STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 217017 Wayne Circuit Court
DWIGHT A. BROWN, Defendant-Appellant.	Criminal Division LC No. 97-007670

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of 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). He was sentenced to twenty to forty years' imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals by delayed leave granted. We affirm.

Defendant contends that reversal is warranted because the trial court failed to instruct the jury on the lesser offense of voluntary manslaughter and the theory of self-defense. Because defendant did not request these instructions in the trial court, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights, i.e., a "clear or obvious" error affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Even if plain error is shown, reversal is not warranted unless the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

This Court reviews jury instructions in their entirety to determine whether error occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Generally, jury instructions must include all elements of the charged offense and should not exclude material issues, defenses, and theories if there is evidence to support them. *Id.* Even if the instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Defendant first contends that the trial court erred in failing to give an instruction on voluntary manslaughter. Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995).

It is a cognate lesser offense of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Instruction on a cognate lesser included offense is required if (1) the principal offense and the lesser offense are of the same class or category and (2) the evidence adduced at trial would support conviction of the lesser offense. *Id*.

Defense counsel argued to the jury that defendant did not fire a gun, but even if he did, the shooting was justified because Kenneth Jordan, the father of one of the men involved in the altercation, fired at him first. In support of this theory, a defense witness testified at trial that Jordan fired several shots with a rifle. Because no evidence was presented regarding the timing of defendant's shots in relation to those allegedly fired by Jordan, the jury might have been able to infer from the evidence that defendant fired his gun in response to being shot at first. Thus, since the jury could have conceivably found that defendant fired his gun under adequate provocation, a voluntary manslaughter instruction was appropriate.

Defendant also claims that the an instruction on self-defense was appropriate given the evidence. The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believed that his life was in imminent danger or that there is a threat of serious bodily harm. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Self-defense consists of the following elements: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). As noted above, one defense theory was that Jordan shot a rifle first and defendant returned fire on him.[1] In view of the trial testimony from a defense witness that both defendant and Jordan fired their guns, an instruction on self-defense was appropriate.

However, although we conclude that failure to instruct on voluntary manslaughter and self-defense amounted to plain error, we are not persuaded that defendant's substantial rights were affected by the error. While there was conflicting evidence whether defendant possessed a gun and whether Jordan fired a rifle at the scene, none of the witnesses testified that defendant fired a gun in response to being shot at first. In fact, the sole defense witness testified that he did not see defendant with a gun at all. On this record, we find that defendant has not satisfied his burden of establishing that the failure to instruct on self-defense and manslaughter affected the outcome of trial. In other words, considering all the evidence, we cannot conclude that the error resulted in the conviction of an actually innocent person or that the error seriously affected the fairness, integrity or public reputation of defendant's trial. *Carines, supra*. Accordingly, reversal is not warranted.

Defendant next argues that the prosecutor engaged in misconduct by failing to identify, locate and list all known res gestae witnesses contrary to the res gestae witness statute, and by

---

[1] Although defendant was not defending himself against the victim who was an innocent bystander to these events, our research has not revealed any case law precluding application of the self-defense doctrine to situations where a defendant was allegedly defending himself against someone other than the victim.

suggesting during closing arguments that there were no other witnesses to the charged offense. We disagree.

Alleged prosecutorial misconduct is reviewed on a case by case basis. This Court examines the pertinent portion of the record to determine whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Under the res gestae witness statute, MCL 767.40a; MSA 28.980(1), the prosecuting attorney is required to produce a list of all res gestae witnesses known to the prosecutor or law enforcement officers and is under a continuing duty to disclose the names of any res gestae witnesses as they become known. However, unlike the former res gestae witness statute, the current statute no longer imposes a duty on the prosecutor to locate and produce res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). While there may have been other people in the vicinity at the time of the offense, there is no indication in the record that the prosecutor was aware of their identities. Nor is there any indication that these other witness could have provided information helpful to defendant's case. Under these circumstances, we find no basis for concluding that the prosecutor violated the statute, or that defendant was prejudiced.

We likewise reject defendant's argument that the prosecutor's remarks during closing arguments were improper. Defendant challenges the following remarks made by the prosecutor: "[l]adies and gentlemen, we have the people that were actually there and saw it" and "[i]ncidentally, it's interesting that everybody heard two shots except Mr. Stitts [the defense witness] who heard five shots." We find nothing inappropriate about these remarks. To the contrary, the prosecutor was simply arguing the evidence presented at trial, which was entirely proper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Lastly, defendant argues that he was denied the effective assistance of trial counsel. Because defendant did not move for a new trial or evidentiary hearing in the trial court, this Court's review is limited to any mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient, i.e., that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced his defense, i.e., that counsel's errors were so serious as to deprive defendant of a fair trial with reliable results. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In doing so, defendant must overcome the strong presumption that the challenged conduct was sound trial strategy. *Id*. at 6.

Defendant contends that counsel was ineffective because he failed to demand the production of Jordan, an endorsed prosecution witness, or to request an instruction directing the jury to infer that the missing witness' testimony would have been unfavorable to the prosecution. We disagree. Upon review of the record, it is not apparent that the prosecution failed to exercise due diligence or that Jordan could have been produced with due diligence. Nor is it apparent from the record that Jordan, if produced as a witness, would have provided any information helpful to the defense. Accordingly, defendant has failed to show that defense counsel was deficient in this regard.

Defendant also contends that counsel was ineffective by failing to investigate and learn the identities of other unknown res gestae witnesses. However, defendant does not articulate what efforts, if any, counsel made to learn the identities of other witnesses, nor is there any indication in the record that there were in fact other witnesses who could have provided information helpful to the defense. Thus, defendant's claim must fail.

Finally, defendant argues that defense counsel was ineffective for failing to request jury instructions on voluntary manslaughter and self-defense. As previously indicated, there is no reasonable probability that the result of the trial would have been different had those instructions been given. Thus, defendant has failed to establish prejudice as a result of counsel's error and reversal is not warranted.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins