STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 283024 Oakland Circuit Court
BRANDON DAVID COLLINS, Defendant-Appellant.	LC No. 2007-214041-FC

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for his first-degree murder conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to the effective assistance of counsel. We disagree. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008).[1]

To establish ineffective assistance of counsel a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the results of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). There is no legal requirement that a defendant has to file notice of the fact that he is going to present a theory of self-defense. It follows that defense counsel's failure to file a notice that he was going to present a theory of self-defense did not fall below an objective standard of reasonableness, and thus, defense counsel was not ineffective for failing to do so. *Id.*

[1] Given defendant's inadequate briefing of his ineffective assistance of counsel argument, we note that we are not required to address defendant's arguments, but will nonetheless do so. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

We additionally reject defendant's arguments that defense counsel was ineffective for presenting no expert witnesses, failing to call defendant's suggested witnesses, and failing to interview a cab driver who witnessed the victim attack Shanora Johnson on a previous occasion (and presumably call the cab driver to testify). Here, defendant has failed to attach any offer of proof or any affidavits sworn by the proposed witnesses (expert or lay), and, in fact, defendant has not even identified what expert witnesses defense counsel should have called to the stand or who his "suggested" witnesses were. Accordingly, defendant has failed to demonstrate that his alleged expert and lay witnesses could have provided exculpatory testimony. Under these circumstances, defendant has failed to rebut the presumption of sound trial strategy accorded defense counsel's decision to fail to subpoena any expert witnesses and/or defendant's "suggested" witnesses. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has likewise failed to present any evidence establishing that defense counsel failed to interview the cab driver, and furthermore, even assuming that defense counsel did not interview the cab driver, defendant has also failed to establish what exculpatory information would have been revealed had defense counsel interviewed the cab driver and subsequently called him to testify. Under these circumstances, defendant did not rebut the presumption of sound trial strategy accorded defense counsel's actions with regard to the cab driver. *Id*.

We also reject defendant's argument that defense counsel was ineffective for failing to interview or check the criminal records of testifying witnesses. Defendant has failed to establish that defense counsel did not interview the testifying witnesses, nor has defendant established that any testifying witnesses had prior convictions, and if they had any convictions, how such convictions could have been used to impeach the respective witnesses. Furthermore, assuming such a deficiency on the part of trial counsel, defendant has failed to show how counsel's alleged failure to interview and/or check the criminal records of the testifying witnesses affected the outcome of the proceedings. Defendant has therefore failed to establish that he was denied his right to the effective assistance of counsel in this regard. *Toma, supra* at 302-303.

We also reject defendant's arguments that defense counsel was ineffective for allegedly failing to discuss his trial strategy with defendant, and failing to explain to the jury that defendant acted in self-defense. Defendant has presented no offer of proof to substantiate the assertion. Moreover, the opening and closing arguments, the trial court's instructions, and the testimony elicited by defense counsel provide record evidence that counsel was relying on and pursued the theory of self-defense. Accordingly, defendant has failed to establish that counsel's alleged inaction in failing to discuss his trial strategy with defendant fell below an objective standard of reasonableness and/or prejudiced defendant, and thus, defendant has failed to establish that he was denied his right to the effective assistance of counsel in this regard. *Toma, supra* at 302-303. Based on the record evidence that the theory of self-defense was presented to the jury, we likewise reject defendant's argument that defense counsel's explanation of the doctrine fell below an objective standard of reasonableness. *Id*.

Finally, we also reject defendant's arguments that defense counsel was ineffective for allegedly filing an untimely motion for a new trial that contained erroneous information. Here, defense counsel filed a timely motion for a new trial, and thus, his actions in this regard did not fall below an objective standard of reasonableness. See MCR 6.431(A)(1). Finally, although defense counsel mistakenly referred to Heaney as "Hayne" in his motion for a new trial, it is clear that he was referring to Heaney, and thus, counsel's mistake did not affect the outcome of

the proceedings. Defendant has therefore failed to establish that he was denied his right to the effective assistance of counsel in this regard. *Toma, supra* at 302-303.

Defendant next argues that he was denied his right to a fair and impartial trial through misconduct of the prosecutor. Once again, we disagree. Defendant failed to properly preserve this argument for appeal by objecting to the prosecutor's challenged actions on the same ground that he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights, meriting reversal only if the plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant first takes issue with the prosecutor's questions to defendant regarding whether being able to listen to all the witnesses' testimony before he testified gave him a "tactical advantage" by making it "a little easier for [defendant] to decide how [he wanted] to tell [his] story to the jury." Our Supreme Court has held that where the evidence presented supports an inference that a defendant may have fabricated his testimony, a prosecutor may suggest that the defendant conformed or fabricated his testimony as a result of being able to hear other witnesses testify as the prosecutor "may argue that a witness, including the defendant, is not worthy of belief." *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985).

Here, defendant's testimony was clearly inconsistent with Shanora's testimony, with Shanora stating that defendant did not live with her on the day of the incident, she and the kids were present when defendant shot the victim, and that the victim did not have a gun, while defendant testified that he still lived with Shanora on the day of the incident, neither Shanora nor the children were present when the shooting took place, and that the victim had a gun and fired it at defendant before defendant fired a shot. Shanora's recollection of events was corroborated by Shanitria Gist's testimony that defendant had moved out a month earlier, as well as the police investigation, which suggested that only one gun was used, that five casings were found, that the victim had six gunshot wounds, and that all the bullets that were fired through the passenger side window were fired from the outside of the vehicle toward the inside of the vehicle. On the other hand, there was no evidence to corroborate defendant's testimony. Accordingly, the evidence presented suggested that defendant might have fabricated his testimony. The prosecutor's questioned conduct was therefore proper, *Buckey, supra* at 14-16, and thus, did not deny defendant a fair and impartial trial, let alone amount to plain error affecting defendant's substantial rights, *Thomas, supra* at 453-454.

Defendant next takes issue with the prosecutor's closing argument that addressed the assessment of defendant's credibility and the lack of corroborating evidence and contends that the comments improperly shifted the burden of proof. As just discussed, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor was commenting that defendant was likely not a credible witness, as his testimony was not corroborated by any of the other evidence that was presented. The prosecutor's questioned conduct was therefore proper, *id.*, and thus, did not deny defendant a fair and impartial trial, let alone amount to plain error affecting defendant's substantial rights, *People v Fields*, 450 Mich 94, 111-112, 114-115; 538 NW2d 356 (1995) (holding that where a defendant testifies to an alternate theory of the case,

comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant).

Defendant next argues that the trial court committed error requiring reversal when it permitted Officer Glen Heaney to provide expert testimony. We disagree. The determination of the qualification of an expert witness and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

If a court determines that recognized scientific, technical, or other specialized knowledge will aid the trier of fact in understanding the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702; *People v Peterson*, 450 Mich 349, 362; 537 NW2d 857, amended 450 Mich 1212 (1995). A trial court's obligation as a gatekeeper to ensure that expert testimony is relevant and reliable extends to all expert testimony, not just to scientific testimony. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150-151; 119 S Ct 1167; 143 L Ed 2d 238 (1999). Expert testimony that is not scientific, and thus, relies on the proposed expert's personal knowledge or experience, rather than on scientific foundations, is subject to the trial court's inquiry to determine if it is reliable and admissible. *Id*. For expert testimony to be admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

Here, Heaney was qualified as an expert in "crime scene investigations with specialized knowledge of ballistics and glass." Before Heaney was qualified as an expert, the prosecution established that Heaney had been a police officer for the past 21 years, the last 14 of which he was an evidence technician where he often dealt with "automobile glass" that has been damaged "as a result of gunshots." It was further established that Heaney had special training from the "Michigan State Police crime lab," as well as "Northwestern University and crime scene techs." Heaney's training included "being able to recognize and identify when an object has been struck by a firearms projectile," which specifically included instruction on being able to tell whether "a firearm has been discharged into a window from the interior versus the exterior of [an] automobile" by looking to see whether the bullet left an "innie [or an] outie." Heaney stated that he was also a firearms instructor. As an instructor, Heaney had fired ammunition into various items (including glass) to "test the velocity and the penetration and the fragmentation of the round," as well as studied research by scholars in "the field of recognition and identification of objects that have been struck by firearms, particularly glass." Heaney concluded that his experience had made him more capable than the average person in recognizing and identifying the path of a bullet that has penetrated a window. Given the evidence presented, the trial court did not abuse its discretion when it qualified Heaney as an expert. MRE 702; *Kumho Tire Co, Ltd*, *supra* at 150; *Peterson*, *supra* at 362.

Heaney testified that the bullets traveling through the passenger side window of the victim's vehicle created a "crater effect" when traveling through the window, and thus, based on his knowledge, training and experience, it was evident that the bullets were fired from outside the vehicle traveling into the vehicle. Heaney's testimony aided the jury's understanding of the

evidence and corroborated Shanora's testimony that the victim did not have a gun and that defendant fired four shots into the passenger side window, and thus, assisted in determining whether defendant was guilty of the charged crimes. The testimony was clearly based on Heaney's past experience and expertise in "crime scene investigations with specialized knowledge of ballistics and glass." Accordingly, the trial court did not abuse its discretion when it allowed Heaney to give the aforementioned challenged expert testimony. *Kumho Tire Co, Ltd, supra* at 150; *Williams (After Remand), supra* at 541. Consequently, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. MCR 6.431(B); *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood