STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 305478 Oakland Circuit Court
DONTE CHRISTOPHER MOSLEY, Defendant-Appellant.	LC No. 2010-234411-FC

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

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon, MCL 750.227, and receiving or concealing a stolen firearm, MCL 750.535b. The trial court sentenced defendant to 5 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, two years' imprisonment for the felony-firearm conviction, three to five years' imprisonment for the carrying a concealed weapon conviction, and 3 to 10 years' imprisonment for the receiving or concealing a stolen firearm conviction. Defendant appeals as of right. We affirm.

I. FACTS

On September 28, 2010, the victim, Terrance Rodney Jackson, Jr., returned to his home in Southfield, Michigan, and discovered that his house had been broken into and several items were missing. Among the missing items were two pairs of Louis Vuitton sneakers and four pairs of Prada sneakers in various colors. Terrance informed his brother, Brian Jackson, that his house had been broken into and of the items that were stolen.

The next day, September 29, 2010, Brian saw an individual wearing Terrance's green Prada shoes. The individual indicated that he had other shoes for sale and his description of the other shoes matched the shoes taken from Terrance. A meeting was arranged to purchase the items back at the Academy of Southfield. Terrance, Brian, and two of their friends met with the individual wearing Terrance's green Prada shoes and defendant in the parking lot. After realizing the individuals had his property, Terrance went toward the individual wearing his green Prada shoes to grab him. Although it is disputed who drew his weapon first and at whom defendant was aiming, it is undisputed that defendant fired the first shot and the shot hit Terrance

while Terrance's arms were up. The bullet entered Terrance's wrist and exited the top of his hand. Defendant fired several more shots. Brian also drew a gun and fired multiple shots. Terrance was the only individual struck by a bullet.

On these essential facts, defendant was convicted as noted above. Defendant's appeal is limited to three errors, though none go to the sufficiency of the evidence supporting his convictions. We turn to these issues now.

II. ALLEGED PROSECUTORIAL MISCONDUCT

Defendant first contends that reversal is warranted because certain comments by the prosecutor during his closing argument constituted prosecutorial misconduct.

"We generally review de novo claims of prosecutorial misconduct on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial." *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). Where the prosecutorial statements are "not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant objected, but did not request a curative instruction. Therefore, we review for plain error. See *id.*

Defendant argues that the prosecutor impermissibly shifted the burden of proof by demanding defendant explain damaging evidence, impermissibly commented on defendant's failure to call a witness, and impermissibly commented on what an absent witness would have testified.

> A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. [*Fyda*, 288 Mich App at 463-464 (footnotes with citations omitted).]

However, "[w]hile the prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). In *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), the Michigan Supreme Court stated:

> [P]rosecutorial comment that infringes on a defendant's right not to testify may constitute error. However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [Footnote omitted.]

The Court also stated, "if the prosecutor's comments do not burden a defendant's right not to testify, commenting on a defendant's failure to call a witness does not shift the burden of proof." *Id.* at 112. The *Fields* Court cited *People v Shannon*, 88 Mich App 138, 145; 276 NW2d 546 (1979), which defendant cites on appeal, stating:

> These published opinions of the Court of Appeals have consistently held that when a defendant advances an alternate theory or alibi, "the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in defendant's case" and not "improperly shifting the burden of proof to the defendant." [*Fields*, 450 Mich at 112 (citation omitted).]

Viewing the prosecutor's statements in context, see *Fyda*, 288 Mich App at 460, we find no misconduct by the prosecutor. During defense counsel's closing argument, he stated, "Brian sees this guy walking down the street, Gary Guyton, *who none of us see here in this courtroom*, who's [sic] got stolen property but he never gets charged with anything." (Emphasis added.) Defense counsel also stated, "Another part of that instruction says you're going to make your decision about whether there's probable or reasonable doubt based on the evidence as presented during the trial or the lack of evidence. Well, we have a little lack of evidence that I want you to think about." Defense counsel argued that defendant "acted in self-defense." Defense counsel further stated, "I can think of one other thing, too, when we talk about lack of evidence. *Where in this whole mess is Gary Guyton?*" (Emphasis added.) In rebuttal, the prosecutor stated:

> Now, I want to say something about courts and subpoena power. Defense counsel has the exact same right to call witnesses as the People of the State of Michigan. He has the exact same subpoena power and he knows that, if he can't find them, we'll bring them in for him. Who's the defendant's best friend? Gary Guyton. Defendant didn't call him. Ask yourselves why -- that's his friend.

Defense counsel objected, stating that "[t]he defense does not have the burden of proof and that should not be shifted to the defense now." The prosecutor replied, "we never did shift that," and the trial court stated, "so noted."

Defense counsel's statements suggested there was a lack of evidence based, in part, on the prosecutor's failure to call Guyton as a witness. Defendant testified at trial and put forth the theory of self-defense, which defense counsel also argued during closing argument. The prosecutor did not imply that defendant had to prove something or ask defendant to explain any damaging evidence. See *Fyda*, 288 Mich App at 463-464. The prosecutor merely commented on the validity of defendant's alternate theory and defendant's failure to produce a corroborating witness. See *Fields*, 450 Mich at 112, 115. Therefore, the prosecutor's comments did not shift the burden of proof. See *id.* Also, because defendant testified at trial, the prosecutor's comment on defendant's failure to call Guyton as a witness did not shift the burden of proof. See *id.* at 112. Moreover, "the prosecutor's comments in this case were a 'fair response' to defendant's argument[.]" *Id.* at 111. Therefore, we find no error. See *Unger*, 278 Mich App at 235.

Further, even if there was error, the trial court instructed the jury that the prosecutor was required to prove each element of the crime beyond a reasonable doubt, defendant was not required to prove his innocence or do anything, and the lawyers' statements and arguments are

not evidence. "We must presume that the jury followed these instructions." *Fyda*, 288 Mich App at 465 (noting that the trial court gave similar instructions to the jury in finding that the prosecutor's comments did not shift the burden of proof). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements . . . ." *Unger*, 278 Mich App at 235.[1]

III. ALLEGED ERROR IN JUDGMENT OF SENTENCE

Next, defendant contends that the judgment of sentence must be corrected and sent to the Department of Corrections because it incorrectly indicates that his sentences are to be served consecutively to each other. Defendant failed to raise this issue below, so our review is for plain error affecting substantial rights. See *People v Strickland*, 293 Mich App 393, 401; 810 NW2d 660 (2011).

Defendant argues that paragraph eight on page one of the judgment of sentence incorrectly provides that the sentences are to be served consecutively to each other. He argues that only the sentence for the assault with intent to do great bodily harm less than murder conviction is consecutive to the sentence for the felony-firearm conviction. According to defendant, the sentence for the carrying a concealed weapon conviction is concurrent to the sentence for the felony-firearm conviction.

However, paragraph 11 on page two of the judgment of sentence correctly reflects the sentences as described by defendant. It provides, in part: "CT III, VI & VII ARE TO BE SERVED CONCURRENT TO EACH OTHER; CT II IS CONSECUTIVE TO CT III." Therefore, the sentences for the felony-firearm (count three), carrying a concealed weapon (count six), and receiving or concealing a stolen firearm (count seven) convictions are concurrent to each other, and the sentence for the assault with intent to do great bodily harm less than murder (count two) conviction is consecutive to the sentence for the felony-firearm (count three) conviction. Accordingly, we find no error. See *Strickland*, 293 Mich App at 401.[2]

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[1] We also note that, contrary to defendant's assertion, the prosecutor did not argue what the testimony of the missing witness, Guyton, would have been. At most, the prosecutor asked the jury to infer that Guyton's testimony would have been unfavorable or adverse to defendant. In *Fields*, the Supreme Court found no error, in part, because the prosecutor did not argue that the missing witness's testimony would have been adverse to defendant. *Fields*, 450 Mich at 117. The Court stated, "[w]here a witness' testimony would be privileged under the Fifth Amendment, the witness is deemed unavailable, and thus the jury may not be instructed or asked to infer that the witness would provide testimony damaging to the defendant." *Id.* at 107. Defendant, however, does not argue that the prosecutor's comment improperly asked the jury to infer that Guyton's testimony would have been adverse to defendant or that Guyton's testimony would have been privileged under the Fifth Amendment. Nonetheless, the trial court's instructions cured the prejudicial effect of any error. See *Unger*, 278 Mich App at 235.

[2] Although the trial court's statements at sentencing regarding which sentences are concurrent and consecutive were unclear and may be inconsistent with the judgment of sentence, "[a] court

IV. RESTITUTION AMOUNT

Finally, defendant contends that this Court should remand for an evidentiary hearing because the trial court erred in determining the amount of restitution without any supporting evidence.

In *People v Gahan*, 456 Mich 264, 276-277 n 17; 571 NW2d 503 (1997), the Michigan Supreme Court stated:

> It is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due. Instead, the court is entitled to rely on the amount recommended in the presentence investigation report "which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." [Citations omitted.]

The Court found that the defendant waived the opportunity for an evidentiary hearing because he failed to request such a hearing at sentencing. *Gahan*, 456 Mich at 276; see also *People v Grant*, 455 Mich 221, 243, 565 NW2d 389 (1997) ("Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence.").

At sentencing, the trial court indicated that restitution was set at $28,204.14 (which was the amount contained in the presentence investigation report) and the judgment of sentence similarly indicates that restitution is $28,204.14. Defendant did not object at sentencing or request an evidentiary hearing. Therefore, no evidentiary hearing was required and the trial court was entitled to rely on the amount recommended in the presentence investigation report. See *Gahan*, 456 Mich at 276-277 n 17. Because defendant did not request an evidentiary hearing at sentencing, he waived the opportunity for such a hearing. See *id.* at 276.

Affirmed.

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

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speaks through its written orders, not its oral statements." *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989).