-firearm instruction as given authorizes a logically inconsistent verdict. However, juries are not held to any rules of logic. For example, juries have the power to acquit as a matter of leniency. *People v Lewis*, 415 Mich 443, 449; 330 NW2d 16 (1982). More specifically, a jury may decide to acquit a defendant of an underlying offense even though it believes beyond a reasonable doubt that he was guilty of that offense. The jury may decide instead to extend mercy by convicting defendant of only what the jury considered to be a lesser offense. *Id.* at 451.

"Whenever a defendant is charged with different crimes that have identical elements, the jury must make an independent evaluation of each element on each charge." *Goss*, 446 Mich at 597. As stated, a criminal jury reach different conclusions regarding identical elements of two different offenses. *Id.*; *Lewis*, 415 Mich at 449. In *Lewis*, the Supreme Court held that, although the judge may and should instruct that a defendant cannot be convicted of felony-firearm unless the jury finds that "he [committed] or [attempted] to commit a felony[,]" it may not instruct the jury that it must convict of an underlying felony in order to convict of felony-firearm. *Id.* at 455 (alteration in original).

Here, the instruction only told the jury to consider the felony-firearm charge separately from the second-degree murder charge. We find no error in this instruction. Nor do we conclude that defendant was entitled to a separate instruction for self-defense for the felony-firearm count. A person has the right to use force, even deadly force, under some circumstances. CJI2d 7.15. In order to be entitled to an instruction on self-defense, the defendant must honestly and reasonably believe that he was in danger, that the danger feared was death or serious bodily harm, that the action taken appeared at the time to be immediately necessary, and that the defendant was not the initial aggressor. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990).

The purpose of the felony-firearm statute is to reduce the possibility of injury to victims, passersby, and police officers in the course of a felony. *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978). It would frustrate the purpose of the felony-firearm statute to allow an independent defense of self-defense. To the extent that defendant argues that the instruction as given misled the jury into believing that it could not consider self-defense in deciding whether defendant had committed second-degree murder as an element of felony-firearm, we disagree.

As stated, this Court must examine the charge as a whole, rather than piecemeal, to determine if error exists. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions in this case could reasonably be understood to require the jury to consider self-defense in the second-degree murder count, both as a substantive offense and as an element of the felony-firearm count. We are not convinced otherwise by the fact that defendant was acquitted of second-degree murder but convicted of felony-firearm. A jury can reach inconsistent verdicts. *Lewis*, 415 Mich at 449. While not a model of clarity, the instructions, as given, fairly presented the issues to be tried and sufficiently protected defendant's rights. *Whitney*, 228 Mich App at 252-253.

Defendant's claims that he was denied effective assistance of counsel because defense counsel failed to object to the jury charge on the grounds discussed above are without merit. Because this we find no error in the jury charge, counsel was not ineffective on these grounds.

Next, defendant argues that trial counsel was ineffective for failing to object to the admission of the testimony of Officer Paul Pesmark about statements made by Tony Williams. We disagree.

First, trial counsel did initially object to this testimony on hearsay grounds. This objection was overruled by the trial court. However, defendant did not object at trial on confrontation clause grounds. Thus, this argument is unpreserved and reviewed for plain error affecting substantial rights. Reversal is ultimately warranted only if the error seriously affected the fairness, integrity, or public reputation of the proceedings, or resulted in the conviction of an innocent defendant. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A statement is testimonial "'when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Spangler*, 285 Mich App 136, 145; 774 NW2d 702 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nontestimonial statements, on the other hand, include those "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[,]" and are not constitutionally barred. *Davis*, 547 US at 822.

Here, defendant has failed to carry the burden of demonstrating that Williams's statements were testimonial and that the admission of the evidence affected the outcome of the trial. From an objective view of the circumstances as they existed at that time, Williams's statements constituted nontestimonial statements made to assist the police in meeting the ongoing emergency. The police were responding to a shooting, when they arrived, they discovered a deceased victim and another victim that had sustained a gunshot wound. This victim was in an excited state, and the police did not yet know what was transpiring. The record does not indicate what questions, if any, the police asked Williams, and Williams did not reveal the identity of the shooter. The record does not support that the police's primary focus was interrogating Williams in order to prove past events relevant to a criminal prosecution. Nonetheless, any error in the admission of Williams' statements was not outcome determinative.

Because there was no error in the admission of the evidence, defendant's trial counsel did not render ineffective assistance in failing to raise a Confrontation Clause objection, as counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). And, even if an error occurred, defendant has not established that, had defense counsel objected, the outcome of the proceedings would have been different. *Pickens*, 446 Mich at 312.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood