

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ROBERT WOODHEAD,

Defendant-Appellant.

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UNPUBLISHED

December 13, 1996

No. 182596

LC No. 94-003105

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burrell,\* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and nine to twenty years' imprisonment for the second-degree murder conviction. We affirm.

Defendant argues that the trial court abused its discretion in denying his motion for a new trial on the basis that the jury's verdict was against the great weight of the evidence. First, defendant argues that, because the trial court stated that it would have been obligated as a matter of law to find defendant not guilty pursuant to the fleeing felon defense, and because the trial court erroneously applied the theory of jury nullification, the court should have granted defendant's motion. Second, defendant argues that, because overwhelming evidence was presented to support defendant's need to use deadly force to apprehend the fleeing felon, the trial court abused its discretion in denying defendant's motion. We disagree with both of defendant's arguments.

In *People v Hampton*, 194 Mich App 593, 596; 487 NW2d 843 (1992), this Court noted that the citizen's arrest statute, MCL 764.16; MSA 28.875, failed to address the issue of whether private persons may use deadly force in making an arrest for felonies committed in their presence. Therefore, the Court turned to the common law and concluded that there were two situations where the use of deadly force by a private person was justified: (1) where the person making the arrest is met

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

with force from the person being arrested, and (2) where force is necessary to prevent the flight of a suspected felon. *Id.* Further, this Court found that, regarding the latter situation, three circumstances had to be present: (1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been “necessary” to ensure the apprehension of the felon. *Id.*

In the present case, defendant claims that deadly force was needed to prevent the suspect’s flight. Therefore, resolution of this issue hinges upon whether the deadly force used was “necessary.” *Hampton, supra* at 596. Because the evidence indicated that defendant pursued the suspect, who had just stolen the car belonging to a friend of defendant, with a powerful semiautomatic weapon with the intention of getting into a fight; that defendant delivered approximately fifteen to seventeen shots at rapid succession into the vehicle that the suspect was sitting in; and that defendant fled the scene, dismantled the weapon, and hid the parts throughout his home, we conclude that the amount of force used was unnecessary. Therefore, the trial court did not abuse its discretion in denying defendant’s motion for a new trial. *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1991).

However, we add that the trial court erroneously based its decision for doing so on the premise of jury nullification. Jury nullification is “the power [of the jury] to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.” *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). Here, however, the jury neither nullified the law, nor returned a verdict less than required by the evidence. Rather, the jury properly considered the question of whether defendant’s use of deadly force was necessary to apprehend the suspect and, and as stated *supra*, returned a verdict consistent with the evidence.

Further we conclude that the trial court erroneously stated that, had this case been tried as a bench trial, it would have been bound as a matter of law to find defendant not guilty. The issue of necessity in such a case is a question of fact for the jury. *Hampton, supra* at 597. Therefore, had the court been sitting as the trier of fact, it would not have been bound as a matter of law to find defendant not guilty; but rather, would have been able to weigh the evidence before it. *Id.*

Defendant next claims two allegations of instructional error. First, defendant argues that the trial court erroneously shifted the burden of proof to defendant when it instructed the jury that it had to find the suspect committed the felony (unlawfully driving away an automobile) before it could consider defendant’s fleeing felon defense. Second, defendant argues that the court erroneously refused to instruct the jury on the suspect’s potential of being considered a felon for the crime of malicious destruction of property. We disagree with defendant’s arguments.

Because defendant not only failed to object to the UDAA instruction, but also expressed his satisfaction with the instructions as read, we conclude that manifest injustice will not result from our failure to review defendant’s first allegation of error. *People v Pollick*, 448 Mich 376, 387-388; 531 NW2d 159 (1995); *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). Further, because the evidence presented at trial did not support defendant’s contention that the suspect could be considered a felon by virtue of his act of malicious destruction of property, we find that the trial court

did not err in refusing to give this instruction. *People v Davis*, 216 Mich App 47, 54; \_\_\_ NW2d \_\_\_ (1996).

Finally, defendant argues that the trial court abused its discretion in refusing to admit testimony regarding FBI statistics, which allegedly showed the incidence of arrests made for stolen vehicles, on the basis the evidence was irrelevant. Defendant claims that the testimony was relevant to show that it was necessary that he pursue the suspect and arrest him. We disagree.

Because the question of whether defendant felt it was necessary to make the arrest was not at issue here, we conclude that the trial court did not abuse its discretion in excluding this testimony on relevancy grounds. MRE 401; *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993); *Hampton, supra* at 596.

Affirmed.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burress