STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2001
v	No. 217375 Kent Circuit Court
DEMEATRIUS LAMONT TATE, Defendant-Appellant.	LC No. 98-00945-FC

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to commit great bodily harm less than murder, MSA 750.84; MSA 28.279, carrying a concealed weapon, MSA 750.227; MSA 28.424, and possession of a firearm during the commission of a felony (felony-firearm), MSA 750.277b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of twelve to thirty-five years for the assault with intent to rob conviction, six to ten years for the assault with intent to commit great bodily harm less than murder conviction, three to five years for the carrying a concealed weapon conviction. He was also sentenced to serve a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court gave an inadequate self-defense instruction. The entire jury instruction on self-defense given by the trial court consisted of the following: "The defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense." Defendant asserts that the trial court erred in not instructing the jury on a single element of the defense.

However, this issue is not preserved for appeal because defendant failed to object to the jury instructions as given. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).[1] Accordingly, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error

[1] Indeed, there is nothing in the record showing that defendant ever requested that the jury be instructed on the elements of self-defense.

was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[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."'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

"In Michigan, the killing of another 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." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). "A defendant who argues self-defense implies [that] his actions were intentional but that the circumstances justified his actions." *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). Instruction on the elements of self-defense must be given if there is evidence supporting it in the record. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978).

After carefully reviewing the testimony, we conclude that the trial court did not err because there was no evidence to support a finding that the use of deadly force was necessary. *People v Garrett*, 82 Mich App 178, 180; 266 NW2d 458 (1978). Defendant testified that at one point while he and the victim were riding in the victim's car, he saw a "black object" in the victim's hand. Defendant was not sure how and when this object had gotten into the victim's hand. Further, defendant admitted that he did not know what the object was. While he "assumed it was a gun," defendant testified that prior to the shooting he had not had any trouble with the victim in a couple of prior drug transactions. Given these circumstances, we do not believe a reasonable juror could have concluded that defendant acted out of a honest and reasonable belief that he was in immediate danger of death or serious bodily harm.

For this same reason, we also reject defendant's contention that his counsel was ineffective for failing to object to the jury instructions. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).[2] Defendant cannot make the requisite showing that his counsel's performance was objectively unreasonable.

Defendant next argues that there were numerous instances of prosecutorial misconduct that denied him a fair trial. Most of the claims of prosecutorial misconduct were not preserved with an appropriate objection at trial. As to those unpreserved claims, we again review for plain error. *Carines, supra*.

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[2] Because defendant failed to move for either a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We have reviewed each of the alleged, unpreserved claims of prosecutorial misconduct and conclude that the prosecutor's conduct was either proper or a curative instruction would have alleviated any prejudice. *People v Nimeth*, 236 Mich App 616, 626; 601 NW2d 393 (1999). Thus, defendant cannot satisfy the requirements of the plain error rule. *Carines, supra* at 763. Moreover, we decline to accept defendant's general claim that his counsel was ineffective for failing to object to any of these instances of alleged misconduct. As we previously observed, in order to demonstrate that counsel was ineffective, defendant must show that the alleged "deficient performance prejudiced the defense so as to deny defendant a fair trial." *Smith, supra* at 556. Defendant has failed to make this showing.

Two of defendant's claims of prosecutorial misconduct are preserved. First, defendant asserts that the prosecutor engaged in misconduct when he elicited testimony from Becky Washington and Tina Tate that defendant had problems with his mother. We disagree. While we agree that questioning each of these witnesses about any problems defendant may have had with his mother was of little relevance, we do not believe the brief questioning on the topic denied defendant a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant also argues that his right to silence was compromised by the prosecutor when he asked defendant the following question: "When you spoke with the police, you didn't say anything, correct?" Defendant's counsel immediately objected to the inquiry and a sidebar discussion was held. After the sidebar, the prosecution moved to an entirely different topic.

We find that while the prosecutor's inquiry was unquestionably improper, it did not deprive defendant of a fair trial. *Id.* Defendant did not answer the question, the error was not highlighted, and the trial court sustained an objection to the inquiry. The prosecution also did not argue that defendant's silence was evidence of his guilt. For these reasons, we find that the error did not amount to prosecutorial misconduct requiring reversal.

Defendant next argues that his counsel was ineffective with regard to his questioning of Police Detective Thomas Sikkema. Defendant argues that his counsel improperly opened the door for Sikkema to testify that he did not believe defendant's version of how the shooting took place. We conclude that this argument has no merit.

Defendant's theory of the case was that he acted in self-defense when he pulled out his gun but that the actual shooting was accidental and took place only after the victim grabbed the gun. As part of his theory of the case, defense counsel emphasized that the police and prosecutor did not fairly assess the evidence or defendant's theory when they charged him in this case. Specifically, defense counsel repeatedly pointed out to the jury that the victim was in possession of a knife and stun gun at the time he was shot. Counsel argued that the victim must have pulled the stun gun out of his pocket during the altercation. In pursuing his theory, counsel asked Sikkema about the knife and stun gun. Defense counsel elicited that Sikkema, the lead detective in the case, was not even aware that there was a knife or stun gun in the victim's vehicle until after defendant was already charged. Defense counsel then elicited that Sikkema never questioned the victim about the weapons or reevaluated the case after learning about the weapons.

In trying to explain his failure to reevaluate the case after learning about the victim's weapons, Sikkema made the comments about which defendant complains. Sikkema indicated that the fact that the victim had weapons did not change his evaluation and that he had no reason to disbelieve the victim. The facts elicited by defense counsel gave defense counsel ammunition to argue that the police did not adequately or fairly investigate the circumstances of the shooting or defendant's claims of self-defense and accident.

The extent and scope of cross-examination of witnesses is a matter of trial strategy. See *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Here, the questions counsel asked were not irrelevant or prejudicial to defendant. They were designed to discredit the police investigation. Defendant has failed to overcome the presumption that his counsel's actions were sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Finally, defendant argues that his sentence for assault with intent to rob while armed is disproportionate. Because defendant's sentence is within the sentencing guidelines recommended range, it is presumptively proportionate. *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). Defendant has failed to present unusual or mitigating circumstances to overcome the presumption of proportionality. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997); *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski