

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAVAR ROMELL COTTRELL,

Defendant-Appellant.

UNPUBLISHED

September 28, 2004

No. 247539

Wayne Circuit Court

LC No. 02-010702

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of involuntary manslaughter, MCL 750.321, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively with and preceding concurrent sentences of 2 ½ to 5 years' imprisonment for the felon in possession of a firearm conviction and eighteen to thirty years' imprisonment for the involuntary manslaughter conviction. We affirm.

I. FACTS

On July 29, 2002, defendant, Lavar "Poncho" Cottrell, shot and killed his uncle, Geoffrey Cottrell. A prior related shooting occurred at a family gathering on Easter Sunday, March 31, 2002, when defendant and his cousin, Dwayne "Marquis" Binyards had a disagreement that resulted in a "tussle." After the two settled the disagreement, Geoffrey yelled at defendant and Marquis for being disrespectful while their great-grandmother was in the house. Defendant responded that Geoffrey could not tell them how to act when Geoffrey had "disrespected this house in the past." Geoffrey, who was thirty-eight years old at the time, pushed the then eighteen-year-old defendant. Defendant pushed him back. The two men fought. Suddenly, Geoffrey pulled out a gun and shot defendant in the side. Geoffrey walked downstairs and outside. Defendant and Marquis followed. Defendant told Geoffrey, "[Y]ou're a coward for shooting." Geoffrey shot defendant two more times in the chest and left. After the shooting, defendant was taken to the hospital where he remained for approximately one week. Upon leaving the hospital, defendant returned to live at his aunt, Lisa Binyard's, house where he had resided since approximately August 2001.

Defendant refused to cooperate with the police or the prosecution in their investigation of the Easter shooting. Defendant told police officers that he did not want to press charges against

Geoffrey and that he did not know who shot him. After receiving a subpoena, defendant continued to assert that he did not know the identity of the shooter. At the instant trial, defendant admitted to lying under oath. He claimed that he did not want to tell the police that Geoffrey shot him because his uncle was still at large, and defendant was scared. Defendant further admitted that he did not want Geoffrey to get into trouble with the police. Geoffrey was never arrested or prosecuted for shooting defendant.

Apparently, defendant and Geoffrey began mending their relationship after the Easter shooting. On July 29, 2002, at approximately 2:30 p.m., Lisa drove defendant to Geoffrey's house in Lisa's car. Lisa parked her vehicle in front of the next house. Defendant got out of Lisa's car and walked toward Geoffrey's house. Defendant and Geoffrey stood in the driveway talking. Lisa testified that Geoffrey gestured for defendant to come inside. Defendant remained on the porch while Geoffrey briefly went inside. When Geoffrey returned, he and defendant again talked in the driveway. The two went toward the back of the house and out of Lisa's sight, possibly to view Geoffrey's pit bulls that were in the backyard. After a couple minutes, the two returned and began talking again.

Lisa testified that she observed defendant pull a gun from either his shirt or his pants, heard a gunshot and saw Geoffrey come running from the back. Geoffrey had nothing in his hands as he attempted to run away from defendant. Defendant shot Geoffrey again. Geoffrey was falling as he was running away and fell down by a tree. Defendant got in Lisa's car and drove away.

II. INVOLUNTARY MANSLAUGHTER AND SELF DEFENSE

On appeal, defendant first claims that there was insufficient evidence to convict him of involuntary manslaughter. Specifically, defendant asserts that the prosecutor failed to present sufficient evidence that defendant did not act in self-defense. We disagree.

A. Standard of Review

We review the sufficiency of evidence in a criminal case in the light most favorable to the prosecution to determine whether a rational factfinder could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

B. Analysis

An unlawful act committed with the intent to harm or in a grossly negligent manner that proximately causes the death of another constitutes involuntary manslaughter. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). "[T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Once the affirmative defense of self-defense has been alleged, the prosecutor must prove that the defendant did not act in self-defense. *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Circumstantial evidence and reasonable inferences derived from the evidence can provide sufficient proof of the

essential elements of the crime. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Where testimony conflicts, it is the jury's function to determine the inferences to be drawn from the evidence and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court will not hinder the jury's function to determine the weight of the evidence and credibility of the witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003).

The prosecutor presented evidence that the victim, Geoffrey Cottrell, was not armed when defendant pulled a gun from his clothing and started shooting at Cottrell. Even if the jury believed that Cottrell was armed, defendant testified that he began shooting after he took the gun away from defendant in a struggle. Witnesses testified that Cottrell had nothing in his hands as he stumbled forward trying to flee from defendant. There was evidence that at least two of the three wounds that caused Cottrell's death entered from the back of Cottrell's body. Defendant claimed that, when he saw Cottrell's girlfriend, Barbara Thomas, pointing a gun at him, he just "flipped out" and started shooting. However, defendant testified that he did not shoot at Thomas. There was evidence that, if defendant felt threatened, he had other means of escape rather than chasing after Cottrell and shooting at him. There was evidence that defendant could have run in a different direction, jumped Cottrell's fence, or jumped the neighbor's fence to get away from Thomas' gunshots.

A rational jury could have determined from the evidence that the prosecutor's witnesses were more credible than defendant, particularly in light of the fact that four witnesses for the prosecution recounted similar versions of the events surrounding the shooting. The jury may have also inferred from the evidence that defendant's vague answers and constant repetition that the shooting was an accident were indicative of untruthfulness. A rational jury could have found compelling the physical evidence that Cottrell's wounds entered from the back and Thomas' gun was not caliber compatible with the recovered bullet fragments. Giving deference to the jury's findings and credibility choices, and viewing the evidence in the light most favorable to the prosecution, we hold that there was sufficient evidence from which a rational jury could find that the prosecutor proved beyond a reasonable doubt that defendant did not act in self-defense and, thereby, conclude that defendant was guilty of involuntary manslaughter. See *Nowack, supra*, 462 Mich 399-400; *Hill, supra*, 257 Mich App 141.

III. JURY INSTRUCTIONS

Defendant's next claim on appeal is that the trial court erroneously instructed the jury on the causation elements of both first-degree murder and second-degree murder. Defense counsel specified that he had "no objections" to the jury instructions as given by the trial court; therefore, defendant waived his right to appeal this issue. See *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003) (the defendant waived his right to appeal two jury instructions when he informed the trial court that he had "no additional objections").

Alternatively, defendant claims that defense counsel was ineffective for failing to object to the erroneous jury instructions for first-degree murder and second-degree murder. We disagree.

A. Standard of Review

The determination of whether a defendant was deprived of the effective assistance of counsel is a combined question of fact and constitutional law. We review a trial court's findings of fact for clear error and constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Absent an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

To establish a claim of ineffective assistance of counsel, defendant must demonstrate that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and that this deficiency resulted in prejudice so egregious that it altered the outcome of the trial. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Trial counsel's performance is presumed to be sound trial strategy. *Riley*, *supra*, 468 Mich 140. Moreover, we will not substitute our judgment for that of trial counsel regarding "trial strategy," nor assess trial counsel's competence with the benefit of "hindsight." *Rockey*, *supra*, 237 Mich App 76-77.

Here, defense counsel failed to object to the jury instructions regarding first-degree murder and second-degree murder. Moreover, defense counsel stated that he had "no objections" to the instructions as given by the trial court. Although defendant waived the issue of whether the instructions for first-degree murder and second-degree murder were erroneous, we analyze the instructions to determine if defense counsel's failure to object to the instructions constituted deficient representation.

The trial court instructed the jury that defendant was presumed innocent until proven guilty. The trial court also instructed the jury that the prosecution was required to prove all elements of the crimes beyond a reasonable doubt. In stating the elements for first-degree murder and second-degree murder, the trial court stated, "First, that Defendant caused the death of Mr. Cottrell. That is, that Mr. Cottrell died as a result of gunshot wounds." Defendant contends that the first element of the instructions removed the causation element and shifted the burden of proof to defendant. When read in conjunction with each other, both sentences require the jury to find that defendant's act of shooting caused the gunshot wound that resulted in Cottrell's death. The second sentence merely clarifies the manner of death as gunshot wounds, which was the only manner of death in this case. It does not negate the causation element required by the first sentence. We conclude that the jury instructions were not erroneous, and thus, defense counsel was not obligated to object to the instructions as given. Even if the jury instructions were erroneous and defense counsel's failure to object constituted deficient representation, we conclude that defendant failed to demonstrate that counsel's inaction was outcome determinative. Defendant was convicted of involuntary manslaughter, not first-degree murder or second-degree murder. Therefore, any deficiency in counsel's performance was immaterial to the jury's final determination of guilt in this case.

IV. DOUBLE JEOPARDY

Defendant also claims that his convictions for felon in possession of a firearm and felony-firearm violated state and federal constitutional guarantees against double jeopardy. We disagree.

A. Standard of Review

A double jeopardy claim constitutes a question of law that we review de novo on appeal. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

B. Analysis

Pursuant to federal and state constitutional law, the double jeopardy clause “protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.” *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), quoting *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000), see also US Const, Am V; Const 1963, art 1, § 15. In *Dillard*, *supra*, this Court held that convictions of both felon in possession of a firearm and felony-firearm do not violate constitutional protections against double jeopardy. *Dillard*, *supra*, 246 Mich App 171 n 5. This Court concluded that the state legislature intended for an additional charge and sentence to apply when a person possessing a firearm committed a felony other than the four specifically delineated in the felony-firearm statute. *Id.* at 167, citing *People v Mitchell*, 456 Mich 693, 697; 575 NW2d 283 (1998). In *Calloway*, *supra*, the Michigan Supreme Court concurred with the *Dillard* opinion and concluded that the state legislature intended cumulative punishments for convictions of felon in possession of a firearm and felony-firearm. *Calloway*, *supra*, 469 Mich 452. Because Michigan case law clearly indicates that punishments for both felon in possession and felony-firearm do not violate double jeopardy, we hold that defendant’s double jeopardy claim on appeal is without merit.

V. EFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 11 brief on appeal, defendant claims that he was denied the effective assistance of counsel when defense counsel asserted his personal belief in defendant’s guilt by vouching for the credibility of the prosecutor’s key witness, failed to object when the prosecutor untimely charged defendant as a third habitual offender, and failed to seek removal of two biased jurors. We disagree.

A. Standard of Review

We review a trial court’s findings of fact for clear error and constitutional determinations de novo. *LeBlanc*, *supra*, 465 Mich 579. Absent an evidentiary hearing, our review is limited to mistakes apparent on the record. *Riley (After Remand)*, *supra*, 468 Mich 139. Effective assistance is presumed, and a defendant bears a heavy burden of proving otherwise. *Rockey*, *supra*, 237 Mich App 76. Moreover, a defendant must overcome the presumption that counsel’s performance constitutes sound trial strategy. *Riley (After Remand)*, *supra*, 468 Mich 140.

B. Analysis

Defendant states that he was denied the effective assistance of counsel because his counsel vouched for the credibility of a key prosecutorial witness and, thereby, asserted his personal belief that defendant was guilty. After reviewing counsel's statement in context, we conclude that counsel was not conceding defendant's entire defense by agreeing with the portion of the prosecutorial witness' testimony that supported defendant's own testimony. Moreover, we find that counsel never expressed a personal belief in defendant's guilt.

Defendant also states that he was denied the effective assistance of counsel because his counsel failed to object to the prosecutor's filing of an amended charge classifying defendant as a third habitual offender and subjecting defendant to enhanced sentencing. Pursuant to MCL 769.13(1), a prosecutor must provide notice within twenty-one days of the arraignment on the information of the intent to pursue enhancement as a habitual offender if the defendant is convicted of the charged offense. After the expiration of twenty-one days, the prosecutor may not amend the notice in such a way as to materially change a defendant's "potential consequences." *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997). On September 9, 2002, the prosecutor filed an amended information with notice that defendant had two prior felony convictions and would be subject to enhanced sentencing as a third habitual offender. This amended notice was filed four days following defendant's arraignment on the information. We conclude that the prosecutor gave defendant appropriate notice pursuant to MCL 769.13. We hold that, because the prosecutor did not err in amending the charge to include defendant as a third habitual offender, defense counsel was not required to object or to move to quash the additional charge.

Defendant also argues that he was denied the effective assistance of counsel because his counsel failed to seek removal of two biased jurors. Defendant contends that two jurors whose nephews had been shot and killed should not have been permitted to decide defendant's fate in a murder trial. Counsel's decisions regarding the selection of jurors are generally matters of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Moreover, a juror's assurance to keep his personal life separate from the defendant's case, and the trial court's acceptance of that assurance is sufficient proof that the juror's presence on the jury was not outcome determinative. *Id.* at 259-260.

After reviewing the record, we conclude that defendant failed to overcome the presumption that counsel's decision not to seek removal of two jurors whose nephews had been shot and killed was sound trial strategy. Additionally, because both jurors in question assured the trial court that their family matters would not affect their ability to determine this case with fairness and objectivity, we conclude that defendant failed to demonstrate that their membership in the jury was outcome determinative. Individually and collectively, defendant's claims of errors by defense counsel did not establish ineffective assistance of counsel. Defendant failed to show that counsel's representation did not meet an objective standard of reasonableness and adversely affected the trial outcome.

VI. PROSECUTORIAL CONDUCT

Also in his Standard 11 brief on appeal, defendant claims that he was denied his constitutional right to a fair and impartial trial when the prosecutor improperly asserted his personal belief in defendant's guilt. We disagree.

A. Standard of Review

Defense counsel failed to object to the prosecutor's statements that formed the basis of the alleged misconduct and this issue is unpreserved for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Nevertheless, we review unpreserved claims of prosecutorial misconduct for plain error affecting a defendant's substantial rights. *Carines, supra*, 460 Mich 763; *Ackerman, supra*, 257 Mich App 448.

B. Analysis

A prosecutor has the duty to provide a defendant with a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information of which the jury is unaware, lending to the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor must argue the evidence and may not request that the jury find the defendant guilty based on the prosecutor's special knowledge or the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). The propriety of a prosecutor's closing argument must be determined as a whole, in light of the defendant's arguments, and in connection with the evidence admitted at trial. *Bahoda, supra*, 448 Mich 283; *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

After reviewing the record, we conclude that the prosecutor's remarks during closing argument were not improper because credibility was at issue, and the prosecutor argued from the evidence that the three prosecutorial witnesses were credible and defendant was not credible. See *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983). The prosecutor also argued that, due to inconsistencies in defendant's testimony and other evidence presented at trial, defendant was not worthy of belief. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). When viewed in context, the prosecutor's remarks were related to the evidence or reasonable inferences drawn from the evidence to support the prosecutor's theory of the case and to refute defendant's position. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Therefore, we hold that the prosecutor's statements were proper and did not constitute plain error. Moreover, any error was cured by the trial court's instructions to the jury that the jury's function was to determine the credibility of witnesses and that the jury was not to consider counsels' remarks as evidence. See *Bahoda, supra*, 448 Mich 281.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter