

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHELBY DEMETRIUS WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

August 3, 2001

No. 222983

Berrien Circuit Court

LC No. 99-401098-FC

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227(b). He was sentenced to mandatory life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

First, defendant argues that the prosecutor committed misconduct during closing and rebuttal arguments because the prosecutor purportedly: (1) testified to facts of his own personal knowledge, (2) used the prestige of his office to attack the credibility of defendant and to vouch for the credibility of prosecution witness Nicole Johnson, (3) expressed his personal opinion that defendant was guilty, (4) argued an incorrect legal standard with regard to the issue of self-defense, (5) made an improper civic duty argument, and (6) accused defendant of two crimes for which he was not on trial.

We note that defendant did not object at trial to the remarks of which he now complains. Therefore, this issue is unpreserved and defendant has forfeited our review of this claim unless he can demonstrate plain error that affected his substantial rights, i.e., affected the outcome of trial. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

To determine whether prosecutorial misconduct occurred, we review the pertinent portions of the record and evaluate the prosecutor's comments in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendant failed to show that the challenged remarks, viewed in context, were plainly improper. Because defendant was unable to show plain error that affected the outcome of the proceeding, he forfeited review of this issue. *Carines*, *supra* at 764-765.

Next, defendant asserts that the trial court abused its discretion, or exercised no discretion, in the procedures it employed in acceding to the request of the jurors to have testimony replayed for them and, by doing so, abdicated its responsibility to control the proceedings. During deliberations, the jury asked to rehear the testimony of two witnesses and, in response pursuant to MCR 6.414(H), the trial court had a tape of the witnesses' testimony played for the jury. Defense counsel expressed satisfaction with the procedures used by the trial court.

Defense counsel's approval of the trial court's response to the jurors' request constitutes a waiver of this issue on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Accordingly, any error is extinguished. *Id.* at 216.

Defendant also argues that the trial court's instructions on self-defense¹ failed to fairly present the issue of self-defense to the jury, thereby unconstitutionally shifting the burden of proof to defendant on this issue. We disagree.

Because defendant did not object to the jury instructions at trial and failed to preserve the issue for appeal, our review of this instructional issue is limited to determine if there was plain error that prejudicially affected defendant's substantial rights. *Carines, supra* at 761-764; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

Here, the trial court clearly and specifically instructed the jury not only that it was the prosecutor's burden to prove defendant's guilt beyond a reasonable doubt, but also that the prosecutor had to prove beyond a reasonable doubt that defendant did not act in self-defense. The court's instructions were more than adequate to convey that it was the prosecutor, not defendant, who had the burden of proof on this issue. The instructions did not shift the burden of proof to defendant, and we find no plain error. *People v Watts*, 61 Mich App 309, 311-312; 232 NW2d 396 (1975).

Defendant next claims he was deprived of his right to due process because the trial court failed to instruct the jury on the lesser cognate offense of involuntary manslaughter. The record does not reflect, and defendant does not suggest on appeal, that the defense requested an instruction on involuntary manslaughter. We therefore review this issue for plain error. *Carines, supra* at 764-765.

Involuntary manslaughter is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). Here, the trial court instructed the jury on the charges of first-degree murder, second-degree murder, voluntary manslaughter, and felony-firearm. The court had a duty to instruct the jury on involuntary manslaughter only if the evidence supported a theory that the killing was accidental. *Id.* at 499; *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

¹ The trial court instructed the jury in accordance with the standard criminal jury instructions on self-defense: CJI2d 7.20, burden of proof for self-defense, CJI2d 7.15, use of deadly force in self-defense, and CJI2d 7.16, duty to retreat to avoid using deadly force.

In the instant case, as in *Heflin, supra*, defendant did not argue that he accidentally or unintentionally killed the victim. Rather, he admitted that he intentionally shot and killed the victim but maintained that he did so in self-defense. As in *Heflin*, “a defendant who relies entirely upon the defense of self-defense cannot expect the trial judge to instruct the jury regarding statutory involuntary manslaughter, a crime neither supported by the evidence nor presented to the jury by the defendant or the prosecutor.” *Id.* at 503. We find no plain error in the court’s failure to instruct the jury on involuntary manslaughter where defendant did not proceed under that theory at trial and where the evidence did not support that charge. *Heflin, supra* at 499, 503.

Finally, defendant claims that he was deprived of the effective assistance of counsel due to counsel’s failure to object to the allegedly improper remarks of the prosecutor during closing and rebuttal argument, failure to object to the trial court’s replaying of the witnesses’ testimony as requested by the jury, failure to object to the trial court’s instructions on self-defense, and failure to object to the trial court’s omission of an instruction on involuntary manslaughter. This claim is without merit.

Because defendant did not request an evidentiary hearing on the issue of ineffective assistance of counsel, our review of this claim is limited to the facts contained on the existing record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). To prevail on a claim of ineffective assistance of counsel, defendant has the burden of showing that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s alleged errors, there was a reasonable probability that the outcome of the proceeding would have been different. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Lee*, 243 Mich App 163, 184-185; 622 NW2d 71 (2000).

Because defendant’s claim of ineffective assistance of counsel is based on the other claims of error raised by defendant, all of which we have found to be lacking merit, defendant’s claim of ineffective assistance of counsel likewise fails.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder