STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2009
v	No. 280523 Kalamazoo Circuit Court
MARVIN TAWON ALLEN, Defendant-Appellant.	LC No. 06-001743-FC

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Marvin Allen appeals as of right his jury conviction of first-degree premeditated murder,[1] assault with intent to commit murder,[2] felon in possession of a weapon,[3] carrying a concealed weapon,[4] and three counts of possession of a firearm during the commission of a felony.[5] The trial court sentenced Allen as an habitual offender, fourth offense,[6] to concurrent terms of life imprisonment for the murder conviction, 40 to 60 years for the assault conviction, and 6 to 30 years for the CCW and felon-in-possession convictions, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. We affirm.

I. Basic Facts And Procedural History

Allen's convictions arise from an August 6, 2006 shooting in the parking lot of a Quick Stop party store in Kalamazoo. Cornelle Mason was killed and William Palm was injured. The shooting occurred shortly after the storeowner had locked the store doors at the 2:00 a.m. closing

[1] MCL 750.316(1)(a).

[2] MCL 750.83.

[3] MCL 750.224f.

[4] MCL 750.227.

[5] MCL 750.227b.

[6] MCL 769.12.

time, at which time there were approximately 50 to 100 people in the parking lot. After hearing multiple gunshots, the storeowner called 911. When the police arrived, the lot was empty and it looked like "a ghost town." The store had eight surveillance cameras, and witnesses identified Allen as the only person with a gun. Witnesses also observed Allen fire the weapon toward Palm. Additionally, witnesses observed Allen driving a red Durango, and the evidence indicated that the driver and sole occupant of the Durango shot and killed Mason.

II. Prosecutorial Misconduct

A. Standard Of Review

Allen argues that the prosecutor's improper comments during closing argument denied him a fair trial. Because Allen did not object to the prosecutor's arguments at trial, he did not preserve this issue.[7] Therefore, we limit our review to plain error affecting Allen's substantial rights.[8]

B. Appeal To Jury Sympathy

Allen argues that the prosecutor improperly appealed to the jury to sympathize for the deceased victim by commenting that he was an innocent victim who left Chicago and went to Kalamazoo to go to college and find a job to make his family proud. "A prosecutor may not appeal to the jury to sympathize with the victim."[9] The prosecutor concedes that the challenged remarks were "unwarranted," but argues that they did not deny Allen a fair trial. We agree. We will find no error requiring reversal if a timely instruction could have cured the prejudicial effect of the prosecutor's comments.[10] Here, to the extent that the prosecutor's remarks improperly evoked sympathy for the victim, the trial court specifically instructed the jury that sympathy must not play a part in its deliberations. The trial court's instruction was sufficient to protect Allen's substantial rights. Therefore, we will not reverse on this ground.

C. Arguing Improper Evidence

Allen also argues that the prosecutor improperly argued impeachment evidence as substantive evidence of Allen's guilt. We disagree. When we view the prosecutor's argument in context, the prosecutor did not directly argue the witness's prior statements as substantive evidence. Rather, the prosecutor urged the jury to consider the witness's previous statements and her trial testimony in light of the "code of silence" (that is, "what happens in the streets stays in the streets"), which several witnesses recognized. The prosecutor suggested that limitations the witness imposed on her testimony in keeping with that code were a factor in the changes in her statements. A prosecutor may draw inferences from the testimony and may argue that a

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[7] *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

[8] *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[9] *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

[10] *Schutte, supra* at 721.

witness's testimony is not worthy of belief.[11] Thus, we find no plain error. Further, the trial court protected Allen's substantial rights by specifically instructing the jury on the limited use of prior inconsistent statements. We presume that the jury followed the court's instructions.[12]

D. Vouching For Witness Credibility

Allen also argues that the prosecutor improperly vouched for the credibility of the police investigation. Although the prosecutor has wide latitude to argue the evidence and its inferences, the prosecutor may not put the prestige of the police behind a contention that a defendant is guilty.[13] When we view the prosecutor's argument in context, the prosecutor was arguing that the police investigation was thorough and, therefore, its results were reliable. To the extent that the prosecutor's remarks might have been improper, an appropriate instruction, if Allen had requested one, could have cured any error. The principal issues at trial involved Allen's identification as the shooter and his intent, and these issues depended largely on the eyewitness testimony, not the police investigation. For these reasons, we reject Allen's argument that misconduct by the prosecutor requires a new trial.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Allen argues that trial counsel was ineffective for failing to object to the prosecutor's remarks. To establish ineffective assistance of counsel, the burden is on Allen to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive Allen of a fair trial.[14]

B. Applying The Standards

Because we have concluded that the prosecutor's remarks were either not improper or not prejudicial, Allen cannot establish that the defense counsel's failure to object prejudiced him. Further, the defense counsel addressed each of the challenged subject matters in her own closing argument. Counsel's decision to address the issues in her own closing argument, rather than object to the prosecutor's argument and possibly create an impression that Allen had something to hide, was a matter of trial strategy and Allen has not overcome the presumption of sound

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[11] *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

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

[13] *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

[14] *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

strategy.[15] The fact that the strategy may not have worked does not constitute ineffective assistance of counsel.[16]

IV. Jury Instructions

A. Standard Of Review

Allen argues that the trial court erred by denying his request for jury instructions on self-defense and defense of others, as well as voluntary manslaughter. The trial court's instructions "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence."[17] We review a trial court's decision whether an instruction applies to the facts for an abuse of discretion.[18]

B. Failure To Instruct On Self-defense And Defense Of Others

"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."[19] A person is also allowed to use deadly force in defense of another.[20] "[T]he touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*."[21] In this case, although the evidence indicated that Allen came to the aid of his brother, who was involved in a fight with Palm, the fight ended before the shooting of either of the victims. According to the witnesses, Palm was running away from the scene, with Allen chasing him, when he was shot. Additionally, Cornelle Mason, who was not involved in the fight, was attempting to drive away when he was shot. Because the evidence did not support a finding that Allen could have honestly and reasonably believed that either he or his brother were in imminent danger when he fired the shots, the trial court did not abuse its discretion in denying Allen's request for the instructions on self-defense and defense of others.

C. Failure To Instruct On Voluntary Manslaughter

Voluntary manslaughter is a necessarily included lesser offense of murder.[22] Therefore, an instruction on manslaughter would have been required upon request if supported by a rational view of the evidence.[23] Manslaughter is an intentional killing, in the heat of passion, caused by

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[15] *Id*.

[16] *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996).

[17] *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

[18] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[19] *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002).

[20] *Id*. at 321.

[21] *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002) (emphasis in original).

[22] *People v Mendoza*, 468 Mich 527, 533, 541; 664 NW2d 685 (2003).

[23] *Id*.; *People v Weeder*, 469 Mich 493, 498; 674 NW2d 372 (2004).

an adequate provocation, and "there cannot be a lapse of time during which a reasonable person could control his passions."[24] We agree with the trial court that a rational view of the evidence did not support a manslaughter instruction. Therefore, the trial court did not err by refusing to instruct on manslaughter. Furthermore, the trial court also instructed the jury on second-degree murder as a lesser offense, but the jury instead convicted Allen on the higher offense of first-degree murder. Given the jury's refusal to either acquit or convict Allen of the lesser offense of second-degree murder, any error in failing to instruct on manslaughter was harmless.[25]

V. Newly Discovered Evidence

A. Standard Of Review

In a supplemental brief that he filed in propria persona, Allen argues that he is entitled to a new trial or remand for an evidentiary hearing because of newly discovered evidence. As explained in *People v Cress*,[26]

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

B. Applying The *Cress* Standards

Here, the allegedly newly discovered evidence is an unsigned letter that Allen contends that Palm, one of the shooting victims, wrote. But, contrary to Allen's argument, the letter contains no clear indication that its author was also armed on the night of the offense. Rather, the letter clearly refers to Allen as the shooter. And, even if Palm wrote the letter, its contents do not provide a reasonable basis for concluding that a different result would be probable on retrial. Accordingly, the discovery of this letter warrants neither a new trial nor a remand for an evidentiary hearing.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

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[24] *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

[25] See *Gillis*, *supra* at 140 n 18.

[26] *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citation and internal quotations omitted).