# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANDRE LAMAR WEBSTER,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 182183
LC No. 93-013875

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of first-degree murder, MCL 750.316; MSA 28.545, and one count of possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). He was sentenced to two years for the felony-firearm conviction to be followed by two concurrent life terms for the first-degree murder convictions. We affirm.

Defendant's first argues that the trial court erred in admitting evidence of an earlier confrontation between defendant and one of the victims. We disagree. In the prior incident, defendant threatened one of the victims with a gun of the same caliber used in the murder. This evidence was admissible because it was relevant to material issues, including identity, opportunity, absence of mistake or accident, and premeditation. *People v Vandervliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993), modified 445 Mich 1205; (1994); MRE 404(b). The evidence showed that defendant had access to a weapon of the same type as the murder weapon and makes more probable that defendant deliberated about the murder and intentionally killed one of the victims because of a prior altercation or disagreement. Defendant's failure to directly contest these issues as part of his defense does not, as he argues, make the evidence irrelevant. See *Vandervliet*, *supra* at 77-78. Further, we believe that the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice. *Id*. The substance of the evidence, which is

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

relevant for the purposes stated could not be introduced in any alternative fashion which would lessen the "prejudice" to defendant. Thus, the trial court did not abuse its discretion in admitting this evidence. *People v Cantanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Defendant also argues that his confession to police, made while in custody after his arrest, should have been suppressed because the underlying arrest was illegal and because the statement was coerced. Again, we find no error. Even accepting the argument that the arrest itself was illegal because the police entered defendant's home without consent or a warrant, the statement need not be suppressed. *New York v Harris*, 495 US 14, 16; 110 S CT 1640; 109 L Ed 2d 13, 19 (1990); *People v Dowdy*, 211 Mich App 562, 568-69; 536 NW2d 794 (1995). Here, the trial court found that there was probable cause to arrest defendant based upon testimony that defendant was one of the last two people to be seen with the victim before he was killed, that defendant had been looking for the victim the evening that he was killed and that defendant had previously had a conflict or altercation with the victim during which he threatened the victim with a .25 caliber weapon. The police found shell casings from a .25 caliber automatic weapon at the murder scene. In our judgment, the evidence pointing to defendant was sufficient to cause a fair-minded person of average intelligence to believe that defendant had committed a felony. *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994). Police officers, therefore, had probable cause to arrest defendant, *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983), and defendant was lawfully within their custody at the time of his confession even if the means for effecting his custody were not the proper ones. *Harris*, *supra* at 19-20. Therefore, the confession was the product of legal custody of defendant, not the illegal arrest, and need not be suppressed. *Id*.; *Dowdy*, *supra*.

As for defendant's claim that his confession was involuntary, we find that, given the length of the questioning, defendant's age and experience, and the credibility of the witnesses, the statement was voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). The trial court did not commit clear error in finding that defendant did not expressly request an attorney and, therefore, we accept that finding. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995). Defendant's final claim, that the statement was involuntary due to the psychological compulsion of having "let the cat out of the bag" in earlier statements to the police, is wholly irrelevant, given that defendant's earlier statements were general denials of any involvement in the shooting.

We also disagree with defendant's claim that the trial court erred in denying defendant's motion to quash the first-degree murder indictments. At the preliminary examination, the prosecution presented evidence from which the elements of first-degree murder, including premeditation, could reasonably be inferred. *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991). Under either of the alternative versions of what occurred, there is evidence to suggest that defendant did not kill his victims in the heat of argument but was able to pause between the precipitating event (either the argument and the threat to shoot the victim or the accidental discharge of the weapon) and the firing of the fatal shots. Evidence which merely raises reasonable doubts as to defendant's guilt is not sufficient

to quash an indictment; in such cases, the determination of guilt must be left to the jury. *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).

Defendant also alleges several instances of prosecutorial misconduct. Because defendant did not object to these remarks at trial, review is barred absent manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Since a proper cautionary instruction could have cured any prejudice, we find no manifest injustice in denying review. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Nevertheless, we note that none of the challenged remarks, individually or collectively, were sufficiently prejudicial as to deny defendant a fair trial, even if we assumed that they constituted error on the part of the prosecutor. *People v Kulick*, 209 Mich App 258, 259-260; 530 NW2d 163 (1995), remanded 449 Mich 851 (1995).

Defendant's last claim on appeal is that the trial court erred in refusing to give a requested jury instruction defining gross negligence when it had instructed the jury on the cognate lesser included offense of involuntary manslaughter. Because gross negligence is an essential element of involuntary manslaughter, *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993), the trial court should have defined the term in its jury instructions. CJI2d 16.10; *People v Vaughn*, 447 Mich 217, 226; 524 NW2d 217 (1994). However, any error in failing to include this instruction was harmless. The failure to instruct on a necessarily included offense is considered harmless if the jury could have convicted defendant on an intermediate charge, but was convicted on the greater offense, because the conviction indicates that the jury would not likely have convicted on the lesser offense even with proper instruction. *People v Mosko*, 441 Mich 496, 502-505; 495 NW2d 534 (1992). Even if the jury had been properly instructed on the elements of involuntary manslaughter, it would have been unlikely to have convicted on that charge given that the jury rejected the opportunity to convict defendant of the intermediate charges of second-degree murder and voluntary manslaughter.

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew