STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 31, 2001
v	No. 219354 Wayne Circuit Court
HENRY BROWN, Defendant-Appellant.	LC No. 98-008613

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of voluntary manslaughter, MCL 750.321. The jury concluded that defendant killed the manager of the Saxony Motel in Detroit by throwing him from a second-floor balcony. The trial court sentenced defendant to seven to fifteen years' imprisonment. We affirm.

I. Admission of Evidence

Defendant first argues that the trial court erred in admitting various statements by prosecution witnesses. Generally, we review a trial court's decision to admit evidence for an abuse of discretion. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). However, if a defendant did not object below to the admission of the evidence, we will not reverse in the absence of a plain error that affected the outcome of the case. *People v Coy*, 243 Mich App 283, 287, 303-304; 620 NW2d 888 (2000).

Defendant contends that the trial erred in admitting the testimony of Johnnie May Dewberry, who stated that she heard defendant say that he threw the victim from the balcony, because it constituted inadmissible hearsay. Defendant did not object to Dewberry's testimony below, and we therefore review its admission for plain error. *Id*. We find no plain error, because the statement about which Dewberry testified was admissible as an admission of a party-opponent under MRE 801(d)(2)(A). Defendant also contends that the trial court erred in admitting Dewberry's testimony because it was not credible and because she had an incentive to lie. Again, we find no plain error; Dewberry's statements were sufficiency believable such that the jury could choose to accept them. Defendant's argument goes merely to the weight, not to

the admissibility, of the testimony. See, e.g., *People v Daniels*, 192 Mich App 658, 669; 482 NW2d 176 (1992), and *People v McRaft*, 102 Mich App 204, 213; 301 NW2d 852 (1980).

Defendant contends that the trial court erred in admitting the testimony of Donald Edwards, who also stated that he heard defendant say that he threw the victim from the balcony, because the testimony was inherently incredible and because Edwards had an incentive to lie. However, defendant did not object to Edwards' testimony on these grounds below and therefore failed to preserve this issue for appeal. See *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Accordingly, we review the admission of Edwards' testimony for plain error. *Coy*, *supra* at 287. We find no plain error. Indeed, Edwards' testimony was sufficiently credible such that the jury could choose to accept it; again, defendant's argument goes merely to the weight, not to the admissibility, of the testimony.[1] See, e.g., *Daniels*, *supra* at 669, and *McRaft*, *supra* at 213.

Finally, defendant contends that the trial court erred in admitting the testimony of Evilyn Willis, who recounted an out-of-court statement by witness Edwards, because it constituted hearsay that did not, as the prosecutor contended below, fall within the excited utterance exception to the rule excluding hearsay. An excited utterance will not be excluded under the hearsay rule if the statement related to a startling event and was made while the declarant was under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); MRE 803(2).

The factual circumstances surrounding Edwards' statement were sufficient for it to qualify as an excited utterance. Edwards, a resident at the Saxony Motel, witnessed a startling event when he came to where defendant and the victim had been yelling at each other and learned from defendant that he had thrown the victim from the second floor balcony. He looked over the balcony and saw the victim laying on the ground moaning. After witnessing this startling event, while still under the excitement it caused, he immediately and frantically rushed to the office and instructed Willis to call the police because of the situation. The trial court did not abuse its discretion in admitting the statement under the excited utterance exception to the hearsay rule. Moreover, even if the trial court *had* erred in admitting Willis' testimony, we would nonetheless find no grounds for reversal, because the testimony was merely cumulative; its admission was not outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (setting forth harmless-error rule).

II. Sufficiency of the Evidence Supporting the Conviction

Next, defendant argues that the prosecutor failed to present sufficient evidence to support the conviction. In reviewing this issue, we view the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that all the elements of the offense were proven beyond a reasonable doubt. *People v Nelson*, 234 Mich App 454, 459;

[1] Although his argument is not entirely clear, defendant also appears to suggest that the trial court should not have admitted Edwards' testimony because it constituted hearsay. However, the statement in question was admissible as an admission of a party-opponent under MRE 801(d)(2)(A).

594 NW2d 114 (1999). We note that circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime. *Id*.

"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). "An essential element of voluntary manslaughter is the intent to kill or commit serious bodily harm." *Id.*

Although no one actually saw defendant throw the victim off the balcony, there was sufficient evidence for the jury to convict defendant of voluntary manslaughter. Testimony established that defendant and Willis, his girlfriend at the time, got into an argument in a motel room, after which she left the room and was rebuffed by defendant on her return. She summoned the victim, who was the motel manager, to assist her in gaining access to the room after defendant's rebuff. Edwards then accompanied the victim to defendant's room, heard defendant arguing with the victim, left the room, and then returned a few minutes later, only to hear from defendant that he had thrown the victim over the balcony. Moreover, Dewberry, the motel cleaning woman, testified that she heard defendant say that he had thrown the victim over the balcony and hoped that he died. After hearing this, Dewberry looked over the balcony and saw the victim lying on the ground. In light of this evidence, the jury reasonably could have concluded that defendant committed voluntary manslaughter.

III. Ineffective Assistance of Counsel

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to develop and present a self-defense argument. To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency reasonably affected the outcome of the case. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. Here, because no evidentiary hearing on the ineffective assistance of counsel claim took place in the lower court, our review is limited to the facts available from the existing record.[2] *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

"[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Here, there is no evidence on the existing record that the victim caused defendant to fear for his life or health such that the use of deadly force was justified. Indeed, we note that the assertions in the ex parte affidavit that defendant attached to his appellate brief cannot be considered by us; a defendant

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[2] Defendant contends that we should remand now for an evidentiary hearing. We decline to do so. Indeed, defendant should not have waited until this case was being heard on the merits to seek a remand. See *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983).

may not enlarge the record on appeal.[3] *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Even if we *did* consider defendant's assertion in the affidavit that the victim hit him in the face, there is no evidence that throwing the victim off the balcony was a *reasonable* response to the assault. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993) ("[a] defendant is not entitled to use any more force than is necessary to defend himself"). Reversal based on ineffective assistance of counsel is unwarranted.

IV. Prosecutorial Misconduct

Finally, defendant argues that the prosecutor committed misconduct requiring reversal. Defendant failed to object to the alleged prosecutorial misconduct at trial; therefore, reversal is required only if a plain error occurred that affected the outcome of the case. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

To determine whether a prosecutor committed misconduct requiring reversal, this Court must review the relevant portions of the record and consider the prosecutor's remarks in the context used. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). "The test of prosecutorial misconduct is whether the defendant has been deprived of his right to a fair and impartial trial." *Id*.

Defendant contends that the prosecutor argued facts not in evidence when he stated that Dewberry testified to having heard an argument, because Dewberry in fact testified that she heard defendant cussing *to himself*. However, in light of the other evidence introduced at trial and the trial court's instructions to the jury that the lawyers' statements and arguments were not evidence, the prosecutor's minor misstatement did not reasonably contribute to the guilty verdict. See *Schutte, supra* at 720.

Defendant contends that the prosecutor again argued facts not in evidence when he stated that Denny Patel testified that he saw blood at the scene. However, Patel *did* in fact testify to having seen blood at the scene; accordingly, no misconduct occurred.

Defendant contends that the prosecutor improperly vouched for the credibility of his witnesses by referring to the fact that both Edwards and Dewberry were African-American, thus allegedly implying that the jury should trust them, because defendant was also African-American, and Edwards and Dewberry would not want to implicate a fellow African-American. We disagree that impropriety requiring reversal occurred. Indeed, viewing the statement in context, it is apparent that the prosecutor mentioned race only after defense counsel raised the issue by cautioning the jury not to employ bias and convict defendant because he had a Caucasian girlfriend. Moreover, the prosecutor's statement about the race of Dewberry and Edwards did not reasonably affect the outcome of the case. See *Schutte, supra* at 720.

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[3] In the affidavit, defendant contends that in addition to failing to develop a self-defense theory, his attorney committed other errors, such as failing to adequately investigate the case. Again, however, we cannot consider the assertions in the affidavit.

Finally, defendant contends that the prosecutor allowed and failed to correct the allegedly false testimony of Edwards, who testified at trial that he saw defendant standing outside of his motel room but testified at the preliminary examination that he saw defendant "in the room." Defendant has failed to show that the prosecutor knowingly solicited false testimony to obtain a conviction or that if the jury had learned of Edwards' inconsistency on this non-crucial detail, they would have acquitted defendant. See *People v Lester*, 232 Mich App 262, 277, 280; 591 NW2d 267 (1998). Again, defendant has failed to demonstrate plain error affecting the outcome of the case.[4] See *Schutte, supra* at 720.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

McDonald, J. did not participate.

[4] We note that in his pro per brief, defendant alludes to the testimony of Dewberry and Willis and to a written "witness statement" of another individual. Defendant's argument regarding these individuals is unclear. Defendant does not make a reasoned argument about their involvement in the case and has therefore abandoned the issues relating to them. See *People v Jones (On Rehearing)*,201 Mich App 449, 456-457; 506 NW2d 542 (1993), and *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992).