STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENDON LEON MICHAUX,

Defendant-Appellant.

UNPUBLISHED
September 12, 1997

No. 183149
Macomb Circuit Court
LC No. 94-000102-FC

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549,[1] and possession of a firearm at the time of the commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to 25 to 50 years' imprisonment for the second-degree murder conviction and 2 years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that he was denied the right to a fair trial when the prosecutor and the trial court suggested to the jury that defendant's statement to the police had already been reviewed by the court and had been held admissible. Because defendant did not object to these remarks, we will only review them to the extent necessary to insure that no manifest injustice will result. *People v Kincaid*, 136 Mich App 209, 216; 356 NW2d 4 (1984).

A trial court should not inform a jury regarding the existence, nature and results of a *Walker*[2] hearing. *Kincaid, supra* at 215; *People v Gilbert*, 55 Mich App 168, 173; 222 NW2d 305 (1974). Specifically, the trial court and the prosecution should not inform the jury that the defendant's statement was made voluntarily. See *People v Corbett*, 97 Mich App 438, 442-443; 296 NW2d 64 (1980), and cases cited therein. Thus, the prosecutor and the trial court should not have commented on the fact that defendant's statement had already been held admissible. Such comments do not always constitute reversible error, however. *Kincaid, supra* at 215-216; *Corbett, supra* at 443.

We conclude that the error in this case does not warrant reversal. Defendant did not deny that he made the statement introduced against him at trial. Under these circumstances, the rationale for

reversal "largely disappears." *Corbett, supra* at 443. Moreover, it was defendant's allegations of police misconduct that prompted the references to the *Walker* hearing. Also, the trial court properly instructed the jury regarding defendant's statement at the close of trial. Finally, there was substantial evidence of defendant's guilt independent of his statement. Under these circumstances, we find no manifest injustice, and reversal is not required. See *Kincaid, supra* at 216.

Defendant next argues that he was denied his rights of confrontation and due process when the prosecutor introduced evidence of a codefendant's statement implicating him. The reference to a codefendant's statement in this case was improper. *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968); see also *People v Banks*, 438 Mich 408, 415-416, 423, 429; 475 NW2d 769 (1991). The Michigan Supreme Court has addressed the application of the harmless error test under these circumstances, however: "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Id.* at 427 (quoting *Schneble v Florida*, 405 US 427, 430; 92 S Ct 1056, 1059; 31 L Ed 2d 340 (1972)). Here, eyewitness testimony and defendant's own statement provided overwhelming evidence of his guilt. The fleeting reference to a codefendant's statement was insignificant by comparison. Thus, we conclude that the error was harmless and reversal is not required.

Defendant next argues that the prosecutor improperly introduced evidence of his postarrest, post-*Miranda*[3] silence against him. A defendant's postarrest, post-*Miranda* silence may not be used against him except for certain limited impeachment purposes. *People v Sutton (After Remand)*, 436 Mich 575, 592-593; 464 NW2d 276 (1990). This result stems from the courts' recognition that it would be unfair to advise a defendant that he has a right to remain silent and then penalize him for exercising that right. *Id.*

Here, although the prosecutor did elicit some testimony regarding defendant's temporary silence when he was first arrested, the prosecutor did not attempt to use defendant's silence as evidence of guilt. Under these circumstances, defendant's constitutional rights were not violated. Even were we to find error, we would conclude that it was harmless beyond a reasonable doubt in light of defendant's subsequent statements to the police that were properly admitted at trial. Under these circumstances, defendant's temporary silence added nothing to the prosecution's case.

Next, defendant argues that the trial court erred by denying his motion for a directed verdict on the first-degree murder charge. We review the denial of a motion for a directed verdict by viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the charged offenses proven beyond a reasonable doubt. *People v Harris*, 190 Mich App 652, 658; 476 NW2d 767 (1991). Defendant claims that the prosecution did not present sufficient evidence to allow the jury to find the elements of premeditation and deliberation established beyond a reasonable doubt. We disagree.

This Court has described the premeditation and deliberation requirements of first-degree murder:

> In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (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. [*People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995) (citations omitted).]

The use of a lethal weapon, alone, is not sufficient evidence to support a conviction of first-degree murder. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975). The use of a lethal weapon, coupled with evidence regarding the manner in which it was used, however, may be sufficient to establish a premeditated intention to kill. *Id.*; *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982), aff'd 419 Mich 577; 358 NW2d 837 (1984).

Here, the evidence presented at trial, viewed in a light most favorable to the prosecution, showed that defendant got out of a car and approached the victim who was walking away from another fight. Defendant engaged the victim in a brief scuffle, wherein the victim wound up on his knees, with defendant standing over him. Defendant then pulled a gun and shot the victim in the head at very close range. There was some evidence that defendant pulled the gun and shot the victim in response to a codefendant's exhortation to "cap him" or "bust 'em."

We conclude that this evidence was sufficient to allow a rational trier of fact to find the elements of premeditation and deliberation proven beyond a reasonable doubt. While the jury could have concluded that defendant did not form the intent to kill until a codefendant told him to "cap him" or "bust 'em," the jury also could have concluded that defendant formed that intent when he began walking toward the victim. Defendant's subsequent actions would allow a jury to infer premeditation and deliberation. See *People v Morris*, 445 Mich 860; 514 NW2d 167 (1994), vacating *People v Morris*, 202 Mich App 620; 509 NW2d 865 (1993). Thus, we conclude that the trial court properly denied defendant's motion for a directed verdict.

Defendant next argues that the trial court gave an erroneous instruction regarding the elements of felony-firearm. Defendant failed to object to this instruction, and our review is limited to the issue whether relief is necessary to avoid manifest injustice to the defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Here, we find no manifest injustice. The error in the instruction actually overstated the prosecution's burden and increased defendant's chances of acquittal on the felony-firearm charge. Thus, reversal is not required.

Defendant further alleges that several remarks in the prosecutor's opening statement and closing argument constituted misconduct. Defendant did not object to any of these remarks, even though some of them were entirely unnecessary and gratuitous. Upon reviewing the comments in context, we conclude that any error could have been cured by appropriate instructions, and our failure to review this

issue will not result in manifest injustice. See *People v Hall*, 396 Mich 650, 655-657; 242 NW2d 377 (1976).

We believe that the cumulative effect of the harmless errors noted in this case were not so prejudicial as to deny defendant a fair trial; thus, defendant is not entitled to a new trial on this basis. Cf. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989).

Finally, defendant argues that his sentence is disproportionate. We disagree. Defendant's sentence falls within the guidelines' range as scored. Thus, defendant's sentence is presumed to be proportionate. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). A sentence within the guideline range may be disproportionate under unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). We conclude, however, that defendant has failed to present unusual circumstances sufficient to make this sentence disproportionate. Defendant suggests that he was a good student, that he was employed, and that he participated in some positive activities in his local parish. While these factors would clearly weigh in defendant's favor, they are not sufficiently "unusual" to overcome the presumption of proportionality. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); *Sharp, supra* at 505.

Affirmed.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman

[1] Defendant's second-degree murder conviction stemmed from a charge of open murder, MCL 767.71; MSA 28.1011. Defendant was also charged with assault with intent to murder, MCL 750.83; MSA 28.278, and an additional felony-firearm count. However, these charges were dismissed before trial.

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).