STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2016
v	No. 323888 Jackson Circuit Court
MARLON THOMAS, JR., Defendant-Appellant.	LC No. 13-004624-FC

Before: SHAPIRO, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Defendant, Marlon Thomas, Jr., appeals as of right his convictions, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced Thomas to serve consecutive terms of 25 to 50 years' imprisonment for his second-degree murder conviction and two-years' imprisonment for his felony-firearm conviction. We affirm.

I. BACKGROUND FACTS

Thomas shot Rakiesh Brown while the two men sat inside a car parked near the home of Brown's grandmother, Barbara Hemphill. According to Hemphill, at about 11:30 a.m., she went out onto the porch to talk to her granddaughter and her granddaughter's friends. She stepped down from the porch and saw that Thomas was on top of Brown inside of her car, which Brown had borrowed from her earlier in the day. She heard two gunshots. Brown got out of the driver's side of the car and ran into the house. Thomas got out of the passenger side and ran into the street while continuing to shoot at Brown.

Hemphill's eleven-year-old granddaughter also saw the shooting. According to the granddaughter, she was playing with her friends on Hemphill's porch when Brown parked the car near the house. She saw Thomas and Brown together in the car, and then heard Brown say "quit playing, dog." She heard a few gunshots and saw Thomas bent over on top of Brown. Both Thomas and Brown got out of the car. As Brown went inside the house, Thomas continued firing the gun. Matthew Hemphill, Brown's uncle, testified that he heard one gunshot and then Brown said, "man, he shot me." Matthew helped Brown get up the steps and into the house.

Ladonna Lewis testified that she lives across the street from Hemphill. According to Lewis, she was watching television when she heard a loud pop. She looked out the window and

saw Brown in his car. Brown said "why'd you shoot me, dog?" Lewis heard a couple more pops and overheard people screaming that Brown was shot.

According to Salvadore Rodriquez, he was working at a store during the time of the shooting. Thomas came into the store "like he had been running or sweating pretty bad," took off his gray and orange hooded sweatshirt, and then ran from the store.

Jackson Police Department Officer Peter Postma testified that he was dispatched to the area of the shooting. As he was watching the area, he saw Thomas, who matched the description of the suspect. According to Officer Postma, Thomas appeared "out of breath" and "poke[d] out between a hedge row." Officer Postma left his vehicle, drew his weapon, ordered Thomas to get on the ground, and arrested him.

Jackson Police Department Officer Robert Noppe testified that he found a 380-caliber semiautomatic pistol behind the store in which Thomas discarded his sweatshirt. It had four bullets in the magazine but no bullet in the chamber, which led Officer Noppe to believe that it had not been fired. He also found a .22 caliber Rohm revolver that Thomas admitted belonged to him. Officer Noppe testified that the revolver had five fired casings and one live round in the chamber.

Thomas testified that both he and Brown sold marijuana and carried handguns. According to Thomas, on the day of the shooting, he and Brown attempted to meet a marijuana buyer at a nearby store, but the buyer never appeared. They left the store and parked. While Thomas used Brown's scale to weigh the marijuana, Brown asked to take half to sell it on consignment. After Thomas refused, he looked up and saw that Brown had a gun.

According to Thomas, Brown demanded the bag of marijuana. As Thomas was passing items over, Brown placed his gun on his lap. Thomas reached for the gun and it fell on the floor. When Brown bent down to retrieve the weapon, Thomas drew his own gun and fired because he was frightened. He grabbed Brown's gun off the floor, unlocked the passenger door, and left the car. He continued to fire toward the car because he was afraid. Thomas admitted that he asked his girlfriend over the phone what the media was saying about the case. Their recorded telephone call was admitted and played for the jury.

The jury acquitted Thomas of first-degree premeditated murder but found him guilty of second-degree murder. Thomas now appeals.

II. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

Thomas contends that insufficient evidence supported his second-degree murder conviction because the prosecution failed to disprove that he acted in self-defense. We disagree.

This Court reviews de novo a defendant's challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642, 741 NW2d 563 (2007). We view "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *Id*. (quotation marks and citation omitted). We must resolve conflicting evidence in favor of the prosecution, *People*

v Terry, 224 Mich App 447, 452; 569 NW2d 641 (1997), and we will not resolve questions of credibility on appeal, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) who acted with malice, and (4) and without lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "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." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990) (opinion by RILEY, CJ). Once a defendant introduces evidence of self-defense, the prosecution must disprove self-defense beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009).

In this case, Thomas testified that he acted in self-defense because he reasonably believed that his life was in danger after Brown drew a gun during a dispute. However, evidence contradicted Thomas's account. Lewis testified that she heard Brown ask Thomas why Thomas shot him. A rational juror could conclude that, if Brown drew a gun on Thomas, such a question would make little sense. Additionally, a rational juror could conclude that Thomas's actions after the shooting, including continuing to shoot at Brown while running away, failing to call 911 to report the death, and discarding his sweater, guns, and marijuana, were inconsistent with his testimony. Viewing this evidence in the light most favorable to the prosecution, we conclude that sufficient evidence supports Thomas's second-degree murder conviction.

For the same reasons, Thomas contends that the jury's verdict was against the great weight of the evidence. Again, we disagree.

The prosecution has the constitutionally based burden to prove each element of an offense beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Generally, courts review a defendant's claim that the jury's verdict was against the great weight of the evidence to determine whether "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Conflicting testimony alone does not provide a sufficient ground to discard a verdict as against the great weight of the evidence. *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2009).

Thomas contends that overwhelming evidence supported his testimony that he acted in self-defense, including that witnesses testified that he was frightened and out of breath, and no eyewitness account directly contradicted his testimony. Thomas essentially asks us to discard the jury's determination of the credibility of his testimony. This Court does not resolve credibility questions on appeal. *Id*. at 469. We conclude that the prosecution sufficiently proved that Thomas acted without lawful justification when he killed Brown.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Thomas contends that trial counsel was ineffective when he failed to call a potentially mitigating witness and when he waived Thomas's right to be present while the jury received supplemental jury instructions. We disagree.

A defendant must move the trial court for a new trial or evidentiary hearing to preserve a claim that his or her counsel was ineffective. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). When the trial court has not conducted a hearing, our review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Id*. at 80-81, citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id.* at 81.

First, Thomas claims that counsel was ineffective by failing to call Shane Anderson to testify that Brown had previously robbed him. Defense counsel's decisions to call and investigate witnesses are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Even considering Thomas's affidavit and what he alleges that Anderson would have said, there is simply no evidence in the record that Anderson would have testified as Thomas alleges. We conclude that Thomas has not shown that counsel's decision not to call Anderson as a witness would have affected the outcome of Thomas's trial.

Second, Thomas contends that counsel was ineffective by waiving Thomas's right to be present when the trial court gave the jury supplemental instructions. In this case, the jury asked, "If we don't agree on first-degree after two votes, do we move on to second degree?" When the trial court recalled the jury, defense counsel waived Thomas's presence. The trial court referred the jury to its previous instruction regarding how to deliberate and reach a verdict, which it had given when Thomas was present.[1] Thomas has not shown that, but for counsel's decision to waive his presence, the result of his proceeding would have been different. We conclude that Thomas has failed to show that counsel's actions prejudiced him.

IV. PROSECUTORIAL MISCONDUCT

Thomas contends that the prosecutor improperly used his constitutional right to remain silent against him when it admitted the recording of Thomas's telephone call in which he told his girlfriend that he intended to remain silent. We note that, at trial, Thomas challenged this evidence on relevance grounds, not on constitutional grounds. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review this issue for plain error.

[1] The trial court's instruction was based on M Crim JI 3.11.

A prosecutor can deny a defendant's right to a fair trial by making improper remarks that infringe on a defendant's constitutional rights or by making remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). This Court reviews unpreserved claims of prosecutorial error for plain error affecting the defendant's substantial rights. *People v Gaines*, 306 Mich App 289, 307-308; 856 NW2d 222 (2014). We evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor's actions in context, and in light of the defendant's arguments and the evidence presented in the case. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The United States Constitution assures that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V. The prosecution may permissibly use the defendant's pre-arrest silence for impeachment purposes. *Jenkins v Anderson*, 447 US 231, 238; 100 S Ct 2124; 65 L Ed 2d 86 (1980); *People v Cetlinski*, 435 Mich 742, 745-746; 460 NW2d 534 (1990). However, the prosecution violates the defendant's right to due process under the Fourteenth Amendment if the prosecution uses a defendant's post-*Miranda*[2]-warning silence as substantive evidence or for impeachment purposes. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Shafier*, 483 Mich 205, 217-218; 768 NW2d 305 (2009).

In this case, Thomas asked his girlfriend what they were saying about him in the media. He then stated, "don't nobody know what happened for real? I ain't sayin' nothin', feel me?" On the basis of this evidence, the prosecution later argued:

> You heard the telephone call with his girlfriend where she recounts what the media said. Does it strike you odd that he's more concerned about how it looks in the media? Why doesn't he just say they got it wrong? No, no, no. What does he tell her? "Ain't nobody know what's happened, and I ain't talkin'."

The prosecution cannot use a defendant's post-*Miranda* silence as impeachment evidence. However, as the prosecution argues on appeal, it did not use Thomas's silence against him—rather, it used his statements about his silence to a third party. A defendant's failure to correct another person's allegedly mistaken belief about his or her involvement in a crime may constitute impeachment evidence to a defendant's later testimony. See *People v Hackett*, 460 Mich 202, 215-216; 596 NW2d 107 (1999). "A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits . . . ." *Vitali v United States*, 383 F2d 121 (CA 1, 1967).

The evidence was at least arguably admissible because it did not involve Thomas's direct silence. Instead, it involved a conversation that Thomas had with another person about his silence, in which Thomas at least arguably failed to address a mistaken belief that he was involved in a crime. Accordingly, we conclude that any error in admitting the evidence from the phone call was not a clear or obvious error. See *People v Vaughn*, 491 Mich 642, 665; 821

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

NW2d 288 (2012) (holding that an error was plain when well-settled law was contrary to the trial court's actions).

Next, Thomas argues that the prosecutor improperly argued facts not in evidence in his closing statements. We disagree.

A prosecutor may not argue the effect of testimony that was not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them, as they relate to the prosecution's theory of the case. *Bahoda*, 448 Mich at 282.

In this case, a witness testified that an examination of Brown's telephone records showed that a call was placed to Brown's telephone from Thomas's telephone on the day of the shooting. Additionally, Rodriquez testified that Thomas discarded his sweatshirt inside a store, and Officer Postma testified that shortly before he arrested Thomas, he saw him "poke out between a hedge row" before crossing the street. We conclude that the prosecution's contentions that Thomas called Brown and that he was hiding before his arrest were reasonable inferences from the evidence.

We affirm.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello