

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDMUND DEMETRIUS BELL,

Defendant-Appellant.

UNPUBLISHED

July 19, 2012

No. 304893

Macomb Circuit Court

LC No. 2010-005332-FH

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals his felony-firearm conviction by right. We affirm.

I. BASIC FACTS

This case arises from a confrontation between the occupants of two vehicles that occurred on November 19, 2010. Defendant and his cousin, Mario Ogletree, were riding in a black Lincoln. Defendant was driving. Timothy John Ingleby and Danielle Albert, Ingleby's then-girlfriend, were driving a Chrysler 300. Ingleby and Albert testified that Albert was driving the 300. Defendant and Ogletree testified that Ingleby was driving the 300. The parties agree that a verbal exchange occurred while the vehicles were stopped at a red light, although they disagree about the content of that exchange. Ingleby claimed that during the confrontation, defendant pointed a gun at him. Defendant and Ogletree assert that defendant took his gun out of its holster at his waist and laid it on his lap, but never pointed it at Ingleby or Albert. Defendant was legally carrying the handgun. The jury found defendant not guilty of felonious assault, MCL 750.82, but guilty of felony-firearm.

II. PROSECUTORIAL MISCONDUCT AND INCONSISTENT VERDICTS

On appeal, defendant argues that prosecutorial misconduct and improper jury instructions resulted in an inconsistent jury verdict because he was convicted of felony-firearm but acquitted of the underlying felony, felonious assault. Defendant argues that these errors entitle him to a new trial. Although we agree that the prosecutor improperly mischaracterized the law and facts in her opening and closing statements, we disagree that the prosecutor's actions deprived defendant of a fair trial, because the jury instructions were proper and cured whatever prejudice

may have occurred. Moreover, the record indicates that whatever initial confusion the jury may have had during deliberations was ultimately resolved by the time it reached its verdicts. Accordingly, defendant is not entitled to a new trial.

“[A] claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but a trial court’s factual findings are reviewed for clear error.”¹ We also review de novo claims of instructional error,² and in reviewing such a claim of error, the instructions are read “as a whole, rather than piecemeal.”³

Defendant contends that the prosecutor’s misconduct violated his general due process rights. He does not claim that prosecutorial misconduct violated a specific constitutional right, such as his right against self-incrimination or right to counsel. “Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law.”⁴ “Issues of prosecutorial misconduct are reviewed on a case-by-case basis by examining the record and evaluating the remarks in context.”⁵ Prosecutors are generally “accorded great latitude regarding their arguments and conduct.”⁶ It is improper for a prosecutor to misstate the law or facts; however, proper jury instructions cure most errors because jurors are presumed to follow the trial judge’s instructions.⁷

A defendant is “entitled to have all the elements of the crime submitted to the jury in a charge which is neither erroneous nor misleading.”⁸ A jury instruction that misinforms the jury of an offense’s elements does not automatically render a trial unfair or unreliable.⁹ A conviction will not be set aside if the jury instructions “fairly presented the issues to be tried and adequately protected the defendant’s rights.”¹⁰ To sustain a conviction for felony-firearm, the prosecution must prove beyond a reasonable doubt that, “defendant possessed a firearm during the commission of, or the attempt to commit, a felony.”¹¹ To sustain a conviction for felonious

¹ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

² *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011).

³ *Id.*

⁴ *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008).

⁵ *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010) (citations and quotations omitted).

⁶ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

⁷ *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

⁸ *Kowalski*, 489 Mich at 501 (citations and quotations omitted).

⁹ *Id.*

¹⁰ *Id.* at 501-502.

¹¹ *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) (citations and quotations omitted).

assault, the prosecution must prove there was: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.”¹²

During her opening statement, the prosecutor outlined for the jury the elements of felonious assault and felony-firearm. After explaining the elements of felonious assault, the prosecutor made the following statement:

And again, as to the count two, the felony firearm, which is the second offense, to prove this the prosecutor must prove each of these two elements beyond a reasonable doubt. One, that defendant committed the crime of assault with a dangerous weapon which has previously been defined for you, and it’s not necessary that the defendant be convicted of the assault with a dangerous weapon. *If for some reason you feel at the close of the proofs the People haven’t met their burden, you can still convict on this particular offense.*

Second, that at the time the defendant committed this crime, he knowingly possessed a weapon. *It doesn’t necessarily mean he has to point it.* These are the two elements for this particular charge.¹³

Although a felony-firearm conviction does not require *conviction* of the underlying felony, it does require proof beyond a reasonable doubt that defendant (1) *committed* or attempted to commit a felony and (2) had a firearm in his possession at the time.¹⁴ During her opening statement, the prosecutor essentially instructed the jurors that they could convict defendant of felony-firearm even if they did not find beyond a reasonable doubt that he committed or attempted to commit felonious assault. Therefore, the prosecutor’s opening statement was not an accurate explanation of the law.

In her closing argument, the prosecutor discussed the government’s burden with respect to the felony-firearm charge:

The defendant either committed the crime of assault with a dangerous weapon, which is defined for you, but it [is] not necessary that you convict the defendant of that charge. *If you feel for some reason I failed in my burden as to the first count, you can convict him of this count or charge.* It’s not necessary that he be convicted of that have crime [sic]. This is what the judge will instruct you as to the law. Again, what he instructs you is the law, but I’m certain this will be verbatim as to what he’ll tell you.

¹² *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (citations and quotations omitted). See also MCL 750.82.

¹³ Emphasis added.

¹⁴ See MCL 750.227b.

* * *

The evidence supports, even with the defendant's testimony, that this crime right here is not in dispute. He indicated he had a weapon. The defendant testified he pulled that out. These elements are met. He used a weapon in that particular incident.

* * *

Taking his [defendant's] testimony alone is enough for conviction of this charge here of felony firearm.¹⁵

The prosecutor's closing statement was improper in two ways. First, as in her opening statement, the prosecutor inaccurately described the law when she stated that the jury could convict defendant of felony-firearm even if the government did not meet its burden regarding felonious assault. Second, defendant had testified that he had not pointed his weapon at anyone, but rather, had merely placed it in his lap. This testimony would not, by itself, support a conviction of felonious assault (the only felony other than felony-firearm with which defendant was charged). Accordingly, the prosecutor's statement that the jury could convict defendant of felony-firearm solely on the basis of defendant's testimony was inaccurate.

However, despite the prosecutor's misstatements during her opening and closing remarks, her actions do not entitle defendant to relief, because the trial court properly instructed the jury on the law of felony-firearm. The trial court instructed the jury as follows:

First, that the defendant committed the crime of assault with a dangerous weapon, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime. Second, that at the time the defendant committed that crime he knowingly carried or possessed a firearm.

* * *

You may find the defendant of guilty [sic] of all or anyone [sic] of these crimes or not guilty.

These instructions reflect the statutory language, which refers to an individual carrying or possessing a firearm "when he or she *commits* or attempts to commit a felony . . ."¹⁶ The statute applies when someone carries a firearm during the *commission* of a felony; it does not say that the individual must be *convicted* of the underlying felony.¹⁷ Accordingly, viewing the jury

¹⁵ Emphasis added.

¹⁶ MCL 750.227b (emphasis added). See also *People v Lewis*, 415 Mich 443, 450-451; 330 NW2d 16 (1982).

¹⁷ See MCL 750.227b; see also *Lewis*, 415 Mich at 453-454.

instructions “as a whole, rather than piecemeal,”¹⁸ we find that the jury was properly instructed regarding felony-firearm. It is presumed that jurors follow the trial court’s instructions, so proper instructions generally cure misstatements of the law by the attorneys.¹⁹ Accordingly, even though the prosecutor made misstatements of law in her opening and closing statements, defendant has failed to meet his burden to show that those misstatements “so infected the trial with unfairness as to make the resulting conviction a denial of due process of law.”²⁰

That the jury returned inconsistent verdicts does not, without more, entitle defendant to a new trial. Jury verdicts that appear inconsistent are permissible because juries “are not held to any rules of logic and they have the power to acquit as a matter of leniency.”²¹ “[A]lthough the jury has the power to disregard the trial court’s instructions, it does not have the right to do so.”²² Accordingly, although a jury can choose to be lenient and render inconsistent verdicts, it is inappropriate to instruct the jury that it can do so.²³

If the jury was lenient, the defendant was not prejudiced by the inconsistency in the verdicts and has no cause for complaint. In that hypothesis, although 12 jurors agreed that the defendant was guilty beyond a reasonable doubt of the underlying felony, they nonetheless extended mercy, convicting him only of what they may have thought was a lesser offense [felony-firearm] instead of both.²⁴

However, if the jury rendered inconsistent verdicts because it was “confused, did not understand the instructions, or did not know what it was doing,” then the confusion taints both the guilty and not guilty verdicts.²⁵ The remedy in such a situation is a new trial on both charges.²⁶ A new trial is also the proper remedy if inconsistent verdicts are the result of compromise.

[If the inconsistent verdicts are the result of compromise,] there is the risk that some of the jurors who agreed to the compromise did not believe beyond a reasonable doubt that the defendant committed a felony, but nonetheless agreed to convict the defendant of felony-firearm (although commission of a felony is an element) in exchange for the agreement of other jurors to acquit the defendant of

¹⁸ *Kowalski*, 489 Mich at 501.

¹⁹ See *Mesik*, 285 Mich App at 542.

²⁰ *Blackmon*, 280 Mich App at 262.

²¹ *Lewis*, 415 Mich at 449 (citations and quotations omitted).

²² *People v St. Cyr*, 129 Mich App 471, 474; 341 NW2d 533 (1983).

²³ *Id.*

²⁴ *Lewis*, 415 Mich at 451.

²⁵ *Id.* at 450 n 9.

²⁶ *Id.*

the underlying felony. If that is what occurred, then the jury was unable to reach a unanimous verdict on both charges. The remedy, where a jury is unable to agree on a unanimous verdict, is not dismissal of the charges, but the declaration of a mistrial, and the defendant can be required to stand trial again on the charges in respect to which the jurors are unable to agree.²⁷

There is some indication that the jury's verdicts were the result of confusion and not leniency. The jury deliberated for approximately one and a half days. During this time, the jury sent several notes to the judge asking for clarification and additional information. For example, the jury requested a copy of the CCW law, the definition of brandish, the definition of both charges, and a map of Stevens Avenue, where the incident took place. The court instructed the jury that the CCW law was irrelevant and it only needed to know that defendant lawfully had a concealed weapon. The court also read the jury the definition of "brandish" from Webster's New Collegiate Dictionary and reread the jury instructions for both charges. Approximately three hours later, the jury requested that the court read the instructions for both charges again, which the court did.

The next day of deliberations, the jury asked for the "law's definition of intent," the "law's definition of a reasonable person," and "do we have to make a verdict on reasonable person as Timothy [Ingleby] acted?" The court decided to reread the jury the instructions for felonious assault. About an hour later, the jury reached its verdict. In all, the court instructed the jury four times on the elements of felonious assault and three times on the elements of felony-firearm.

However, there are also indications that the jury's confusion was resolved. The jury eventually reached verdicts. In addition, the jurors were polled individually and all voiced their agreement with the verdicts. The polling of the jurors is also evidence that the inconsistent verdicts were not the result of compromise; each juror individually agreed to the verdicts when the jury was polled. The jurors were not compelled to reach a verdict; they could have informed the court that they still did not understand the law or were unable to reach a unanimous decision. Because verdicts were reached and the jurors were individually polled, we conclude that the inconsistent verdicts should stand.

II. CROSS-EXAMINATION

Next, defendant argues that the trial court violated his confrontation right by precluding him from cross-examining Ingleby about his suspended driver license. We disagree.

If a court errs by limiting cross examination in violation of a defendant's right to confrontation, that error is a nonstructural constitutional error²⁸ which we review de novo.²⁹

²⁷ *Id.* at 451-452.

²⁸ See *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000), citing *Neder v United States*, 527 US 1; 8, 119 S Ct 1827; 144 L Ed 2d 35 (1999) (describing and giving examples of

Preserved, nonstructural constitutional errors are not grounds for reversal where they are harmless.³⁰ An error is harmless if “it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”³¹

Under the Confrontation Clause, a defendant has the right “to be confronted with the witnesses against him.”³² The primary purpose of this right is to cross-examine to attempt to show that “a witness is biased, or that the testimony is exaggerated or unbelievable.”³³ The right of confrontation is generally satisfied if “defense counsel receives wide latitude at trial to question witnesses.”³⁴ However, “[n]either the Sixth Amendment’s Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject.”³⁵ “[T]he trial judge has a discretionary power to control the extent of examination,” and the judge’s “exercise of discretion will be overturned only for abuse resulting in substantial harm to the complaining party.”³⁶

Following defense counsel’s request to introduce evidence that Ingleby’s driver license was suspended, made outside the presence of the jury, the court stated:

The record will reflect that he [Ingleby] clearly explained how he characterized what was taking place using the pronoun I as opposed to we in his description of events [during his call to 911]. He further testified he was not driving. The driver of the vehicle was present under oath and indicated that she was driving, and the Court denied your motion.

Defense counsel responded that two of his witnesses were going to testify that Ingleby was driving and the evidence of Ingleby’s suspended license was relevant on the issue of Ingleby’s motive to lie. The court again denied defense counsel’s request.

To the extent Ingleby’s driver license status was relevant at all, it was relevant on the issue of his character for truthfulness. Although defendant argues that Ingleby’s driver license status was relevant to Ingleby’s “interest” or “motive to lie,” Ingleby’s licensure status does not, the “very limited class of cases” in which constitutional errors are structural and subject to automatic reversal).

²⁹ *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002) (constitutional questions are reviewed de novo).

³⁰ *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

³¹ *People v Hyde*, 285 Mich App 428 447; 775 NW2d 833 (2009).

³² US Const, Am VI; see also Const 1963, art 1, § 20.

³³ *Pennsylvania v Ritchie*, 480 US 39, 51-52; 107 S Ct 989; 94 L Ed 2d 40 (1987).

³⁴ *Id.*, at 51.

³⁵ *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

³⁶ McCormick, Evidence (Practitioner Series) (6d ed), § 29, p 135.

in itself, tend to show that it is more or less probable that he had a motive to lie about what he saw during the incident. Moreover, even if Ingleby's driver license status was relevant to his motive to lie about who was driving the car, as explained below, defendant was still permitted to cast doubt on Ingleby's assertions that he was not driving by playing the 911 tape in which Ingleby referred to himself as the driver. Accordingly, it is unclear how Ingleby's driver license status was relevant to anything other than his character for truthfulness generally. "Cross-examination may be denied with respect to collateral matters bearing only on general credibility"³⁷ without offending the Sixth Amendment guarantee to confront one's accusers.³⁸ Moreover, even if defendant had been permitted to inquire into Ingleby's general character for truthfulness, he could not properly have done so by calling additional witnesses as he desired because "extrinsic evidence [such as the testimony of other witnesses] may not be used to impeach a witness on a collateral matter."³⁹ Accordingly, the trial court did not err by limiting cross-examination.

Moreover, even if the trial court had erred in limiting defendant's cross-examination of Ingleby, the error would have been harmless. Defendant had the opportunity to question Ingleby about who was driving the Chrysler 300. Defense counsel thoroughly cross-examined Ingleby about his use of "I" during the 911 call he made after his confrontation with defendant:

Q. The question is where on that tape do you say Danielle was driving?

A. I didn't say.

Q. You say you were driving?

A. At the point I didn't know –

Q. Sir, I didn't ask for an explanation. You said four times you were driving, correct?

A. Yes.

Defense counsel went on to play the tape recording of the 911 call, stopping the tape each time Ingleby used "I" ("I am still driving," "I tried to pull out of McDonald's," and "I'm going to follow him"), and questioning Ingleby about whether he used "I." The 911 call recording and defense counsel's cross-examination of Ingleby bolstered the testimony of defendant and Ogletree with respect to who was driving. In spite of the evidence that Ingleby may have been driving, and therefore may have been lying during his trial testimony, the jury still convicted

³⁷ *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

³⁸ *Id.* ("In precluding defendant from inquiring into [a witness's general credibility], the trial court neither abused its discretion nor denied defendant his Sixth Amendment right of confrontation.").

³⁹ *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984).

defendant of felony-firearm. Consequently, it is clear that the jury still would have convicted defendant of felony-firearm, even if it had been error to restrict defendant's cross-examination of Ingleby about his suspended driver license.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective for failing to request jury instructions on self-defense. We disagree.

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law."⁴⁰ "The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo."⁴¹

"To prove a claim of ineffective assistance of counsel, a defendant must establish [first] that counsel's performance fell below objective standards of reasonableness and [second] that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different."⁴² "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy."⁴³ However, trial counsel is "responsible for preparing, investigating, and presenting all substantial defenses."⁴⁴ A substantial defense is "one that might have made a difference in the outcome of the trial."⁴⁵ A jury instruction on self-defense is proper if there is evidence from which a jury could conclude that self-defense applies.⁴⁶ An individual is justified in the use of deadly force if he "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself . . . or to another individual."⁴⁷ An individual may use force other than deadly force anywhere he has a legal right to be, with no duty to retreat, if he "honestly and reasonably believes that the use of that force is necessary to defend himself . . . from the imminent unlawful use of force by another individual."⁴⁸

⁴⁰ *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

⁴¹ *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

⁴² *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

⁴³ *Matuszak*, 263 Mich App at 58.

⁴⁴ *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

⁴⁵ *Id.* (citations and quotations omitted).

⁴⁶ *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010).

⁴⁷ See *People v Conyer*, 281 Mich App 526, 529-530; 762 NW2d 198 (2008). See also MCL 780.972(1).

⁴⁸ MCL 780.972(2).

There was evidence presented at trial that defendant used nondeadly force against Ingleby; Ingleby testified that defendant pointed a gun at him. This Court has held that “the use of a deadly weapon in carrying out an assault is not the equivalent of the utilization of deadly force.”⁴⁹ In *Pace*, this Court concluded that the trial court erred when it instructed the jury on the use of deadly force for self-defense where the evidence showed that the defendant, at most, drew a knife and held it at his side. Instead, an instruction on nondeadly self-defense was proper.⁵⁰ In addition, Black’s Law Dictionary defines nondeadly force as “1. Force that is neither intended nor likely to cause death or serious bodily harm; force intended to cause only minor bodily harm. 2. A threat of deadly force, such as displaying a knife.”⁵¹

Here, an instruction on self-defense would not have “made a difference in the outcome of the trial.”⁵² The altercation between defendant and Ingleby occurred while defendant was stopped at a red light. The car with Ingleby and Albert was blocked from turning left and merging into southbound traffic on Hoover because of defendant’s Lincoln. The cars were not speeding. If Ingleby had, in fact, hit defendant’s Lincoln, it is highly unlikely that defendant or Ogletree would have sustained injuries. If anything, defendant’s Lincoln would have incurred minor damage. According to defendant and Ogletree, Ingleby was driving, so he would not have been immediately next to defendant. According to their account, Albert would have been closest to defendant. There was no evidence that Albert added at all to the confrontation or made any threats of force.

In addition, Ingleby was in his car during the entire incident. There was no evidence presented at trial that he attempted to exit his car or verbally threatened to cause harm to defendant or Ogletree. Based on all of this evidence, it would not have been reasonable for defendant to believe that he needed to defend himself or Ogletree “from the imminent unlawful use of force” by Ingleby. See MCL 780.972(2). While Ingleby may have been angry and upset, there was no indication that he was going to use force against defendant or Ogletree.

In short, the evidence at trial did not support a jury finding of self-defense, and the failure of defendant’s trial counsel to request an instruction on self-defense was not outcome determinative because it did not deprive defendant of a substantial defense. Because the failure to request an instruction on self-defense did not deprive defendant of a substantial defense, defendant has failed to overcome the “strong presumption”⁵³ that his counsel’s decision to not request such an instruction was reasonable trial strategy in light of the facts presented at trial.

⁴⁹ *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980).

⁵⁰ 102 Mich App at 533-535.

⁵¹ Black’s Law Dictionary (9th ed) (force) (emphasis added).

⁵² *Chapo*, 283 Mich App at 371 (citations and quotations omitted).

⁵³ *Matuszak*, 263 Mich App at 58.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan