

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011

v

MAURICE DEANDRE GARNER,
Defendant-Appellant.

No. 299278
Wayne Circuit Court
LC No. 10-002629-FC

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial judge sentenced defendant to two years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his felony-firearm conviction. The jury found defendant not guilty of first-degree murder, the underlying felony, but found defendant guilty of felony-firearm. Defendant argues that the jury's verdict indicates that it believed defendant acted in lawful self-defense or defense of others and, thus, did not commit first-degree murder. Therefore, defendant argues, he could not properly be convicted of felony-firearm, which requires as an element of the offense, the commission or attempt to commit a felony.

We review de novo defendant's challenge to the sufficiency of the evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). We consider the evidence in the light most favorable to the prosecutor to determine whether the jurors could have found beyond a reasonable doubt that the prosecutor proved the elements of the felony-firearm charge. *Id.* "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. While the commission or attempt to commit a felony is an element of the offense of felony-firearm, conviction of the underlying felony is not an element of the offense. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982).

In *Lewis*, the Court held that "the asserted inconsistencies in verdicts do not invalidate the convictions of felony-firearm." *Lewis*, 415 Mich at 448. The Court found that "the defendants [were] not entitled to have their convictions of felony-firearm set aside on the premise that the

acquittals of the felony charges were findings that they did not commit the underlying felonies.” *Id.* at 452. According to the Court, the jury “either was lenient or compromised.” *Id.* at 453.

Therefore, although the jury found defendant not guilty of first-degree murder, defendant is not entitled to have his felony-firearm conviction set aside on the premise that this acquittal was a finding that he did not commit the underlying felony. There was sufficient evidence for the jurors to find beyond a reasonable doubt that defendant possessed a firearm during the commission of either first-degree or second-degree murder.

The elements of first-degree murder are “that the defendant intentionally killed the victim with premeditation and deliberation.” *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); MCL 750.316. “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of second-degree murder are: “(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.” *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007); MCL 750.317. Malice is “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

At least two witnesses testified that defendant fired a gun from his porch toward a group of people who were fighting in front of defendant’s house. One of the fighters was shot in the back and died. Police officers found spent casings on defendant’s porch, and an expert testified that casings he examined could be consistent with the type of gun allegedly fired by defendant.

The testimony at trial was thus sufficient for the jurors to find defendant possessed a firearm during the commission of either first-degree premeditated murder or second-degree murder. Specifically, the testimony is sufficient for the jurors to find defendant intentionally killed the victim after sufficient time had passed to allow defendant to take a second look. See *Taylor*, 275 Mich App at 179; *Anderson*, 209 Mich App at 537. Alternatively, the testimony is sufficient for the jurors to find that the victim’s death was caused by defendant’s act of shooting; that defendant either intended to kill the victim, intended to cause great bodily harm to the victim, or intended to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior would be to cause death or great bodily harm; and that defendant acted without lawful justification or excuse. See *Smith*, 478 Mich at 70; *Goecke*, 457 Mich at 464.

Although some of the trial testimony may have supported defendant’s contention that he acted lawfully in self-defense and defense of others, the jury did not necessarily acquit defendant of the murder charge on the basis of these defenses. The jury could have acquitted defendant as a matter of leniency or compromise. See *Lewis*, 415 Mich at 453. Because there was sufficient evidence for the jurors to find the elements of first-degree murder or second-degree murder were proved beyond a reasonable doubt, there was also sufficient evidence for the jurors to find the elements of felony-firearm were proven beyond a reasonable doubt.

Defendant also contends that the trial judge failed to instruct the jury that defendant could not be convicted of felony-firearm unless defendant committed or attempted to commit a felony, resulting in an inconsistent verdict. Defendant waived any objection as a result of the defense attorney's affirmative approval of the instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 69 (2009); see generally *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, appellate review of the instructions is precluded. *Chapo*, 283 Mich App at 372-372.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell