STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 294149 Wayne Circuit Court
KENNETH ROY BARTLEY, JR., Defendant-Appellant.	LC No. 99-011967-FC

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

PER CURIAM.

Defendant Kenneth Bartley, Jr., appeals as of right his bench trial conviction of first-degree premeditated murder[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Bartley to mandatory life in prison for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction, the two sentences to be served consecutively. We affirm.

I. FACTS

At approximately 6:00 p.m., on October 30, 1999, six individuals were gathered on the porch and driveway of a home located at 9911 Somerset in Detroit, Michigan. Included in this group were Tyrone Ready, a/k/a "Pooh," who lived at the house, and Tanisha Simmons.

Don Maxie, a neighbor who lived across the street from 9911 Somerset, was on his porch. As Maxie turned to step inside his home, he heard the sound of two gunshots nearby. Maxie looked across the street and saw everyone but two men run into the house. Maxie observed a girl lying on the driveway, beside the porch. The girl was Tanisha Simmons. Maxie also noticed Bartley, about a house distance away, dressed in a blue and black nylon coat and black pants. Maxie did not see anything in Bartley's hands. Bartley turned and proceeded to run

[1] MCL 750.316(1)(a).

[2] MCL 750.227b.

in the direction of Haverhill Street. After observing Bartley running away, Maxie saw Ready come out of the home and shoot a gun into the air.

Steven Bowie was one of the individuals on the porch at 9911 Somerset on October 30, 1999. Bowie saw a man dressed in a blue or black hoodie and black pants come from the direction of Haverhill Street. The man stood on the sidewalk in front of the house next door, raised his arm, and then pointed a hand gun in the direction of the porch. Bowie then heard shots fired. After he heard the shots, Bowie ran around the side of the house toward the backyard. He then circled back to the front of the house. As he was running, a .25-caliber gun that he was carrying fell out of his pants pocket. When he returned to the front of the house, Bowie saw the victim, Tanisha Simmons, lying on the driveway, beside the porch, with a pool of blood around her head. However, Bowie's trial testimony was, in many respects, internally inconsistent and contradictory. Bowie originally denied that he saw Tyrone Ready pick up his .25-caliber gun and shoot it into the air. But he then admitted that he saw Ready do just that. Later, Bowie explained that he saw Ready fire into the air; however, he claimed that he was not aware at the time that Ready was firing his .25-caliber gun.

Bowie also eventually admitted on cross-examination that on the day of the shooting, he had seen Bartley earlier in the day. At that time, Bowie was with several individuals, including Ready. Bowie denied that anyone took a shot at Bartley during that earlier encounter. But Bowie admitted that there had been an ongoing "beef" between Ready, Bartley, and Antoine Stalling.

According to Ready, the victim, Tanisha Simmons, was standing on the driveway, beside the porch, when the shots rang out. Ready did not see who fired the shots; however, they came from the direction of Haverhill Street. Ready looked in the direction from which the shots came and saw a man dressed all in black. Ready did not see anything in the man's hands. Ready did not know if he recognized the man; however, he told the police that he thought the man looked like a man named Otis Parker. Ready testified that, after hearing the shots, he went into the house and called the police. He originally testified that he stayed in the house until the police arrived. And, at first, he denied that he picked up a gun and shot it into the air. However, Ready eventually admitted that he did pick up a .25-caliber gun and shoot about six shots into the air. He explained that he testified to the contrary earlier because he was scared. He was not sure who the gun belonged to. Ready explained that he shot into the air because he saw Simmons on the ground in a pool of blood and he was angry. Ready denied shooting at Bartley earlier in the day. However, Ready confirmed that there was an ongoing dispute between Bartley and him.

Ronald Hall was another one of the individuals on the porch at 9911 Somerset. He testified that he heard shots coming from the direction of Haverhill and Somerset. But he did not see the shooter. After hearing the shots fired, Hall looked in the direction from which they came and saw a man dressed all in black. Hall then took off running through some backyards. When he came back, he saw Simmons lying on the side of the porch in a puddle of blood. When asked if he recalled telling the police that the shooter "looked like Otis," Hall replied that he had been drinking that night.

Jacquelyn Williams, Otis Parker's mother, testified that Parker was living in her home on Nottingham in October 1999. On the evening of October 30, 1999, Jacquelyn Williams, Parker,

and Jacquelyn Williams's daughter, Toni Williams, were in the home. Jacquelyn Williams heard shots fired sometime around 6:30 p.m., coming from the direction of Somerset, the next block over. Parker was home with her at the time. After the first shots, Jacquelyn Williams saw Bartley running through her backyard and up her driveway. Bartley was dressed all in black and he was carrying a gun in his right hand. After seeing Bartley, Jacquelyn Williams heard another round of shots coming from the direction of Somerset.

Parker's sister, Toni Williams, confirmed that she was at her mother's house, with Parker on October 30, 1999. She heard a couple of shots coming from the direction of Somerset. She then saw Bartley running around the corner of Haverhill and Somerset. While she did not see a gun in Bartley's hand, she did notice that Bartley's right hand was tucked under his shirt. Further, Toni Williams testified that she saw Bartley earlier in the day and, at that time, he was wearing a burgundy shirt and black pants. Toni also gave a statement to police indicating that, earlier in the day, she saw "Duke" hand Bartley a gun. However, at trial, she conceded that she just saw Duke hand Bartley "something black," which she could not be sure was a gun.

Parker testified that around 6:00 or 6:30 p.m. on October 30, 1999, he was at home with his mother and sister. He heard two gunshots coming from the direction of Somerset, followed by a "whole bunch of shots." Earlier in the day, "probably" hours before the Somerset shooting, he saw Bartley and Stalling. Stalling was "hot" because Ready had shot at him when he came out of the L and T Party Store. Bartley said the same thing, and he wanted to "get at em." Parker admitted that he and Bartley had dispute with Ready and his "troop." On cross-examination, Parker agreed that his conversation with Bartley, while Bartley was still angry, occurred about 20 minutes before the Somerset shooting and that the alleged shooting at the party store was one or two hours before that.

Latrice Webster lived next door to Jacquelyn Williams's house on Nottingham. On October 30, 1999, sometime after 6:00 p.m., she heard gunshots coming from the direction of Somerset. As she was gathering her children into the house, she saw Bartley dressed in black running from the side of Jacquelyn Williams's house. She did not see anything in his hands, but his hands were tucked under his sweatshirt. In her police statement, Webster indicated that earlier in the day on October 30, 1999, she saw Bartley and Stalling telling Parker about being shot at by Ready. Bartley was "hyped," and Webster thought that he was dressed in burgundy. It was "not long after" overhearing this conversation that she heard the shots coming from the direction of Somerset.

After the shooting, Lieutenant Charles Flanaghan was dispatched to 9911 Somerset. Upon receiving certain information, Lieutenant Flanaghan arrested Bartley, who was extremely nervous and sweating. Police also arrested Parker. Parker was placed in a scout car during which time he blurted out that Bartley had done the shooting.

In his statements to police, Bartley admitted that he fired a 9 millimeter Glock at the people sitting on the porch at 9911 Somerset. Bartley claimed that these were the people that shot at him earlier in the day. Bartley explained that at 3:00 or 4:00 p.m. on October 30, 1999, Ready shot at him six or seven times while he was leaving a party store. Bartley then admitted that, at about 6:45 p.m., he walked down Somerset and saw Ready sitting on a porch. According to Bartley, Ready pulled out a gun. Bartley started to run and then he heard six or seven shots,

which compelled him to pull out his gun and fired one shot back without looking. He did this "just in case" Ready was chasing him. At first, Bartley told one officer that, as he ran from the scene, he threw the gun into a yard. However, in a subsequent interview, he stated that he returned home and gave the gun back to "Duke."

Police Officer Joseph Abdella testified that two 9-millimeter shell casings were recovered in the middle of Haverhill Street. Officer Abdella estimated the distance between the porch and the curb of Haverhill Street to be between 60 and 70 feet. Also, spent casings from a .25-caliber weapon were found on the front lawn near the porch at 9911 Somerset. On November 1, 1999, Officer Abdella confiscated a .25-caliber semi-automatic pistol from Bowie. In addition, on the basis of the information received that a shooting may have occurred at the L and T Party Store, Abdella canvassed the area around the store. Officer Abdella looked for witnesses as well as any physical evidence, but he was unable to locate any evidence that a shooting took place at this location. On cross-examination, Officer Abdella admitted that evidence could have been swept up between the day of the shooting and his investigation. Officer Abdella could not say that no shooting took place; however, he noted that, in addition to the lack of physical evidence, none of the store owners or neighbors recalled hearing shots on the day in question.

Detroit Police Officer John Morell testified that he retrieved a 9-millimeter semi-automatic hand gun from a dog pen in the yard of a home on Hillcrest. The retrieved gun might look similar to a Glock at first glance. Moreover, on cross-examination, Officer Morell testified that he took a statement from Tremell D. Carpenter, wherein Carpenter indicated that, at approximately 5:00 or 6:00 p.m., Ready came into the L and T Party Store admitting that he had just fired shots at Bartley.

Kim Allen testified that on October 30, 1999, she lived on Nottingham and knew Bartley. Allen saw Bartley with Stalling about 12:00 or 1:00 p.m. on October 30, 1999. They were on Somerset going to a store. Later, when the men were coming back from the store and, Allen overheard Bartley stating that Ready had just shot at them. Then Allen saw Bartley go to his home. When Allen saw Bartley two or three hours later, he had changed his clothing and was wearing all black. Bartley appeared to be carrying something under his jacket, which he told Allen was a hat, and he was walking toward Somerset. The next thing Allen heard was shooting coming from the next block. Allen then saw Bartley running back around the block as if he were being chased. On cross-examination, Allen admitted that, in her statement to the police, she indicated that she saw Bartley about 4:00 or 5:00 p.m., not 1:00 p.m. as she had testified on her direct examination. However, on redirect, she once again claimed that a couple of hours passed between the time she heard Bartley say that he had been shot at by Ready and when she saw Bartley again.

After the close of the prosecution's proofs, Bartley moved for a directed verdict, but the trial court denied the motion. Bartley then rested, and the trial court heard closing arguments. The prosecution argued that all the elements of the charge of first-degree murder had been established, while Bartley argued that the shooting was done in the heat of passion and, therefore, manslaughter was the appropriate charge. Indeed, Bartley requested that the trial court return a verdict of guilty of manslaughter. The trial court then convicted Bartley of first-degree premeditated murder and felony-firearm, and sentenced him as outlined above.

II. RIGHT TO CONFRONTATION

A. STANDARD OF REVIEW

Bartley claims that he was denied his Sixth Amendment right to confrontation when the reports of three witnesses were admitted into evidence. This Court reviews de novo the constitutional question whether a defendant was denied his Sixth Amendment right to confrontation.[3]

B. UNDERLYING FACTS

Several stipulations were entered into the record during trial. Bartley waived the testimony of evidence technician Officer Peter Gernand and stipulated that, if called, Officer Gernand would state that he processed the scene at 9911 Somerset and then generated a report. The parties stipulated to the admissibility of Gernand's report.

Bartley also waived the testimony of forensic chemist, Hayden Dannug. The parties stipulated that, if called, Dannug would testify that, after examining gunshot residue kits taken from Bartley, Parker, Ronald Hall, and Kevin Johnson, he found that "gunshot residue particles were detected on all the sampling stubs from" Bartley. Gunshot residue particles were detected on the hands of Kevin Johnson. With respect to Parker, "significant quantities of antimony, barium and lead were not detected on the sampling stubs" from this individual. Although gunshot residue was detected on the samples from Ronald Hall, the quantity of particles "was insufficient for confirmation." The parties stipulated to the admission of Dannug's report.

Finally, Bartley waived the presence of witness Susan Lavalley and the parties stipulated that, if called, Lavalley, a firearms examiner, would testify that she examined a 9-millimeter "high point model, blue steel semi-automatic" firearm and seven 9-millimeter Remington-Peters full metal jacketed cartridges. She also examined a .25-caliber automatic firearm and two spent cartridges. She concluded that the 9-millimeter cartridges were not compatible with the .25-caliber firearm. Further, the two spent cartridges did come from the .25-caliber firearm.

C. LEGAL STANDARDS

The Sixth Amendment of the United States Constitution is applied to the states through the Fourteenth Amendment, and it provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[4] However, the right of confrontation can be waived.[5] "'[W]aiver is the "intentional relinquishment or abandonment of a

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[3] *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

[4] US Const, Am VI; see *People v Buie*, 285 Mich App 401, 407-408; 775 NW2d 817 (2009).

[5] *Buie*, 285 Mich App at 418.

known right."'"[6] In general, a defendant must personally waive the right of confrontation.[7] However, this Court has stated that "[t]he right of confrontation is not of such moment that it requires waiver by the defendant personally when he is represented by counsel."[8]

D. APPLYING THE STANDARDS

Bartley's trial counsel stipulated to the admission of the reports generated by the witnesses. In addition, the parties stipulated to the nature of the witnesses' testimony if they had been called at the time of trial. After the scope of the stipulations were placed on the record, the trial court specifically clarified that Bartley was waiving his right to have the witnesses produced and their testimony given. By intentionally relinquishing a known right, Bartley waived a Confrontation Clause issue, and extinguished any error.

Bartley contends that the United States Supreme Court's opinions in *Melendez-Diaz v Massachusetts*,[9] and *Crawford v Washington*[10] compel a different result. In *People v Dendel* (*On Second Remand*),[11] this Court succinctly stated the Court's holding in *Melendez-Diaz*:

> After we issued our opinion in *Dendel II*, the United States Supreme Court issued its decision in *Melendez-Diaz*. The prosecution charged the defendant in *Melendez-Diaz* with narcotics trafficking offenses. In order to prove that the substance in question was cocaine of a certain quantity, the prosecution introduced into evidence sworn certificates of state laboratory analysts documenting the results of tests performed on the material seized by the police. Building on the principles established in *Crawford* and *Davis*, a majority of the Supreme Court determined that the certificates constituted testimonial statements because they were made under circumstances in which an expert witness would anticipate their future use at trial, and also because they served as the "'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance" under the Massachusetts statutes. The Court concluded, '[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with' the analysts at trial."

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[6] *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[7] *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983).

[8] *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976).

[9] *Melendez-Diaz v Massachusetts*, 557 US ____; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

[10] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[11] *People v Dendel* (*On Second Remand*), ___ Mich App ___; ___ NW2d ___ (2010) (internal citations omitted).

Despite Bartley's contentions to the contrary, it is clear to us that the holding in *Melendez-Diaz* is inapplicable to the facts in this case. Unlike the present case, *Melendez-Diaz* did not involve a defendant who stipulated to the admissibility of the reports and intentionally waived the presence of the witnesses at the trial. Indeed, the Supreme Court specifically recognized that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence[.]"[12]

Not only did Bartley in this case fail to object to the admissibility of the evidence, he stipulated to its admission, thus waiving his rights under the Confrontation Clause.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Bartley argues that the evidence presented at trial was insufficient to support his conviction. A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which we review de novo on appeal.[13] In determining whether sufficient evidence has been presented to sustain a conviction following a bench trial, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[14]

B. LEGAL STANDARDS

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation."[15] Premeditation and deliberation require sufficient time to allow the defendant to reconsider his actions.[16] Factors relevant to the establishment of premeditation and deliberation include: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide.[17] Circumstantial evidence and reasonable inferences from the evidence can be sufficient to prove the elements.[18] Further, under the doctrine of transferred intent, if evidence shows that a defendant intended to kill

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[12] *Melendez-Diaz*, 129 S Ct at 2534 n 3.

[13] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[14] *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009).

[15] *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

[16] *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

[17] *Id.*

[18] *Id.*

someone, yet accidentally killed someone else, the evidence is sufficient to establish the intent element of first-degree murder.[19]

C. APPLYING THE LEGAL STANDARDS

In this case, the evidence viewed in a light most favorable to the prosecution showed that Bartley, while intending to kill Ready, killed Simmons with premeditation and deliberation. Several witnesses testified that there was bad blood between Bartley and Ready. Earlier in the day, Ready fired a gun at Bartley while he was coming out of a party store. After this event, witnesses described Bartley as angry, and he was overheard threatening to "get at em." Bartley then made preparations for carrying out his retaliation. He changed from his burgundy shirt into dark blue or black clothing to better conceal his identity. He obtained a gun from "Duke" to perpetrate the crime. Several witnesses identified Bartley as the individual that fired shots in the direction of the people standing on the porch at 9911 Somerset. And, indeed, in his own statements, Bartley admitted shooting at the people on the porch.

Further, Bartley had time to contemplate, reflect, and reconsider his actions. Although the testimony was conflicting, several witnesses testified that at least one hour, if not three, transpired between Ready shooting at Bartley and Bartley shooting at the individuals on the porch.

Viewing all of the evidence in the light most favorable to the prosecution, there was sufficient evidence for the fact finder to have concluded that the prosecutor proved the elements of the crime beyond a reasonable doubt—that is, that Bartley shot and killed Simmons while intending to shoot Ready. Under the circumstances, Bartley has failed to establish that there was insufficient evidence to convict him on the charge of first-degree premeditated murder.

We note that, despite the overwhelming weight of the evidence, Bartley argues for the first time on appeal that because there were two people at the scene shooting guns that evening, there was no evidence that it was his bullet that actually caused Simmons's death. It is important to note that Bartley never once argued at trial that it was not his bullet that killed Simmons. In fact, Bartley appeared to concede this point, posited the defense that the shooting was done in the heat of the moment and, thereafter, requested that the trial court find him guilty of manslaughter. In any event, the overwhelming weight of the evidence established that the bullet came from Bartley's firearm.

It appears that the bullet that pierced Simmons's brain was not recovered at the scene. The autopsy established that she died from a through-and-through gunshot wound to the head. No bullet was found in the wound track. While the evidence established that Bartley and Ready fired shots that evening, Bartley was the only individual seen shooting in the direction of the porch where Ready and the victim were standing. The witnesses testified that the other shooter, Ready, fired his shots up into the air. More importantly, the witnesses all testified that Ready did

[19] *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988).

not shoot into the air until after Simmons was seen lying on the ground with a pool of blood around her head. Additionally, when Ready shot into the air, he was in the immediate vicinity of the victim, while Bartley was placed 60 to 70 feet away. The medical examiner concluded that there was no evidence of close range firing. Thus, the trier of fact could find that the evidence established, beyond a reasonable doubt, that the fatal bullet came from Bartley's gun.

IV. DUE PROCESS

Bartley argues that his conviction should be reversed because he was denied due process. However, Bartley has abandoned any claim of error in this respect by failing to explain his claim adequately.[20]

Regardless, Bartley simply mentions again the issues related to the admissibility of the reports generated by Hayden Dannug, Peter Gernand, and Susan Lavalley. And as we concluded above, there was no error regarding admission of these reports. He also again implies that there was no evidence that it was his bullet that caused Simmons's death. But, again, we have already concluded that there was no error requiring reversal. Further, Bartley points to irregularities in the management of the forensic evidence at the Detroit Police Crime Lab. However, Bartley has not provided any support that the forensic evidence in this case was not properly processed. Further, Bartley has not indicated how the outcome would have been any different had the investigation of his case been conducted differently.

We affirm.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

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[20] *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").