STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2012
v	No. 304391 Macomb Circuit Court
JOSEPH THOMAS EPLETT, Defendant-Appellant.	LC No. 2009-000372-FH

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Following a three-day trial, a jury convicted defendant of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and acquitted him of second-degree murder, MCL 750.317. Defendant was sentenced to two years' imprisonment and he appeals as of right. For the reasons set forth in this opinion, we affirm.

I. FACTS

This case arises from an incident that occurred early in the morning on November 1, 2008, in Warren, Michigan. At that time, defendant lived in an apartment with his mother. At about 3:00 a.m., defendant was in his bedroom and he heard the apartment door open. Defendant assumed it was his mother entering the apartment. A short time later, defendant heard a male voice. Defendant opened his bedroom door and observed Paul Gorinski sitting in the living room of the apartment. Defendant closed his door and went back into his room.

A short time later, defendant heard loud noises and he told his mother and Gorinski that they would have to leave if they would not be quiet. At that point, defendant and Gorinski started arguing. According to defendant, Gorinski shoved him and then punched him in the face. Defendant went to his bedroom and got a handgun. At the doorway of his room, defendant "racked the gun." He wanted Gorinski to leave the apartment. Gorinski began walking from the living room toward defendant's bedroom. Defendant told Gorinski that he had a gun; however, Gorinski reached defendant and grabbed him. Gorinski pinned defendant's arms and forced him backwards. Gorinski punched defendant several times and tried to take the gun. Defendant fired the gun once, but Gorinski did not respond and continued to fight with defendant. A few seconds after the first shot, defendant fired the gun a second time. Gorinski fell to the floor and later died of a gunshot wound to the abdomen. Defendant immediately left the apartment and drove away in his vehicle.

On the following day, defendant appeared at the Warren Police Department and turned himself in to police. Detective Randy Costanzo conducted an unrecorded interview with defendant and defendant agreed to provide Costanzo with both a written statement and a recorded audio statement. At trial, Costanzo testified regarding information he received from defendant during the unrecorded interview and both defendant's written and audio statements were admitted into evidence.

Defendant was charged with open murder, MCL 750.316, and felony-firearm. After the preliminary examination, the prosecutor asked the district court to dismiss the open murder charge and bind defendant over on charges of second-degree murder and felony-firearm. The district court denied the prosecution's request, and bound defendant over on manslaughter, MCL 750.321, and felony-firearm. On May 4, 2009, the prosecutor appealed the district court's order to the circuit court. The circuit court reversed the district court and bound defendant over on charges of second-degree murder and felony-firearm. This Court granted defendant leave to appeal[1] and affirmed the circuit court.[2] The case proceeded to trial and the jury ultimately acquitted defendant of second-degree murder and convicted him of felony-firearm. This appeal ensued.

II. ANALYSIS

Defendant contends that the prosecutor committed several instances of misconduct. Defendant failed to preserve this issue for review because he did not raise contemporaneous objections to the alleged instances of misconduct. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "Generally, a claim of prosecutorial misconduct is a constitutional issue, that is reviewed de novo, but a trial court's factual findings are reviewed for clear error." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Unpreserved instances of misconduct are reviewed for plain error affecting the defendant's substantial rights. *Id.*

Defendant first contends that the prosecutor elicited "unreliable" testimony from Detective Costanzo both during the preliminary examination and during trial. Issues of prosecutorial misconduct are examined on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *Brown*, 279 Mich App at 134.

Defendant claims that Costanzo's testimony regarding defendant's unrecorded statement was grossly inconsistent with defendant's recorded statements. However, defendant's two recorded statements were admitted as evidence at trial and submitted to the jury. Therefore, any inconsistencies between Costanzo's testimony and defendant's recorded interviews were presented to the jury. Additionally, defendant's trial counsel cross-examined Costanzo, and

---

[1] *People v Eplett*, unpublished order of the Court of Appeals, entered November 17, 2009 (Docket No. 293255).

[2] *People v Eplett*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2010 (Docket No. 293255).

impeached him with the inconsistencies between his trial testimony and defendant's recorded statements. Moreover, there is nothing in the record to suggest that the assistant prosecutor acted in bad-faith when he examined Costanzo on direct, and nothing supports that the prosecutor intentionally tried to misrepresent the statements defendant made to police. See *Noble*, 238 Mich App at 660-661 ("prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence"). For these reasons, the prosecutor's direct examination of Costanzo did not constitute prosecutorial misconduct.

Similarly, with respect to Costanzo's testimony during the preliminary examination, defendant has failed to show that the assistant prosecutor acted in bad-faith during the examination, and the testimony was not introduced into evidence at trial. Accordingly, defendant cannot show that he was denied a fair and impartial trial or that the prosecutor committed an error that resulted in a miscarriage of justice. *Brown*, 279 Mich App at 134; *People v McGee*, 258 Mich App 683, 689-699; 672 NW2d 191 (2003) (an error in a preliminary examination does not merit reversal unless the error resulted in a miscarriage of justice).

Next, defendant makes a bald assertion that the prosecutor committed misconduct when he cited portions of Costanzo's direct testimony in his brief on appeal, while ignoring portions of Costanzo's cross-examination testimony. Defendant fails to cite specifically where the prosecutor cited the challenged testimony, fails to articulate what aspect of Costanzo's testimony he is referring to, and otherwise fails to provide any meaningful analysis in support of his argument. As such, to the extent defendant contends this amounted to a distinct instance of prosecutorial misconduct, he has abandoned that aspect of his argument for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

Next, defendant argues that the prosecutor committed misconduct during his rebuttal argument when he quoted a biblical passage. The prosecutor concluded his rebuttal argument as follows:

> Paul Gorinski was murdered by [defendant.] And, before you retire to that jury room and you take the cloak of innocence off that man and find him guilty, I have one more thing. Proverbs, Chapter 28, Verse 1: "The wicked flee when no man pursueth, but the righteous are bold as a lion." Thank you for your time, and I'm asking for a conviction on second-degree murder and felony firearm.

A prosecutor may not "appeal to the jury's religious duties in calling for a conviction." *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). However, a prosecutor is not restricted from using biblical passages for purposes of illustration, as long as the passage does not misstate the facts or the law and is not used in a "prejudicial manner to inflame the passions of the jury." *Id*. Here, the assistant prosecutor used the same language from *Mischley*.

In this case, the prosecutor's statement did not misstate the facts or the law and it was not used to inflame the passions of the jury to secure a conviction on religious grounds. Rather, the prosecutor used the passage as an illustration. Specifically, the defense theory at trial was that

defendant acted in self-defense when he shot and killed Gorinski during a physical altercation. The prosecutor used the biblical passage to illustrate that an innocent man would have no reason to flee after having killed someone in self-defense. The fact that defendant fled the apartment after the incident made it more likely that he was guilty. Therefore, the prosecutor did not commit misconduct or deprive defendant of a fair and impartial trial when he referenced the biblical passage.

Next, defendant argues that there was insufficient evidence to support his conviction of felony-firearm. We review a challenge to the sufficiency of the evidence de novo. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). We review the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

To establish felony-firearm, a prosecutor must prove that defendant possessed a firearm during the commission of a felony or an attempt to commit a felony. *People v Johnson*, 293 Mich App 79, 82; 808 NW2d 815 (2011). However, a defendant need not be convicted of the underlying felony or the attempt to commit a felony in order to sustain a conviction for felony-firearm. *People v Lewis*, 415 Mich 443, 453-455; 330 NW2d 16 (1982). "It would not be consistent with the legislative purpose in enacting the felony-firearm statute to conclude that it intended that a felony-firearm conviction be set aside and no punishment at all be imposed in a case where the jury, extending leniency or compromising, failed to convict of the underlying felony, but did convict of felony-firearm." *Id*. at 454.

The underlying felony in this case was second-degree murder. To establish second-degree murder, a prosecutor must prove: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (quotation omitted). "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 willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. (quotation omitted). "Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. (quotations omitted).

Defendant claims that the prosecutor failed to prove beyond a reasonable doubt that defendant did not act in self-defense. The Michigan Self-Defense Act, MCL 780.971 *et seq*., provides in relevant part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if. . .
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972.]

Once a defendant raises self-defense and presents evidence from which a jury could conclude that the elements of the defense exist, the prosecutor bears the burden of disproving self-defense beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010).

In this case, we find that when the evidence is viewed in a light most favorable to the prosecution, a rational jury could have concluded beyond a reasonable doubt that defendant did not act in self-defense, but rather used a firearm to commit second-degree murder. *Kissner*, 292 Mich App at 533-534. Here, defendant's mother brought Gorinski to the apartment she shared with defendant. Defendant was angry at his mother because she and the victim were being loud. Defendant got into a verbal argument with Gorinski that quickly accelerated into a physical altercation where Gorinski punched defendant in the face. Defendant got a loaded gun from his bedroom and then returned to confront Gorinski. Defendant racked the gun and informed Gorinski that he had a gun. When Gorinski attempted to take the gun from defendant, defendant purposefully fired the gun two times at Gorinski. After Gorinski collapsed, defendant fled the scene. On this evidence, a juror could have concluded that defendant did not act in self-defense because he could not have honestly and reasonably believed deadly force was necessary. *Dupree*, 486 Mich at 709. Although the victim punched defendant in the face, tried to take the gun, and was bigger than defendant, the victim was not armed with a weapon at the time of the incident. Defendant escalated the violence by retrieving a loaded gun from his room in response to the physical altercation and by returning to reinitiate the physical altercation. This same evidence, combined with the fact that defendant shot Gorinski two times in close proximity, would allow a rational juror to conclude that defendant acted with malice when he killed Gorinski. *Roper*, 286 Mich App at 84.

In sum, there was sufficient evidence to allow a rational jury to convict defendant of felony-firearm beyond a reasonable doubt because the jury could have concluded that defendant used a firearm to commit second-degree murder. *Johnson*, 293 Mich App at 83; *Roper*, 286 Mich App at 84. As noted above, the jury's acquittal on the underlying second-degree murder charge does not undermine its finding with respect to the felony-firearm conviction. *Lewis*, 415 Mich at 453-455.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello