STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN SCOTT, III,

Defendant-Appellant.

UNPUBLISHED
July 2, 2002

No. 223445
Wayne Circuit Court
LC No. 97-001692

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a second jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of 300 to 600 months' imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts and Procedure History

Seventeen-year-old Michael Ingram was shot six times and died inside of defendant's home on Terry Street in Detroit. Defendant and his wife lived next door to the victim and his mother.

Defendant's cousin, Jamil Ingram, testified that on the day of the shooting, he witnessed a confrontation between defendant and the victim. Defendant came to the victim's front door and asked when his furniture would be returned. The victim ordered defendant off of his porch. Later, after smoking some marijuana, the victim left his house. He did not have a weapon. Ingram also indicated that he observed defendant speaking with Timothy Watkins outside of the house but did not hear the specific contents of the conversation.

Watkins testified that sometime after 1:00 p.m., he and the victim were standing on the victim's porch. They saw defendant and his brother, Beau Scott. Defendant called Watkins, who went over to, and inside of, defendant's house. Watkins testified that he saw two weapons, a shotgun and a "mini-14," inside of the house. Based on a conversation that he overheard, Watkins believed that defendant and Beau wanted to get the victim into defendant's house. Watkins also heard defendant complain that people were breaking into his house and taking his "stuff." Beau stated that the victim would come if Beau called him to do so. When Watkins exited from defendant's home, Beau went outside and called the victim. The victim began

walking toward defendant's house. He did not have a weapon in his hands. Watkins testified that he told the victim not to go. Watkins indicated that he was scared when the victim continued toward defendant's house. Watkins went to his aunt's house, which was on the same street. He wanted to call the police to tell them what he saw and heard.

At approximately 1:45 p.m., the victim's mother, Robin Ingram, returned to her house from a shopping trip with her brother, Eric Ingram. Defendant confronted Robin, indicating that she should talk to the victim because he was breaking into defendant's house. Robin and Eric immediately looked for the victim. He was not at home. Robin thereafter approached defendant's house. When she did, defendant yelled out "close my door up." At that point, defendant's front door slammed shut. Robin subsequently walked to Degeane Cleveland's house to see if the victim was there. He was not. Defendant, who also walked to Cleveland's house, asked for the telephone and was given access to it. Cleveland was unsure whether defendant made a telephone call. The parties stipulated, however, that defendant called 911. Robin did not see defendant make a telephone call and, unable to locate her son, she went home. Defendant never told Robin that the victim was in defendant's house or that the victim needed medical attention. Approximately fifteen minutes after returning home, Robin saw the police outside of defendant's house.

Responding officers testified that they were dispatched to defendant's home with information that the homeowner was holding someone for breaking and entering into the home. When they entered the house, they found the victim face down with his feet touching the front door. He was dead. The television set was playing very loudly, no one else was present and no weapons were recovered.

Nine spent .22 caliber shell casings were recovered from the crime scene. They were all fired from the same weapon. One spent, twelve-gauge shotgun shell and several unused twelve-gauge shells, were also found. The victim sustained six gunshot wounds and died as a result. The medical examiner opined that the victim was upright when he suffered each of the six shots. Four .22 caliber bullets were removed from the victim. Three of them were fired from the same gun. The fourth was too damaged to compare to the others. There was no evidence that the gun was fired at the victim from close range. The victim's toxicology screen was negative for alcohol or illegal narcotics. The test, however, did not screen for marijuana.[1]

Defendant and his wife fled to his aunt's house in Indianapolis. Defendant told his aunt that he shot someone. He indicated that the person came into his home, uninvited, and that people were breaking into his house, stealing his things and trying to sell drugs. Defendant indicated that he shot the victim only after the victim began hitting him. Defendant's aunt accompanied him back to Detroit a few days later and they went to the police station.

In addition to the testimony of witnesses, the prosecution relied on a letter written by defendant. The letter was written on January 4, 1999, after defendant's first trial ended without a verdict. The letter stated:

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[1] The police found eighteen small bags and one large bag of marijuana in the victim's clothing.

Dear God and Judge Strong,

> Please forgive me for the wrongs I've committed against God and State. First for delibaretly [sic] taking a valuable soul from this earthly dwelling. God have mercy on his soul at his appointed day of judgment.
>
> Secondly for contending in a charade of courts. Judge Strong you are perceived as a fair and honorable man. Forgive me for abusing so much of your Dockett [sic]. From the beginning I've known and fought against the truth.
>
> Your Honor, I do love the truth which is God. And more than that I know he loves me and with that in heart and mind there is no road we can't travel.
>
> As this letter and confession comes to a close there's a sense of joy and peace, no longer torment and fear.
>
> According to the charges of premeditated 1st degree murder I plead guilty.

In this second trial, defendant's brother, Beau, was the only witness that testified for the defense. He indicated that defendant came to his house and complained that people were breaking into his house and that defendant was scared as a result. Beau had two firearms and gave both to defendant. Beau recalled that at approximately 1:00 p.m. on January 15, Watkins appeared at defendant's house trying to sell a jacket. While Watkins was there, the guns were visible. After Watkins left, Beau yelled outside and told the victim to come over to defendant's house. According to Beau, the victim did not come when called. Beau subsequently went into the bathroom. While in the bathroom, he heard some commotion. He exited the bathroom and saw the victim with part of a twelve-gauge shotgun in his hand. Beau ran to the victim and grabbed the gun. While they were struggling, a shot discharged into the television. Beau admitted that he had the handle portion of the gun during the struggle. The victim only had the barrel. At some point, defendant shot the victim in the buttocks and the victim let go of the shotgun. Beau admitted that the victim had his back to defendant at the time that the first shot rang out. Beau also admitted that defendant subsequently fired other shots at the victim. Beau insisted, however, that defendant did so because the victim kept charging defendant. Beau testified that defendant was approximately four to six feet away from the victim while shooting. After shooting, defendant tossed his gun to the ground and engaged in a physical fight with the victim. Shortly thereafter, the victim was by the front door and the fight stopped. Defendant, who suffered no injuries, left to telephone the police. The victim could not get up after defendant left. Beau took the guns into the backyard and ran away.

After deliberation, the jury found defendant guilty of second degree murder.

II. References to First Trial

Defendant first argues that the prosecutor improperly admitted irrelevant and prejudicial evidence. Specifically, defendant complains about the prosecutor's statements referencing the first trial as well as testimony adduced therein. Because defendant did not object to these references or evidence, this issue is not properly preserved for appellate review. Nevertheless, we review unpreserved evidentiary errors to determine if defendant has demonstrated the

existence of a plain error which affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During jury selection, defense counsel indicated to the potential jurors that he planned on presenting both defendant and his brother, Beau Scott, as witnesses. Defense counsel also questioned the jury about whether they would acquit defendant if the law excused or legally justified defendant's conduct. Defense counsel specifically asked the potential jurors whether they could accept the concept of self-defense and keep an open mind with respect to defendant's testimony. In opening statement, having been led to believe that defendant would again testify at the second trial, the prosecutor informed the jury that they would hear testimony that defendant was previously tried on the same charges in November 1998, that he asserted self-defense to defend against the charges, and that he testified that he caught the victim, uninvited, in his house and had to shoot him. The prosecutor further informed the jury that they would also hear evidence, which was not presented at the first trial, of a letter that defendant wrote after the first trial concluded. During trial, and on stipulation of the parties, the trial court admitted defendant's letter as substantive evidence. Both the prosecutor and defense counsel mentioned the first trial. However, the prosecutor did not mention the first trial during his closing argument. On the other hand, defense counsel specifically mentioned the first trial when trying to explain defendant's letter. On rebuttal, the prosecutor then mentioned that "obviously" there was another trial.

We find no error requiring reversal. The reference to and testimony about the first trial was neither irrelevant nor prejudicial. The prosecutor had the burden of disproving self-defense beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). It was clear from jury voir dire that defendant was going to pursue a self-defense theory which was the same defense presented at the first trial. In defendant's letter to the court, which he wrote after the first trial, defendant indicated that he was sorry that he participated in a charade perpetrated upon the courts. Therefore, the prosecutor planned to disprove the self-defense theory by eliciting information to support his argument that defendant's letter constituted an admission that the self-defense theory was nothing more than a "charade."[2] The existence of the first trial was therefore relevant and necessary to place defendant's letter into the proper context and to assist the prosecutor in disproving the defense asserted. MRE 401; MRE 402.

In addition, the limited information revealed about the first trial should not have been excluded under MRE 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. The jury was never informed why a second trial was necessary and they were given an appropriate instruction with respect to how they should consider it. We find no plain error in this regard.

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[2] We are mindful that defendant unexpectedly refused to testify despite his counsel's adamant plea that he do so. The prosecutor was therefore unable to elicit testimony from defendant about the first trial. The prosecutor's theory, as outlined, was thus not entirely supported. However, the trial court admitted the letter, defendant's theory of the case was known, and the prosecutor elicited some information about the first trial from Beau. In addition, during closing argument, the prosecutor avoided argument pertaining to defendant's testimony from the first trial.

III. Cross-Examination

Defendant next argues that the prosecutor improperly questioned Beau about whether he lied during the first trial and about whether defendant ever indicated that he fought against the truth or lied at the first trial. While defendant objected to preliminary questions posed to Beau Scott regarding defendant's letter, defense counsel did not object to the questions about which he now complains on appeal. Therefore, this issue is not properly preserved. An objection based on one ground during a trial is insufficient to preserve an appellate attack upon another. *People v Maleski*, 220 Mich App 518; 523; 560 NW2d 71 (1996). As previously noted, we review unpreserved claims for plain error. *Carines, supra.* We find no plain error requiring reversal as regards the prosecutor's questions.

Additionally, defendant's letter was introduced into evidence before Beau testified. The questions about which defendant now complains pertained to the letter and its contents. The letter was relevant to Beau's credibility because Beau's testimony specifically contradicted the contents of defendant's letter, which essentially admitted to a deliberate killing and thus, to premeditated murder. Further, the questions were relevant to assist the prosecutor in disproving the self-defense testimony that Beau provided. We disagree with defendant that the questions were based on an unproven factual predicate. The letter provided the basis for the questions. More importantly, the jury was instructed that the prosecutor's questions were not evidence. And, Beau, who testified at the first trial, denied that he participated in any charade on the court. He maintained that he told the truth at the first trial. Thus, his answers did not affect the outcome of the case.

IV. Playback of Trial Testimony

Defendant next argues that the trial court abused its discretion in acquiescing to a jury request to replay portions of testimony after deliberations began. This issue was not properly preserved because defendant did not object to having the testimony played back to the jury.[3] We therefore review this issue for plain error. *Id.*

Fourteen witnesses testified at trial. After deliberating for more than an hour, the jury asked to hear the testimony of three witnesses; Beau Scott and two police officers. Counsel discussed the matter off the record. The trial court thereafter indicated that the jury would hear the testimony. The testimony of the officers was played first. At some point while replaying Beau's testimony, the jury indicated that it heard enough whereupon the playback apparently ceased.

MCR 6.414(H) provides:

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[3] We note that this issue is merely unpreserved and not forfeited because defense counsel did not specifically express satisfaction with the trial court's handling of the jury's request. *People v Carter*, 462 Mich 206, 213-215; 612 NW2d 144 (2000).

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, *but it may not refuse a reasonable request.* The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. [Emphasis added.]

There is no requirement, and defendant cites no authority to support his argument, that the trial court should have inquired of the jurors what their purpose was for wanting to rehear the testimony and whether their questions could be answered by other means. The jury's request to rehear the testimony of three witnesses was reasonable. Moreover, when the jury determined that it heard enough testimony to resolve the issues that arose during deliberations, it indicated that it did not need to hear any more testimony. Nothing obligates the trial court to compel the jury to rehear all of the testimony. *People v Wilson*, 111 Mich App 770, 776; 315 NW2d 423 (1981). Thus, we find that the trial court did not abuse its discretion with respect to its decision to replay the testimony requested as well as the extent to which the testimony was replayed. The record also does not support defendant's contention that there was any unfair emphasis. Because there was no plain error, reversal is not required.[4]

V. Jury Instructions

Defendant next argues that the trial court improperly instructed the jury on the law of self-defense. Because no objection was raised with respect to the instructions, this issue was not preserved for our consideration. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Id.*, citing *Carines, supra.*

The trial court instructed the jury in accord with CJI2d 7.15 (general self-defense instruction,) CJI2d 7.17 (no duty to retreat from one's own dwelling) and CJI2d 7.20 (self-defense burden of proof.) Defendant complains that the trial court's instruction negatively conveyed his self-defense theory and improperly shifted the burden of proof to defendant. We disagree.

While this Court has not officially sanctioned the standard criminal jury instructions and their use is not required, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), trial judges are nevertheless encouraged to use them. *People v Anderson*, 111 Mich App 671, 677; 314 NW2d 723 (1981), citing Supreme Court Administrative Orders No. 1977-1 and 1978-5. In using the standard instructions, trial courts should examine them to ensure their accuracy and appropriateness to the case at bar. *Petrella, supra.* Our review of the record reveals that the standard self-defense instructions rendered by the trial court in this case were accurate.

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[4] On appeal, defendant also argues that the court reporter violated her duties. This issue is not properly before this Court because defendant failed to raise it in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Because the standard instructions were applicable to this case, accurately stated the law, and properly allocated the burden of proof to the prosecution, there was no error in the trial court's use of those instructions. Defendant's rights were adequately protected.

Defendant further argues that the trial court improperly instructed the jury that the prosecution had to prove, beyond a reasonable doubt, that the killing *was* justified, excused or done under circumstances that reduced it to a lesser crime. Defendant contends that the trial court should have instructed that the killing *was not* justified, excused or done under circumstances that reduced it to a lesser crime. The court reporter filed a correction to the original transcript, indicating that the trial court instructed the jury that the "killing *was not* justified, excused or done under circumstances that reduces it to a lesser crime." Thus, there was no error.

VI. Prosecutorial Misconduct

Next, defendant raises numerous claims of alleged prosecutorial misconduct. Defendant agrees that none of the alleged errors are preserved:

> [A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." [*People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001) (citations omitted.)]

In his opening statement, the prosecutor informed the jury that it would hear evidence from the first trial, specifically witness testimony, and that there would be new evidence that was not heard in the first trial; specifically evidence of a letter that defendant authored after that trial concluded. Defendant argues that the statement constituted prosecutor testimony about matters within his own personal knowledge. We disagree. The purpose of an opening statement is to tell the jury what the advocate proposes to show. *People v Moss,* 70 Mich App 18, 32; 245 NW2d 389 (1976). The prosecutor's statement in this case outlined for the jury the information that the prosecutor believed they would hear. The statement contained absolutely no personal testimony by the prosecutor. We further note that even if the prosecutor did not prove what he claimed he would, reversal is not necessarily mandated. See *People v Moncure,* 94 Mich App 252, 261; 288 NW2d 675, vacated on other grounds 409 Mich 905 (1980), citing *People v Davis,* 343 Mich 348, 357; 72 NW2d 269 (1955) ("reference by a prosecutor in his opening statement that something will be shown, but which is later not shown, is not grounds for reversal if the statement was made in good faith.")

Defendant next argues that the prosecutor committed misconduct by arguing that defendant's January 4, 1999, letter was "the truth." This argument has no merit. The prosecutor's argument was based on the content of defendant's letter. The letter discussed the truth and defendant's love of the truth. A prosecutor may comment about and suggest reasonable inferences from the evidence presented at trial. *People v Vaughn,* 200 Mich App 32, 39; 504 NW2d 2 (1993). Here, the prosecutor's comment was a permissible comment on the evidence and reasonable inferences to be drawn from it.

Defendant also complains that, in closing, the prosecutor impermissibly stated that Beau "remembered the only thing that he was either coached to remember or told to remember which could help his brother get out of the situation." Again, we find that this comment was a permissible inference based on the evidence. While testifying, Beau did not know or could not remember several things. Yet, he very clearly remembered the details that assisted defendant in pursuing his self-defense theory.[5] The prosecutor was allowed to use "hard language" because it was supported by the evidence presented and the inferences drawn therefrom. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). The prosecutor was not required to phrase his arguments in the blandest of terms. *Id.* "Emotional language may be used during closing argument and is `an important weapon in counsel's forensic arsenal.'" *Id.* at 679 (quotation omitted).

Defendant further contends that it was improper for the prosecutor to argue that nine shots were fired in defendant's house. We disagree. This argument was a reasonable inference from the evidence. Nine spent .22 caliber casings were found in the house. The evidence indicated that casings are ejected when a gun is fired. The evidence also indicated that all of the casings were ejected from the same weapon.

We also disagree with defendant's argument that it was improper for the prosecutor to argue that, based on the evidence and cross-examination, Beau Scott was "nothing more than a liar," who was trying to assist his brother. The prosecutor may argue from the facts that a witness is not worthy of belief and may even characterize a witness, or the defendant, as a liar. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant next argues that the prosecutor improperly appealed to the passions of the jury, argued his personal opinion that defendant was guilty, and argued that the jury should convict as a favor to the prosecutor and because it was their civic duty. We disagree. The prosecutor asked the jury for justice for the victim and asked the jury to think about whether the victim deserved to be executed in cold blood. An improper civic duty argument plays on the fears or prejudices of the jury, *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), or injects issues broader than the defendant's guilt or encourages the jury to suspend their powers of judgment, *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). A prosecutor's request for justice, even if couched in terms of civic duty, is relatively innocuous, especially where the evidence against a defendant is strong. *People v Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991). Any resultant prejudice can be cured by an instruction if requested. *Id.* at 354. We further note that in making these statements, the prosecutor never expressed his personal opinion about defendant's guilt and he did not ask the jury to convict defendant as a personal favor to the prosecution. Thus, we find no plain error requiring reversal.

We further disagree that the prosecutor improperly appealed to the jury's sympathy for the victim. Appeals to the jury to sympathize with the victim are improper. *Watson, supra* at 591-592. However, the alleged impermissible comments appealing to sympathy must be considered within the context of the *entire* closing argument. *People v Siler*, 171 Mich App

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[5] While not evidence, we note that during Beau's testimony, the prosecutor pointed out that defendant was making gestures and shaking his head up, down, left and right.

246, 258; 429 NW2d 865 (1988) (emphasis added.) A review of the entire closing argument in this case demonstrates that the prosecutor properly asked the jury to examine all of the evidence and convict defendant because the evidence supported defendant's guilt beyond a reasonable doubt. The comments at issue were isolated and were not inflammatory. Moreover, the trial court instructed the jury that the lawyers' arguments did not constitute evidence and that they could only consider the evidence presented. Certainly, any prejudice flowing from the prosecutor's statements could have been cured by an instruction to the effect that when deliberating, the jury should not be influenced by prejudice or sympathy. *Id.*

Defendant also complains about the prosecutor's rebuttal argument. The prosecutor argued that defendant's use of the word "charade" in his letter meant that he "lied at the first trial." Defendant contends that in making this argument, the prosecutor was testifying about facts from his own knowledge. We disagree. In closing, defense counsel argued that defendant's use of the term "charade" did not necessarily mean what it appeared to mean. The prosecutor's rebuttal comment was responsive to that argument and was a reasonable inference based on the language of the letter itself and the context in which it was written.

Defendant also complains about the prosecutor's rebuttal argument that "this is the face of a killer, ladies and gentleman. This is the face of a killer." Defendant contends that this comment was an expression of the prosecutor's personal opinion about defendant's guilt. Again, we disagree. When considered its proper context, after this assertion, the prosecutor immediately stated: "We agreed that we wouldn't let sympathy influence our verdict. The evidence in this case points to only one conclusion. That that man was brought into that house and he was executed." The prosecutor based his argument on the evidence in the case. Therefore, the argument was permissible. *Ullah, supra.* However, even if it were not, considering that the evidence presented established defendant's overwhelming guilt and further considering that the prosecutor's comments were isolated statements, we decline to find error requiring reversal. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Finally, defendant argues that the prosecutor's final rebuttal statement called upon the jury to return verdicts of guilt as a favor to the prosecution and intimated that the jury had to convict. The prosecutor stated: "And I'm asking you please convict the defendant of first degree murder and felony firearm." This statement was not an improper civic duty argument where it did not appeal to the fears or prejudices of the jury nor did it inject issues broader than defendant's guilt or innocence into the trial. *Truong, supra*; *Cooper, supra.* The prosecutor's final statement was simply not improper. See *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988) ("Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper.")

Upon review of defendant's unpreserved claims of prosecutorial misconduct, we find no plain error requiring reversal. Even if some of the prosecutor's comments were improvidently uttered, any prejudice flowing therefrom could have been cured with a timely requested curative instruction. Moreover, defendant cannot demonstrate that any error affected the outcome of the trial where the evidence against defendant was overwhelming.

VII. Ineffective Assistance of Counsel

Finally, defendant complains that his counsel was ineffective. Our review of this claim is limited to errors apparent on the record because no *Ginther*[6] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant makes the general argument that an "attorney of ordinary skills and training would have not have [sic] acted as did trial counsel in this case; he would have recognized the imperative need for him to object in the several instances spot-lighted in the arguments above and to take the actions indicated as appropriate." Defendant subsequently argues that, with elimination of "objectionable material and testimony under proper and appropriate objections, there is a reasonable probability that the outcome of the trail [sic] would have been more favorable to defendant."

Defendant's claims of ineffective assistance have no merit because he did not demonstrate that, but for his counsel's performance with respect to any of the alleged errors, the result of the proceeding would have been different. The evidence against defendant was overwhelming and included defendant's written confession. Moreover, defendant pursued a theory of self-defense but refused to take the witness stand on his own behalf despite his attorney's advice. Thus, by his own conduct, defendant severely compromised his only defense. Under the circumstances, where the evidence of defendant's guilt was overwhelming and the errors few or nonexistent, defendant cannot meet his burden with respect to his claim of ineffective assistance. See e.g., *Launsburry*, *supra* at 361-362.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).