

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK THOMPSON,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 229660

Wayne Circuit Court

LC No. 98-011383

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Although initially sentenced to consecutive terms of 20 to 40 years' imprisonment for the second-degree murder conviction and two years for the felony-firearm conviction, the trial court later vacated the second-degree murder sentence and sentenced defendant to 20 to 40 years as a third habitual offender, MCL 769.11. Defendant appeals as of right. We affirm.

I

On appeal, defendant first argues that he was denied a fair trial as a result of several instances of prosecutorial misconduct. Because defendant failed to preserve these claims by objection at trial, our review of defendant's allegations of improper conduct by the prosecutor is for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) the error affected his substantial rights. *Id.* In order to establish that the error affected his substantial rights, defendant must show that the error affected the outcome of the proceeding. *Id.*

In challenging the prosecutor's conduct at trial, defendant first asserts that the prosecutor improperly commented on defendant's failure to testify when he argued that conviction of the lesser-included offense of voluntary manslaughter would be inconsistent with defendant's statement to police that he did not kill the victim. We disagree.

Claims of prosecutorial misconduct are decided on a case by case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine if

the defendant was denied a fair and impartial trial. *Id.* The propriety of the prosecutor's remarks depends on all the facts of the case. *People v Bahoda*, 448 Mich 261, 267, n 7; 531 NW2d 659 (1995). Moreover, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted. *Schutte, supra* at 721.

After review of the record, we are not convinced that the prosecutor's comments were an impermissible reference to defendant's failure to testify. See *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). When these comments are read in the context of the entire argument, it is apparent that the prosecutor was simply addressing defense counsel's argument that the evidence supported, at best, a conviction of voluntary manslaughter. Contrary to defendant's assertion, the prosecutor's comments neither directly nor indirectly addressed the fact that defendant failed to testify.

Moreover, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof. *Id.* at 115. Accordingly, we reject defendant's claim that in making the challenged comments, the prosecutor also improperly shifted the burden of proving defendant's guilt or innocence to the defense. Again, when considered in the context of defense counsel's remarks during closing argument, the prosecutor's comments were not improper. See *id.* at 116-118; *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

Defendant next argues that the prosecutor argued facts not in evidence when he asserted during closing argument that the trial testimony supported the prosecution's theory that the killing resulted from the close-range firing of a handgun. Again, we disagree.

Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case *Bahoda, supra* at 282. Here, the evidence at trial supported the inference that the victim was killed with a handgun fired at close distance. Wayne County Assistant Medical Examiner Cheryl Loewe testified that after performing an autopsy on the victim, she determined that the cause of death was multiple gunshot wounds believed by her to be "consistent" with those caused by "a higher velocity handgun." Although Loewe acknowledged on cross-examination that her official report listed the victim's wounds as consistent with the use of a "high velocity rifle," she explained that this merely meant that the injuries were "typical" of those caused when "a high velocity weapon *such as* a rifle" was used, but that the victim's injuries were also consistent with the use of other "high velocity weapon[s]." Detroit Police Firearm Examiner Dale Johnston additionally testified that, although he could not determine the type of weapon used, he could not rule out that a handgun was used in the killing.

With respect to the distance from which the weapon was fired, it is true that the Loewe specifically denied that there was evidence of "close-range firing." However, Loewe testified that "close-range" meant within two to three feet of the body. Patricia Ellis testified that she saw defendant in the hallway outside the bedroom where she and the victim were located, firing into the bedroom with a handgun. Given this testimony, we find that the evidence supported the prosecutor's statement that Loewe could not "rule out" that the shooting occurred at "close distance." In any event, even assuming that the prosecutor erred in arguing that Loewe agreed

with his theory of a “close-range” shooting, reversal is not required because the error did not affect the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Given Ellis’ testimony, the distinction whether the firing was or was not at close-range would not provide a reasonable doubt that defendant shot the victim under circumstances warranting defendant’s second-degree murder conviction. See *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001).

We similarly reject defendant’s claim that he is entitled to a new trial because the prosecutor erroneously argued that defendant did not speak to the victim before shooting him. Although there was evidence that defendant inquired as to Ellis’ whereabouts before shooting the victim, the challenged statement does not require reversal. The statement was made in the context of the argument that defendant had time to premeditate the shooting. If anything, the statement hindered the prosecutor’s argument in this regard because it actually reduces the time for reflection before the killing. In any event, the jury convicted defendant of second-degree murder, which does not require premeditation. See *Aldrich*, *supra*. Accordingly, defendant has not shown that the challenged statement affected the outcome of the proceedings.

Defendant next argues that the prosecutor improperly vouched for Ellis’ credibility. Again, we disagree. While it is improper for a prosecutor to vouch for the credibility of his witnesses, *Bahoda*, *supra* at 276, a prosecutor may argue from the facts that a witness is credible. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor did not suggest that it was his own belief that the witness was credible. Instead, he merely argued that, on the basis of the evidence presented and Ellis’ demeanor while testifying, she was a credible witness. In this context, the remarks were not improper.

The prosecutor similarly did not breach the bounds of proper argument in arguing that defendant’s flight to Chicago immediately after the murder proved his guilt. Although evidence of flight is, by itself, insufficient to sustain a conviction, *People v Coleman*, 210 Mich App 1, 4, 532 NW2d 885 (1995), it is nonetheless admissible as circumstantial evidence showing consciousness of guilt. *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988). Contrary to defendant’s assertion, at no point did the prosecutor assert that defendant’s flight was alone enough to convict him of the charged crimes. Rather, the prosecutor properly argued that this fact, along with all the other facts in evidence, showed defendant’s guilt. Accordingly, we find no error in the prosecutor’s comments, plain or otherwise.

Defendant next argues that the prosecutor denied him a fair trial by failing to limit his rebuttal argument to the issues raised by defense counsel during closing argument. See MCR 6.414(E). However, after review of the record, we find that contrary to defendant’s claim the prosecutor clearly made the challenged arguments in response to defense counsel’s assertions that there was no evidence of premeditation and that defendant acted in either self-defense or the defense of others. Given these claims, the prosecutor’s remarks, including those challenging defendant’s credibility, were clearly appropriate and did not deny defendant a fair and impartial trial. See *Schutte*, *supra*.

II

Finally, defendant argues that he was denied the effective assistance of counsel because his attorney failed to object to the prosecutor’s comments, as outlined above. Again, we

disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

As discussed above, the alleged improper prosecutorial conduct was either not improper or did not constitute plain error. Thus, defense counsel's failure to object to the prosecutor's statements was neither objectively unreasonable nor prejudicial to defendant. Accordingly, reversal is not warranted based upon defendant's claims of ineffective assistance of counsel.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter