STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 302412 Wayne Circuit Court
THOMAS GLOVER, Defendant-Appellant.	LC No. 10-008104-FC

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Defendant, Thomas Glover, appeals as of right his jury convictions of second-degree murder,[1] assault with intent to commit murder,[2] felon in possession of a firearm,[3] and possession of a firearm during the commission of a felony (felony-firearm).[4] The trial court sentenced Glover as a second habitual offender[5] to serve 46 to 75 years in prison for the second-degree murder conviction, 30 to 60 years in prison for the assault with intent to commit murder conviction, four to 7.5 years in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. FACTS

A. THE UNDERLYING EVENTS

This case arises out of the death of Adrian Brown and the shooting of Willie Shears on June 26, 2010, in Detroit, Michigan. At approximately 12:30 a.m. or 12:45 a.m., Brown; brothers, Willie and Robert Shears; and Bernard Crump arrived at a strip club called Starvin'

[1] MCL 750.317.

[2] MCL 750.83.

[3] MCL 750.224f.

[4] MCL 750.227b.

[5] MCL 769.10.

Marvin's. The four men had driven to Starvin' Marvin's in two vehicles: Robert Shears and Crump were in a black Jaguar that Crump was driving, and Willie Shears and Brown were in Brown's van. They parked the vehicles in valet parking. Robert Shears, Willie Shears, and Crump then entered the club, while Brown initially remained outside. Brown came into the club five minutes later. The men then ordered and drank a bottle of vodka. According to the testimony, the men were in the club somewhere between 20 minutes to about an hour. Brown then decided that he wanted to leave. The testimony of Willie Shears, Robert Shears, and Crump varies about what happened next.

According to Robert Shears, he and Brown walked out of the club first, exiting through the front door. Willie Shears and Crump came out just behind them. They stood and waited approximately 10 or 15 minutes for the valet to bring back Brown's van. But then someone from the valet service told them that Brown's van was not in the valet parking area. Brown then took his keys from the valet.

Robert Shears testified that he then heard five or six gunshots. After hearing the shots, Robert Shears then saw Brown fall to the ground. Robert Shears stated that at this time Willie Shears was standing near the front entrance of the club.

According to Robert Shears, after the shooting, although he did not believe that Brown was alive at that point, he called out to Crump to help him put Brown into the Jaguar. As Robert Shears was trying to get Brown into the Jaguar, another unidentified individual approached to help, so Robert Shears ran to look for Brown's van. Robert Shears found the van parked in a field on the next block. He drove to near the front entrance of the club and parked on the street. Robert Shears then found out that Willie Shears had also been shot, so he left to meet Willie Shears at the hospital. At the hospital, Robert Shears learned that Brown, who was at a different hospital, was in fact dead.

According to Willie Shears, after exiting the club, they waited for Brown's van for approximately six or seven minutes. Willie Shears then heard nine or 10 gunshots. But he did not see where the shots were coming from at that time. After the gunshots stopped, Willie Shears saw Brown fall. According to Willie Shears, Brown then asked Willie and Robert Shears to put him in the Jaguar. They rushed over to him, but Willie Shears then heard six or seven more shots, and he was shot in the right ankle. Willie Shears testified that although he did not see him firing the gun, at that point, he saw Glover standing behind the Jaguar, holding a gun. Willie Shears did not see anyone else shooting. After getting shot, Willie Shears left Brown and "hopped" back into the club. He then lay inside the front entrance.

Willie Shears initially testified that he did not see where Glover went after he was shot. However, on cross-examination, he testified that he saw Glover run to the back of the parking lot and then he heard a third series of shots. In total, over the three series of shots, Willie Shears heard approximately 20 shots.

Willie Shears testified that he lay inside the club for approximately five or six minutes before the police arrived. An ambulance took Willie Shears to Henry Ford Hospital. At the hospital, Willie Shears identified a photograph of Glover as the person who shot him.

Crump testified that when they decided to leave the club, the three men left before him because he had ordered food and he had to wait for it. Approximately five minutes later, Crump walked to the door with his food, and someone at the door told him not to go outside because there was shooting in the parking lot. Crump did not hear any shooting, so he went out the door anyway. But after Crump got outside, he heard shooting. Crump did not see where the shooting was coming from because he ducked when he heard the shots. As he was ducking, however, Crump saw Willie Shears run past him, limping on one leg as if he had been shot. According to Crump, the shooting sounded close at first and then sounded like it moved further away. When the shooting was further away, Crump looked up and saw Robert Shears holding Brown and saying that Brown had been shot.

Crump testified that Robert Shears then told him to go find the van. According to Crump, he ran around the parking lot trying to find the valet to get the key, but the van was not in the lot. So then Crump got the Jaguar, and he and Robert Shears tried to put Brown in it, but they were not strong enough, so a security guard helped them. Crump testified that Robert Shears then told him that he was going to take Willie Shears to the hospital and told Crump to take Brown. Crump drove off and took Brown to Receiving Hospital, which was the only hospital with which Crump was familiar. Crump testified that while on the way to the hospital, Brown was "breathing hard." But at the hospital, Crump learned that Brown was dead.

When asked what Brown did for a living, Robert and Willie Shears and Crump all testified that Brown sold drugs. However, they all denied that they themselves sold drugs. All three men also testified that none of them had a gun that night, and they did not see anyone in their group with a gun, including Brown.

Roderick Williams, a reserve police officer for the Highland Park Police Department testified that, at the time of trial, he worked for Starvin' Marvin's Corporation. Reserve Officer Williams was at Starvin' Marvin's on June 26, 2010, at about 1:10 a.m., to see Charles Finn, a manager at Starvin' Marvin's. Reserve Officer Williams entered the club through the front door. He and Finn then went through the back door into an alley behind the club to discuss business because it was loud inside the club. Finn testified that he was asking Reserve Officer Williams to lead the security team at Starvin' Marvin's. Both men testified that the alley was not well lit.

After approximately four to 10 minutes, Reserve Officer Williams heard shots coming from the parking lot. Reserve Officer Williams testified that he heard three or four shots at first, and then he heard another three to five shots. Reserve Officer Williams then saw a man with a gun in his hand running down the alley toward him and Finn. Reserve Officer Williams, who was in full police uniform, "yell[ed] out police." According to Reserve Officer Williams, the man paused and then Reserve Officer Williams saw a muzzle flash, so he drew his firearm, yelled, "Drop your gun," and returned fire with his .357 caliber Sig Sauer semi-automatic pistol. Reserve Officer Williams fired approximately three to five shots, from low to high. He believed that he hit the person he was shooting at because the man spun around, which happens "sometimes when you get shot[.]" The man was then was out of sight. Reserve Officer Williams testified that he did not shoot at the man again after he saw him spin around. Instead, Reserve Officer Williams and Finn retreated back into the club.

Reserve Officer Williams later identified Glover as the person he had seen running toward him. According to Reserve Officer Williams, at the time of the incident, Glover had been wearing a white T-shirt and jeans. Reserve Officer Williams had two guns on him that day; in addition to his .357, he also had a .40 caliber HKP 2000 SK semi-automatic pistol, both of which he turned over to the police.

Starvin' Marvin's manager, Charles Finn, testified that he also works security at Starvin' Marvin's. He testified that the likelihood of someone entering the club with a gun was slim because security personnel performed pat-down searches on everyone entering the club, except police officers with badges.

B. THE INVESTIGATION

Detroit Police officers David Gonzalez and Juan Serrata testified that they responded to the shooting at Starvin' Marvin's. When they arrived, Officer Gonzalez saw one victim, who appeared to be shot, lying in the doorway of the club. That victim was already being treated by emergency medical service workers. He saw another victim, who also appeared to be shot, in the back of the parking lot. Officer Gonzales observed several spent shell casings on the ground in the rear of the parking lot and on the side of the building on the west side of the parking lot. He also saw blood in the rear of the parking lot where that victim was lying. He also observed blood on a handgun that was lying on the other side of a fence in a yard next to the parking lot. Officer Gonzalez took Reserve Officer Williams' handguns as evidence.

Officer Serrata testified that he had contact with Glover in the parking lot behind the club while a medical unit was tending to him. Officer Serrata asked Glover what happened, and Glover said that he heard some shots, felt pain in his right leg, and went down to the ground. Glover said that he did not know where the shots came from. Officer Serrata also learned from a security guard that another victim that was shot had already been taken to an unknown hospital. Officer Serrata saw another person, who had been shot in the ankle, lying in the front doorway of the club. He placed into evidence a vehicle at the scene that had a bullet hole in the back end. Glover was on the ground near that vehicle, and there was blood on the ground.

Detroit Police Officer Eugene Fitzhugh testified that he was called to Starvin' Marvin's to process the scene of a homicide. Officer Fitzhugh collected evidence from the parking lot, from the alley behind the club, and from the fenced yard beyond the alley. He found two fired bullets near the entrance of the club and 13 .357 shell casings throughout the parking lot, alley, and yard. He also found a .357 caliber Sig Sauer semi-automatic pistol with blood on it. He testified that the pistol's slide was all the way to the rear. It was found nearby in the driveway of 4124 Clippert. Officer Fitzhugh saw a vehicle with a bullet impact to the rear and blood below the rear of the vehicle. He also collected blood from the foyer of the club.

Officer Gonzalez and Officer Fitzhugh testified that revolvers do not eject shell casings when they are fired. Conversely, Reserve Officer Williams, Officer Gonzalez, and Officer Fitzhugh all testified that shells are ejected when a semi-automatic gun is fired. Officer Fitzhugh testified that if a fired bullet missed its target it could go anywhere and that casings, when ejected from a semi-automatic weapon, do not necessarily fall straight to the ground. Therefore, according to Officer Fitzhugh, where the casing is found does not necessarily mean that is where

the shot was fired. But he acknowledged that the ejection of shells from a semi-automatic weapon does "leave some sort of a trail[.]"

Detroit Police Officer Adam Szklarski testified that he was sent to recover property from Henry Ford Hospital. The property turned out to be a bullet. The parties stipulated that the bullet that Officer Szklarski recovered was the bullet taken from Glover's ankle.

Detroit Police Officer Gerald Williams, the officer-in-charge of this case, retrieved a bullet that the medical examiner's office recovered from Brown's body. He sent the bullet and the other evidence in this case to the Michigan State Police lab. He testified that he learned that multiple cell phones and approximately $4,300 were also recovered from Brown.

Brian Schloff, a forensic scientist at the Michigan State Police forensic crime lab, was qualified at trial as an expert in DNA analysis. Schloff testified that he received five pieces of evidence in this case—three possible bloodstains from the foyer, the alley, and a Sig Sauer; a blood sample from Brown; and a buccal swab from Glover. He compared the DNA profiles obtained from the evidence and concluded that the bloodstain in the foyer was not from Brown or Glover, but that the bloodstains from the Sig Sauer and the alley matched Glover's DNA.

Dr. Anita Lal, of the Wayne County Medical Examiner's Office, was qualified at trial as an expert in forensic pathology.[6] She testified that there was a gunshot entrance wound to Brown's left abdomen. But there was no exit wound. Dr. Lal testified that the manner of death was homicide, and the cause of death was the gunshot wound to the abdomen.

Michigan State Police Sergeant Reinhard Pope was qualified at trial as an expert in firearms and tool mark identification. In this case, Sergeant Pope initially received two firearms, 13 casings, and three fired bullets. Several days later, he received an additional firearm. The third firearm was a .357 caliber Sig Sauer semi-automatic pistol. The parties stipulated that this gun was taken from the yard or alley near Starvin' Marvin's and was associated with Glover. Sergeant Pope testified that six of the casings came from one firearm, which the parties stipulated was Reserve Officer Williams' weapon. Sergeant Pope testified that the other seven casings came from the Sig Sauer associated with Glover. He also identified one of the fired bullets as having been fired from Reserve Officer Williams' weapon. (The evidence tag number for this bullet—E38015904—was the same evidence tag number for the bullet recovered from Glover—E38015904.) Sergeant Pope identified one of the other bullets, which was the one removed from Brown's body, as having been fired from the firearm associated with Glover. Sergeant Pope eliminated the remaining bullet, which was damaged, from having been fired from Reserve Officer Williams' firearm, but he could not identify or eliminate it as having been fired from the firearm associated with Glover.

[6] Dr. Lal did not perform the autopsy in this case. However, Dr. John Scott Somerset, who did perform the autopsy, was not available at trial, and Dr. Lal reviewed Dr. Somerset's work.

C. TRIAL

Glover moved for a directed verdict, arguing there was no premeditation or deliberation. Glover also asked that the first-degree murder charge be reduced to second-degree murder. Glover further argued that, with regard to the charge of assault with intent to murder Willie Shears, there was a wound to the ankle and no indication that he was shot anywhere else. The prosecution argued that, with regard to Willie Shears, the doctrine of transferred intent applied and that the evidence showed that Glover shot Brown. The trial court denied Glover's motion, finding sufficient evidence for the case to proceed to the jury and that the concept of transferred intent applied.

Glover testified that he lives on the east side of Detroit, and used to buy marijuana from Brown. He purchased marijuana from Brown for approximately three to five months in 2008, but then lost track of Brown. However, in the spring of 2010, Glover saw Brown at a strip club on the east side of Detroit. Glover asked Brown about buying marijuana. But, according to Glover, Brown got mad, and the men got into an argument. Glover explained that when he approached him, Brown acted like he did not recognize Glover. Glover tried to explain who he was and that he used to purchase marijuana from him, but Brown "blew up." Brown called him "the police" and said that Glover was a snitch. Brown told Glover to leave "if [he] didn't want any problems." Glover asked Brown why he was treating him like a "bitch," and Brown said because he was one. Glover told Brown that he was "messed up." After that, one of the men with Brown flashed a gun at Glover and Brown told Glover to not "ever end up in the same place with him ever again." At that point, Glover left.

After asking other people about Brown's reputation, Glover came to the conclusion that Brown "was going to be a problem" and someone that Glover needed to "watch[] out for." As a result, Glover started carrying a gun, which he had purchased off the street in 2009, when he went out on the weekends.

On the evening of the shooting, at approximately 11:30 p.m. or 12:00 a.m., Glover went to Starvin' Marvin's, which is on the west side of Detroit. Glover was avoiding the clubs on the east side. Glover went to the club alone and was carrying his gun. Glover testified that he was not patted down when he entered the club. After approximately an hour or an hour and a half, Glover noticed Brown staring at him, pointing, and shaking his head. Brown did not say anything, however, he just walked away. Glover then decided to leave the club. He intended to go through the parking lot, to the alley, and then to his car.

After leaving the club, as Glover was walking toward the back of the parking lot, he felt a shot in his back, on his left shoulder near his neck. Glover pulled his gun, saw two or three people shooting at him, and started running and shooting over his back. Glover testified that one the people shooting at him was Brown. Glover testified that he shot back because he was scared and, as he was shooting, he was trying to get away. Glover ran to try to hide behind a truck located toward the back of the alley. As he was running, Glover was shot three more times. Glover testified that he got shot in the leg, the entrance wound was on the back of his leg, and the exit wound was on the front of his leg. Glover was also shot in the arm and hip. With regard to his hip, Glover testified that the entrance wound was on the back and the exit wound was on the front. According to Glover, after he fell, he shot two or three more times toward the front of the

parking lot from which the shots at him were coming. Glover did not hear any more shots after that, so he tried to walk, but could not. He then tossed his gun over the fence, sat down, and passed out.

After the police arrived, Glover testified that he told them that he "got shot up." Glover testified that he did not point or shoot at anyone in a police uniform and that he did not fire shots toward the back of the building or in the alley. He only shot toward the front, where the people were that were shooting at him, and he did not intend to kill anyone.

On cross-examination, Glover testified that he determined the entrance and exit wounds on his leg on his own. Glover confirmed that, in fact, his medical records did not indicate the exit and entrance sites of the wound, but only stated "through and through or gunshot wound." Glover also testified that, with regard to the shot to his back, there was also a corresponding wound in the front. Glover claimed that the front wound was where doctors removed the bullet. But he admitted that he was not awake when they took it out, and he confirmed that his medical records did not denote an entrance and exit wound. Also on cross-examination, Glover denied that he knew Brown would be at Starvin' Marvin's that night or that he paid the valet to move Brown's van.

The jury found Glover guilty of second-degree murder, assault with intent to commit murder with regard to Willie Shears, felon in possession of a firearm, and felony-firearm. The jury acquitted Glover of first-degree murder and assault with intent to commit murder with regard to Reserve Officer Williams. Glover now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Glover argues that there was insufficient evidence to convict him of second-degree murder and assault with intent to commit murder. "In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt."[7] "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime."[8]

B. SECOND-DEGREE MURDER

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[9] "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful

[7] *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

[8] *Id.*

[9] *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[10]

Here, the evidence that Brown died as a result of the gunshot wound caused by Glover satisfies the first two elements of second degree murder. The bullet removed from Brown's body matched the gun associated with Glover, and Willie Shears testified that he saw Glover holding a gun. With regard to the third element, there was also evidence that Glover acted with malice. "[M]alice can be inferred from the use of a deadly weapon."[11] And Glover admitted to shooting a gun.

Glover, however, argues that the prosecution failed to prove beyond a reasonable doubt that he acted without justification or excuse. More specifically, he argues that the evidence showed that he acted in self-defense. "'In Michigan, the 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.'"[12] "'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'"[13]

There was sufficient evidence that Glover did not honestly and reasonably believe that his life was in imminent danger or that there was a threat of serious bodily harm. Although Glover testified that he saw Brown and one or two other people shooting at him, Robert Shears, Willie Shears, and Crump all testified that none of them, including Brown, carried a gun. And contrary to Glover's suggestion, the facts that Brown sold drugs, had multiple cellular telephones, and had a significant amount of cash do not necessarily mean that he also had a gun. Similarly, the mere fact that Crump and Robert Shears left the scene does not in and of itself imply that they were armed and were seeking to dispose of their weapons.

Moreover, Willie Shears testified that he heard two series of shots and a third series when Glover ran to the back of the parking lot. Reserve Officer Williams similarly heard two series of shots before he saw Glover run toward the alley with a gun and more shooting occurred. Sergeant Reinhard Pope examined three guns, Reserve Officer Williams' two guns and the gun associated with Glover. All of the found casings were identified as having come from either Reserve Officer Williams' gun or the gun associated with Glover. One bullet was excluded as being fired from Reserve Officer Williams' gun, but could not be excluded or identified as having been fired from Glover's gun. Glover suggests that the testimony of many of the prosecution's witnesses was not credible. However, "[t]he credibility of witnesses and the

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[10] *Id.* at 464.

[11] *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

[12] *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009), quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

[13] *Id.*, quoting *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor."[14]

Glover also claims that he was shot from behind and the prosecution failed to prove otherwise. However, although Glover did testify that he was shot from behind, he admitted on cross-examination that his medical records did not confirm this assertion and that it was his own conclusion or opinion. Reserve Officer Williams' testimony suggested that he shot Glover from the front and a bullet from Reserve Officer Williams' gun was removed from Glover. Thus, a rational trier of fact could have found that Glover was not shot from behind as he was running away, but rather that Reserve Officer Williams shot him from the front.

Accordingly, we conclude that a rational trier of fact could have found that Glover was not justified in killing Brown and that there was sufficient evidence to convict him of second-degree murder.

C. ASSAULT WITH INTENT TO COMMIT MURDER

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder."[15] "The intentional discharge of a firearm at someone within range is an assault[.]"[16] Moreover, this Court has stated that "intent may be transferred[.]"[17] "Under the doctrine of transferred intent, where A aims at B, intending to kill him, but misses and hits C, killing her, A is held guilty of the murder of C."[18] For example, in *People v Plummer*, this Court found that where the defendant fired a shot at a man with the intent to kill him and instead shot a bystander in the leg, the intent to kill was transferred.[19]

There was evidence that Glover assaulted Willie Shears. Willie Shears was shot in the leg, he testified that he saw Glover holding a gun at the scene of the shooting, and, while in the hospital, he identified a picture of Glover as the person that was shooting.

Glover, however, suggests that he did not have the intent to kill because he fired shots in self-defense and the shot that hit Willie Shears was in the ankle, which would not be fatal. For the reasons that we discussed above, a rational trier of fact could have found beyond a reasonable doubt that Glover did not act in self-defense. Thus, a rational trier of fact could also have found that Glover intended to kill Brown and that the intent transferred to Willie Shears.

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[14] *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

[15] *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (internal quotation marks and citation omitted).

[16] *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

[17] *Id.*

[18] *People v Plummer*, 229 Mich App 293, 304 n 2; 581 NW2d 753 (1998).

[19] *Id.* at 305-306.

Accordingly, we conclude that a rational trier of fact could have found that there was sufficient evidence to convict Glover of assault with intent to commit murder with regard to Willie Shears.

III. CRUEL AND UNUSUAL PUNISHMENT

A. STANDARD OF REVIEW

Glover argues that his sentences for second-degree murder and assault with intent to commit murder are disproportionate and, thus, constitute cruel and/or unusual punishment.[20]

Glover failed to preserve this issue by failing to raise it during sentencing.[21] But MCL 769.34(10), which provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, "is not applicable to claims of constitutional error."[22] Nevertheless, even when reviewing claims of constitutional error, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.'"[23]

B. ANALYSIS

Glover acknowledges that the trial court sentenced him within the guidelines range. According to the Sentencing Information Report, Glover's guideline range was 270 to 562 months in prison and Glover's minimum sentence was 552 months in prison. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment."[24] "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the

[20] US Const, Am VIII, and Const 1963, art 1, § 16. "The Michigan constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States constitution prohibits cruel *and* unusual punishment, US Const, Am VIII. If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.'" *People v Benton*, __ Mich App __; __ NW2d __ (Docket No. 296721, issued September 22, 2011) (slip op at 6-7) (citation omitted; emphasis in original).

[21] See *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002).

[22] *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

[23] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (internal quotation marks and citation omitted).

[24] *Powell*, 278 Mich App at 323 (citations omitted).

presumptively proportionate sentence disproportionate."[25] Here, Glover "offers no unusual circumstances that would render his presumptively proportionate sentence disproportionate."[26]

Glover also suggests that, similar to the defendant in *People v Powell*, his sentences constitute cruel and/or unusual punishment because his conviction was based on insufficient evidence.[27] However, as the *Powell* Court noted, if the evidence was not sufficient, "the remedy would be to vacate his conviction."[28] And as we discussed above, there was sufficient evidence to support Glover's convictions. Thus, Glover has not overcome the presumption of proportionality and has not established a constitutional violation.[29]

IV. STANDARD 4 BRIEF

Glover raises two additional issues—prosecutorial misconduct and ineffective assistance of counsel—in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which have merit.

A. PROSECUTORIAL MISCONDUCT

1. STANDARD OF REVIEW

Glover argues that the prosecutor mischaracterized witness testimony and his medical records. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction."[30] "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice."[31] Glover did not object or request a curative instruction. Therefore, the issue of prosecutorial misconduct is unpreserved.

This Court reviews unpreserved issues "for plain error affecting substantial rights."[32] Again, under the plain error standard, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or

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[25] *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

[26] *Id.*

[27] See *Powell*, 278 Mich App, 318, 323; 750 NW2d 607 (2008).

[28] *Id.*

[29] See *id.* at 324.

[30] *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

[31] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[32] *Bennett*, 290 Mich App at 475.

public reputation of judicial proceedings."[33] Moreover, this Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect."[34]

2. LEGAL STANDARDS

> When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Further, the propriety of a prosecutor's remarks will depend upon the particular facts of each case. In addition, a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. Furthermore, otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense. Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence.[35]

3. MISCHARACTERIZATION OF THE MEDICAL RECORDS

In support of his argument that the prosecutor mischaracterized his medical records, Glover attaches as appendices to his Standard 4 Brief what appear to be parts of his medical records. However, it does not appear from the lower court record that Glover's medical records were admitted as evidence at trial. Therefore, the prosecutor could not have mischaracterized "evidence" in referring to Glover's medical records, which were not evidence. "[I]t is impermissible to expand the record on appeal."[36]

4. MISCHARACTERIZATION OF THE TESTIMONY

Glover claims the prosecutor improperly suggested that the wounds to his front were the cause of the wounds to his back and, thus, that Glover did not act in self-defense. Glover argues that the testimony and evidence clearly show that he was shot at least twice in the back. To this end, Glover cites his trial counsel's opening statement and his own testimony regarding his wounds. Glover testified that he was shot four times. He testified at trial that he was shot in the back, the back of the leg, and the back of the hip. Glover also testified that he was shot in the arm. Further, Glover testified that he had a scar on his chest where he was operated on. But on cross-examination, Glover confirmed that his medical records did not denote entrance and exit wounds and that he made the determinations on his own.

Based on our review of the transcripts, the prosecutor did not misstate Glover's testimony. The prosecutor merely asked Glover questions about his testimony and whether

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[33] *Callon*, 256 Mich App at 329.

[34] *Id.* at 329-330.

[35] *Id.* at 330 (citations omitted).

[36] *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Glover's testimony was consistent with his own medical records. Even if the assumptions made in the prosecutor's questions were incorrect, Glover had the opportunity to answer the questions and correct any error. Glover agreed that his medical records did not make any indication of entrance and exit locations. Moreover, the jury was instructed that the lawyers' questions were not evidence. "[J]urors are presumed to follow their instructions."[37] The jury was then free to accept or reject Glover's testimony.

Accordingly, we conclude that the prosecutor's conduct did not amount to plain error affecting Glover's substantial rights.

5. CUMULATIVE ERROR

Glover also suggests that the cumulative effect of these alleged errors warrants reversal. "The cumulative effect of several minor errors may warrant reversal where individual errors would not."[38] "However, in order to reverse on the basis of cumulative error, 'the effect of the errors must [be] seriously prejudicial in order to warrant a finding that [the] defendant was denied a fair trial.'"[39] Because there were no errors unfairly prejudicial to Glover, "[t]here are no errors that can aggregate to deny [him] a fair trial."[40]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Glover argues that his trial counsel was ineffective for failing to investigate, failing to present evidence and witnesses to support the theory of self-defense, failing to introduce Brown's criminal history, and failing to object to the instances of prosecutorial misconduct. "In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing."[41] Because Glover did not make a motion in the trial court for a new trial or evidentiary hearing, these claims are unpreserved, and this Court's review is "limited to errors apparent on the record."[42]

2. LEGAL STANDARDS

In order to establish a claim of ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the

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[37] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[38] *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

[39] *Id.* (citation omitted).

[40] See *id.*

[41] *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658; 620 NW2d 19 (2000).

[42] *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

result would have been different and the result that did occur was fundamentally unfair or unreliable."[43] "'Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.'"[44]

3. FAILURE TO INVESTIGATE

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel."[45] However, here, there is no evidence in the record that trial counsel failed to undertake an investigation. Indeed, Glover's argument that a private investigator went to the scene suggests that trial counsel did investigate.

4. FAILURE TO PRESENT EVIDENCE AND WITNESSES TO SUPPORT SELF-DEFENSE THEORY

What evidence to present and whether to call witnesses "are presumed to be matters of trial strategy."[46] "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'"[47] Trial counsel's decision to not call any other witnesses or present other evidence is presumed to be sound trial strategy.[48]

Here, Glover has failed to overcome the presumption of sound trial strategy. Glover was still able to present his defense of self-defense. Thus, Glover has failed to show that trial "counsel's performance fell below an objective standard of reasonableness."[49]

Moreover, Glover "has merely speculated that" any witnesses could have provided favorable testimony.[50] While there may have been witnesses at the scene, there is no indication that their testimony would have been favorable to Glover. Glover has failed to show that the presentation of such witnesses would have affected the outcome.

5. FAILURE TO INTRODUCE BROWN'S CRIMINAL HISTORY

Glover has also failed to establish a claim of ineffective assistance of counsel regarding trial counsel's failure to present Brown's criminal record. Glover contends that Brown was

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[43] *Id*.

[44] *Id.*, quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[45] *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

[46] *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

[47] *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted).

[48] See *Horn*, 279 Mich App at 39.

[49] *Seals*, 285 Mich App at 17.

[50] *Payne*, 285 Mich App at 190.

convicted of a felony for firearm possession and was also found not guilty of murder. This, information, however, is not apparent from the record.

Regardless, even if Brown had a criminal record, Glover has failed to explain under what theory Brown's firearm conviction and acquittal of murder would have been admissible. Glover has also failed to show that the presentation of Brown's criminal history would have affected the outcome of the case. There was already testimony that Brown sold marijuana, and Willie Shears testified that Brown had gone to jail for "weed." Even if the jury had known that Brown had a previous firearm conviction, there was no evidence that Brown was armed that night. Therefore, there is no reasonable probability that, had the jury known of this conviction or that Brown had been acquitted of murder, the outcome of the trial would have been different.

6. FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT

Because we have concluded that no prosecutorial misconduct occurred, trial counsel's failure to object did not fall "below an objective standard of reasonableness."[51] "[C]ounsel does not render ineffective assistance by failing to raise futile objections."[52] There is also no reasonable probability that, had counsel objected, the result of the trial would have been different.

We affirm.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[51] *Seals*, 285 Mich App at 17.

[52] *Ackerman*, 257 Mich App at 455.