

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DARNELL FORTE,

Defendant-Appellant.

UNPUBLISHED

October 2, 2008

No. 276091

Saginaw Circuit Court

LC No. 06-027429-FC

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of voluntary manslaughter, MCL 750.321, felonious assault, MCL 750.82, larceny of a firearm, MCL 750.357b, carrying a concealed weapon (CCW), MCL 750.227, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve concurrent prison terms of 5-1/2 to 15 years on the manslaughter charge, 24 months to four years on the felonious assault charge, and 38 months to five years on the larceny of a firearm and CCW charges, all to be served consecutively to a two-year term of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

On the evening of April 2, 2006, on a street corner at the intersection of Rust and Ray streets in Saginaw, defendant shot the victim, Devon Holmes, once through the heart from a distance of two feet or less. Three companions of the victim that evening identified defendant at trial as the shooter. Defendant did not dispute that he had shot the victim, but testified that he had done so because the victim produced a handgun, and the victim and his companions intended to rob defendant. After shooting the victim, defendant discharged his handgun twice more to frighten away the victim's companions, and took the victim's gun.

In addition to the several firearm-related counts mentioned above, defendant stood trial on a count of open murder and a count of assault with intent to murder. On these most serious counts, the jury found defendant guilty of the lesser charges of voluntary manslaughter and felonious assault.

Defendant first contends on appeal that the trial court's admission of irrelevant testimony concerning a speed loader deprived him of a fair trial. This Court generally reviews a trial court's decision whether to admit evidence for a clear abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). Because defendant failed to preserve this issue,

however, by raising a relevance objection to the challenged testimony at trial, we consider this issue only to determine whether any plain error affected defendant's substantial rights. *Id.* at 180.

The sole trial testimony concerning the existence of a speed loader consisted of a detective's testimony that the police discovered at 3300 Rust Street a speed loader "for a .38 handgun." Defendant's former girlfriend testified that she resided at 3300 Rust Street, and that defendant and a cousin of hers also lived there around April 2006. She denied knowing whether either her cousin or defendant owned a speed loading device. The speed loader testimony plainly qualified as irrelevant to any material fact or issue raised at trial because absolutely no evidence tended to show that defendant employed a speed loader at any time proximate to April 2, 2006. MRE 401, 402.

Although the speed loader had no relevance to any material question involved in defendant's trial, the interjection of speed loader testimony at trial occasioned no prejudice to defendant. Most of the relevant facts in this case were not in dispute. The evidence at trial agreed, for example, that only defendant fired any shots at the corner of Rust and Ray streets late on April 2, 2006; that defendant shot the victim in the chest from less than two feet away, killing him quickly; and that defendant then fired twice more, either in the air or toward the victim's friends, to dissuade them from remaining near the scene. The only significant evidentiary dispute concerned the extent to which either the victim and his friends or defendant might have behaved aggressively immediately before the shooting. Furthermore, the affirmative testimony about a speed loader occurred in a brief and isolated fashion during the questioning of one police detective, and the prosecutor made no subsequent reference to the speed loader during closing arguments. Given the very limited nature of the irrelevant speed loader testimony and the overwhelming evidence that defendant caused the victim's death, we conclude that the evidentiary error caused defendant no prejudice. *Bauder, supra* at 180.

Defendant next asserts that the prosecutor engaged in misconduct by expressing his personal belief in defendant's guilt during closing argument. Because defendant also failed to preserve this issue at trial, we review his claim of misconduct for plain error affecting his substantial rights. *People v Rodriguez*, 251 Mich App 10, 31-32; 650 NW2d 96 (2002).

Defendant's complaint focuses on the following, highlighted portion of the prosecutor's closing argument:

. . . But it is the position, ladies and gentlemen, of the People, the prosecution, that notwithstanding what I have characterized as the divergence of testimony of the other people, all you really need to look at are the defendant's own statements and his own testimony to prove that his claim of self-defense is not that at all. That he was not really afraid for his life or safety and/or that he—if he claims that fear, it was not reasonable under the circumstances.

And I say this because of what he told the detectives and what he admitted this morning under oath he told the detectives. First [defendant] says, even though [the victim] had his pistol out almost the whole time; and, again, remember that I am not agreeing that that was what the evidence was. *I believe the evidence is every bit as strong, if not stronger, that it was [defendant] that had*

his pistol out first. But even if you look only at his testimony and not the rest, he says that even though [the victim] had it out, he didn't use it. [Emphasis added.]

In light of the consistent trial testimony by the victim's three friends that defendant had initiated verbal contact with them at the street corner, approached them, and drew a gun before the victim retrieved his, we find that, reviewing the prosecutor's challenged remark in context, his argument plainly and properly summarized the evidence introduced at trial, and the reasonable inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (observing that prosecutors remain free to argue the evidence and all reasonable inferences from that evidence as relevant to their theory of the case); *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988) (explaining that while a prosecutor cannot place the prestige of his office behind an assertion that the defendant is guilty, he can argue that the evidence establishes the defendant's guilt). Consequently, no error, let alone plain error, occurred here.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra