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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2021
v	No. 352717 Oakland Circuit Court
KEANDRE KEVON SEAY, Defendant-Appellant.	LC No. 2019-271714-FC

Before: REDFORD, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Defendant appeals by right his convictions by a jury of second-degree murder, MCL 750.317, two counts of second offense use of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm (felon-in-possession), MCL 750.224f. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.13, to serve 65 to 100 years' imprisonment for his second-degree murder conviction, five years each for his two second offense felony-firearm convictions, and two years for his felon-in-possession conviction. Defendant received 220 days credit for time served in relation to his two felony-firearm convictions. The trial court ordered defendant to serve his second-degree murder sentence consecutively to his concurrent sentences for felony-firearm and felon-in-possession. We affirm.

I. FACTUAL BACKGROUND

This case arose from an incident in which defendant shot the victim, Michael Manley, in the parking lot outside defendant's girlfriend Elonjana Welch's apartment located at 676 Newman Lane in the Newman Lane Apartments in Pontiac, Michigan, around 11:40 p.m. on June 29, 2019. Defendant fled the scene, disposed of his handgun and cell phone, and stayed in Detroit until police found and apprehended him on July 2, 2019.

The night of the incident, Manley and his friend, April Young, spent time at Welch's apartment drinking with her on her porch. A surveillance video at the apartment complex indicates that at different points in the evening Manley and Young separately walked away from Welch's apartment. At one point, Manley returned and went inside Welch's apartment. Defendant arrived and he, Welch, and Manley migrated outside where words were exchanged and defendant took a

swing at Welch while they stood on the curb near the parking lot. Defendant and Welch went back inside Welch's apartment where they argued and exchanged blows.

Young, who lived in the same apartment complex, had gone home to get her wallet, returned and left with Manley in his vehicle to go to a nearby store to purchase more liquor. Defendant left Welch's apartment and went looking for Manley. Young's son, Kamaree Farria, testified that defendant came to Young's apartment and shouted loudly outside then barged into the apartment with a handgun in his pocket and shouted, "Say where that bitch ass [n-word] Mike at." Farria managed to push defendant back outside.

Meanwhile, Young and Manley returned to the parking lot outside Welch's apartment, Manley exited his vehicle, went to its rear and opened the trunk door, while shouting to Welch. Welch eventually came outside, Young exited Manley's vehicle's passenger side, and as Welch approached Manley's vehicle and Manley and Young focused their attention on Welch, defendant approached Manley from behind with his handgun drawn. Defendant accosted Manley and wrapped him up in his arms, then pushed Manley into the space between the vehicle and open trunk door. Welch attempted unsuccessfully to intervene and Manley and defendant struggled and moved away from Manley's vehicle a short distance when defendant shot Manley at point-blank range. Manley limped back to his vehicle with his back turned to defendant who appeared to attempt to shoot again, racked the slide on his handgun, and pointed the gun at Manley who entered his vehicle, sat down in the driver's seat and closed the door. Defendant started to walk to the curb but turned and went back to Manley's driver's door and pointed his handgun at Manley. Defendant then went inside Welch's apartment.

Defendant called his mother to pick him up and while he waited for her to arrive he went outside to the rear of Manley's vehicle and picked some things off the ground. Defendant later checked on Manley. Young testified that, at one point, she heard defendant say, "Is that mother f*er still breathing?" Defendant left the scene with his mother. Young looked in Manley's car and saw blood and Manley shaking but unable to speak. She called 911. The police and fire department personnel arrived and attempted to revive Manley. An ambulance arrived and transported Manley to the hospital where he was pronounced dead.

II. STANDARDS OF REVIEW

Claims of prosecutorial misconduct are reviewed de novo to "determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005) (citation omitted). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (citation omitted). This Court also reviews de novo constitutional issues. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

Because defendant failed to object to the prosecution's alleged improper conduct, his prosecutorial misconduct claims of error are unpreserved. In *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994) (citations omitted), our Supreme Court stated: "Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error." "An exception exists if a

curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *Id*. This Court has directed that unpreserved instances of prosecutorial misconduct are reviewed for plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Error requiring reversal cannot be found where a curative instruction would have "alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, . . . and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citations omitted).

A claim of ineffective assistance of counsel "presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). This Court generally reviews the trial court's findings of fact, if any, for clear error, and reviews de novo its conclusions of law. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Armstrong*, 490 Mich at 289. This Court, however, reviews unpreserved claims of ineffective assistance of counsel for mistakes apparent on the record. *People v Putnam*, 309 Mich App 240, 246, 247; 870 NW2d 593 (2015).

A challenge to the sufficiency of evidence in support of a criminal conviction is a question of law reviewed de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This Court reviews the evidence in a light most favorable to the prosecution to determine whether rational jurors could find that the essential elements of each crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Circumstantial evidence and reasonable inferences drawn from such evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). This Court will not resolve witness credibility questions or interfere with the fact-finder's determination of the weight of evidence. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Triers of fact, not the appellate court, determine what inferences may be fairly drawn from the evidence and the weight to be accorded them. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court resolves all evidentiary conflicts in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

III. ANALYSIS

A. PROSECUTORIAL ERROR

Defendant argues that the prosecution committed prosecutorial misconduct in several ways, all of which defendant contends served the purpose of garnering the jury's sympathy for Manley and, in so doing, deprived defendant of his constitutional right to the presumption of innocence and a fair trial, which warrants reversal. Defendant argues that he is entitled to a new trial because of individual and cumulative error. The prosecution counters that the conduct about which defendant complains did not rise to the level of prosecutorial misconduct, and at most, only constituted prosecutor error. This Court addressed the definitional distinction between prosecutorial misconduct and error in *People v Cooper*, 309 Mich App 74; 867 NW2d 452 (2015). This Court explained that the term "prosecutorial misconduct" may be "appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct" but not to "technical or inadvertent error at

trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct." *Id*. at 87-88 (referencing MRPC 8.4). This Court concluded that only the most extreme cases rise to the level of prosecutorial misconduct. Nevertheless, this Court indicated that, no matter which term applies in a given situation, appellate courts "must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id*. at 88 (citation omitted).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007) (citation omitted). "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief . . . and is not required to state inferences and conclusions in the blandest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (citation omitted). "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *Unger*, 278 Mich App at 236 (citation omitted). "They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id*. (citation omitted). "A prosecutor may not appeal to the jury to sympathize with the victim." *Id*. at 237 (citations omitted). "Nor may a prosecutor urge the jury to convict as part of its civic duty or on the basis of its prejudices." *Id*. (citation omitted). "A prosecutor may argue from the facts that a witness is credible or that a witness is not worthy of belief." *Id.* at 240 (citation omitted). "A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Id*. at 241 (citation omitted).

A prosecutor's remarks, however, are not considered in a "vacuum" and "must be read in context." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, "the prosecution's remarks must be considered in light of defense counsel's comments" and an "otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's arguments." *Unger*, 278 Mich App at 238 (quotation marks and citations omitted). Moreover, reversal is not warranted where a curative instruction could have alleviated the prejudicial effect, if any, resulting from the prosecution's comments. *Id*. 278 at 235.

In this case, during trial, defendant failed to object to any of the conduct about which he complains now on appeal. "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Cooper*, 309 Mich App at 88 (citation omitted). To demonstrate plain error warranting appellate relief, a defendant must show that: (1) error occurred; (2) the error was plain, meaning clear or obvious; and (3) the plain error affected substantial rights. *Carines*, 460 Mich at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Defendant bears the burden to demonstrate prejudice. *Id*. Even if these three prongs have been established, this Court must exercise its discretion in deciding whether reversal is warranted. *Id*. Reversal is not warranted unless the plain error resulted in a conviction of an "actually innocent defendant" or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764. Reversal is not required if a jury instruction could have cured the error. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant first challenges the prosecution's questioning during voir dire of a prospective juror who indicated that she knew Manley and contends that the prosecution's questions served to garner sympathy for Manley to defendant's detriment. Defendant's argument lacks merit.

"The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996) (citation omitted). "What constitutes acceptable and unacceptable voir dire practice does not lend itself to hard and fast rules." *Id*. (quotation marks and citation omitted). The trial court and counsel, therefore, "must be allowed wide discretion in the manner they employ to achieve the goal of an impartial jury." *Id*. at 186-187 (quotation marks and citation omitted).

In this case, the record reflects that a prospective juror disclosed that she knew the decedent in response to the trial court's general question regarding whether any prospective juror knew anyone involved in the case. The prosecution later followed up with additional questions to reveal when and the extent to which she knew Manley and his family. The prosecution asked if she got along with Manley and his family to which she answered affirmatively. The prosecution's questioning of the prospective juror during voir dire revealed that she likely held bias favoring Manley and potentially would favor the prosecution. The record reflects that the prosecution requested and defense counsel concurred in the exclusion of that prospective juror for cause. The depth at which the prosecution examined the prospective juror appropriately exposed her potential inability to serve impartially and revealed the reasons why she needed to be excluded for cause. Analysis of the questions posed by the prosecution does not reveal an attempt to garner sympathy for Manley. Rather, the questions exposed bias by sufficiently probing the background to achieve voir dire's constitutional purpose. Accordingly, defendant has failed to meet his burden of establishing plain error in this regard.

Defendant also argues that the prosecution committed prosecutorial misconduct by improperly eliciting testimony from Manley's mother that garnered sympathy for Manley, requiring reversal. We disagree.

In this case, the record reflects that defense counsel's opening statement advanced defendant's self-defense theory. Defense counsel provided an interpretation of evidence anticipated to be admitted during trial that suggested that Manley acted as the aggressor. Defense counsel concluded by stating that she would convince the jury that the shooting incident occurred after verbal threats and threatening physical actions were taken, essentially asserting that Manley had been the aggressor, thereby justifying defendant's response. Defense counsel's opening statement demonstrated that defendant intended to raise a self-defense claim.

MRE 404 provides in relevant part:

> (a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *

(2) When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor[.]

MRE 405 provides in relevant part:

(a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

Although an opening statement is not evidence within the meaning of MRE 404(a)(2), we conclude that, when a defense counsel's opening statement advances the defendant's self-defense theory and directly or impliedly announces the defendant's intention to justify his conduct by asserting that the victim acted as the first aggressor, such opening statement allows the prosecution to admit in its case-in-chief evidence of the victim's character for peacefulness to rebut the defendant's theory that the victim constituted the first aggressor.

In this case, based upon defense counsel's opening statement, the prosecution anticipated the self-defense theory and introduced through Manley's mother evidence of Manley's character for peacefulness. The prosecution elicited background information about Manley regarding his reputation in the community and his dislike of guns. Manley's mother offered her opinion regarding Manley's character for peacefulness to rebut defendant's anticipated claim that Manley acted aggressively and that Manley had a gun. Defendant testified on his own behalf and blamed Manley for being the aggressor, accused Manley of verbally and physically threatening defendant, and claimed that Manley brandished a gun and threatened to kill defendant which caused defendant fear and shock justifying his shooting of Manley. Although Manley's mother's testimony came before defendant introduced his evidence of self-defense, we do not find introducing such evidence to constitute prosecutorial misconduct or error when it would have been admissible to rebut defendant's testimony. Accordingly, defendant has failed to establish plain error in this regard.

Defendant also argues that the prosecution committed misconduct by eliciting testimony from Manley's mother regarding how his death affected her, which defendant claims garnered sympathy for Manley and scorn for defendant. Even if error exists, reversal is not required unless defendant meets his burden of establishing that the error determined the outcome and resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). Consequently, even if one concludes that the prosecutor improperly focused on sympathy for the decedent by eliciting testimony regarding how Manley's death affected his mother, and thereby committed plain error, nevertheless, reversal is not warranted because defendant has failed to establish that the plain error resulted in a conviction of an "actually innocent defendant" or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763-764. The prosecution presented ample evidence from which the jury could conclude beyond a reasonable doubt that defendant committed the charged offenses. Although defendant claimed that he acted in self-defense, the jury rejected his defense theory. Nothing in the record indicates that the jury determined defendant's guilt based upon

partiality or sympathy for Manley. Therefore, defendant is not entitled to reversal because of such plain error.

Defendant next argues that the prosecution committed prosecutorial misconduct by referring to Manley as "the victim" in its opening statement, closing and rebuttal arguments. This argument lacks merit.

"Victim" is defined as "[a] person harmed by a crime, tort, or other wrong." See *Black's Law Dictionary* (10th ed). The term necessarily does not connote or imply that a crime was committed. Further, the trial court specifically instructed the jury that the lawyers' statements and arguments were not evidence and were not to be considered evidence by them. The trial court instructed the jury to only accept things the lawyers said that were supported by the evidence or by their own common sense and general knowledge. The trial court instructed the jury to decide the case based only on the evidence admitted during trial and that they were the only judges of the facts. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). We conclude that the trial court's instructions sufficed to dispel any prejudice. Therefore, this unpreserved issue does not warrant appellate relief. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). "Finally, because a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 237 (citation omitted); see also *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). Accordingly, defendant is not entitled to reversal.

Defendant also claims entitlement to reversal because of cumulative error respecting prosecutorial misconduct. "Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal." *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988) (citation omitted). The term "cumulative error" "refers to cumulative unfair prejudice, and is properly considered in connection with issues of harmless error." *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). "[O]nly 'actual errors' are aggregated when reviewing a cumulative-error argument." *People v Gaines*, 306 Mich App 289, 310; 856 NW2d 222 (2014) (citation omitted). "To warrant reversal based on cumulative error, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Schrauben*, 314 Mich App 181, 193; 886 NW2d 173 (2016) (quotation marks and citation omitted). "The test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial." *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987) (citation omitted). In this case, defendant's cumulative error claim fails because the errors about which he complains, when properly analyzed, were not errors and even if this Court assumes for argument's sake that some were, defendant has failed to establish that he was denied a fair and impartial trial.

Defendant's unpreserved claims that his trial counsel provided him ineffective assistance also lack merit. Defendant has failed to meet his burden.

"In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance,

there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*. at 52 (citation omitted). "In addition to proving that defense counsel's representation was constitutionally deficient, defendant must show that but for counsel's deficient performance, a different result would have been reasonably probable." *Id*. at 55-56 (quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Further, defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defense counsel cannot be said to have rendered ineffective assistance by failing to raise meritless or futile objections. *Putnam*, 309 Mich App at 245. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant asserts that his counsel provided ineffective assistance by not objecting to the three specific types of alleged prosecutorial misconduct that he claims garnered the jury's sympathy for Manley and scorn for himself. As explained previously, defendant has failed to establish that the alleged conduct by the prosecution rose to the level of prosecutorial misconduct or error. Further, even if this Court concludes that some of the instances of which defendant complains constituted error, such error did not result in the conviction of an actually innocent defendant nor seriously affect the fairness, integrity, or public reputation of the judicial proceedings. At most, defendant simply argues that his trial counsel's choice to not pose the objections caused him prejudice.

Examination of the record, however, does not confirm defendant's contentions. The record reflects that defense counsel learned from the prosecution's questioning of the prospective juror that she held bias and likely could not impartially serve as a juror in this case. Defense counsel agreed with the prosecution based upon her answers that she should be excluded for cause. Had defense counsel objected to the prosecution's questions, such objections likely would not have been sustained since the questions served the purpose of voir dire to reveal bias and impartiality to ensure proper determination of the outcome of the case. Respecting Manley's mother's testimony, the prosecution did not commit prosecutorial misconduct or error by eliciting general background information regarding Manley's character in light of defendant's intention to defend by claiming that he acted in self-defense. An objection regarding such testimony would have been futile. Further, assuming that the prosecution improperly questioned Manley's mother regarding the impact of Manley's death upon her, and failure to object constituted defective performance, we are not persuaded that but for defense counsel's performance, defendant's trial would have resulted differently.

Similarly, close review of the record does not support defendant's claim that his trial counsel performed defectively by not objecting to the prosecution's references to Manley as "the victim." The record reflects that the prosecution referred to Manley by his name or the pronouns "he" and "him" the vast majority of the time throughout opening statement, closing and rebuttal

arguments. Further, the term victim does not mean or imply that defendant bore criminal guilt. The record reflects that defendant admitted that he shot Manley with his handgun. Manley, therefore, could be understood as the victim of injury, whether as the result of his own doing as defendant contended, by an accident, or by defendant's commission of a crime. The record does not establish that the prosecution referring to Manley as a victim constituted misconduct or error. Even assuming that the prosecution erred by referring to Manley as a victim during opening statement, closing and rebuttal argument, defense counsel reasonably could have chosen not to object because doing so may have seemed imprudent at the time. This Court cannot second-guess defense counsel's reason for not doing so. "While the lack of an objection may have been questionable strategy, absent the advantage of hindsight, we cannot say that defense counsel performed below the standards of a reasonably competent attorney." *Stanaway*, 446 Mich at 688.

Moreover, even if defendant could establish that his trial counsel's performance fell below an objective standard of reasonableness, defendant has failed and cannot show that but for his counsel's purported deficient performance, a different result would have been reasonably probable. The record reflects that the prosecution presented substantial evidence from which the jury could conclude beyond a reasonable doubt that defendant committed the charged offenses. Defendant admitted that he possessed a handgun despite having no legal right to do so, admitted that he shot Manley, and that the gunshot resulted in Manley's death. The jury rejected defendant's claim that he acted in self-defense. Ample evidence supported the jury's decision in that regard. The prosecution's witnesses' testimonies and the surveillance video footage revealed that defendant acted as the first aggressor and used deadly force against an unarmed man. The evidence did not support defendant's self-defense theory. A different result, therefore, would not have been reasonably probable. Accordingly, defendant has failed to establish that his counsel provided him ineffective assistance.

B. SUFFICIENCY OF EVIDENCE

Defendant argues that the prosecution failed to prove with sufficient evidence that he committed second-degree murder and at most the evidence only sufficed to convict defendant of voluntary manslaughter. We disagree.

The prosecution charged and tried defendant of committing first-degree murder in violation of MCL 750.316. "Second-degree murder is always a lesser included offense of first-degree murder." *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975). The jury convicted defendant of second-degree murder.

To prove second-degree murder the prosecution was required to present evidence of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citations omitted). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.' " *Id*. (citation omitted). "Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. (quotation marks and citation omitted). "The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead,

the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *Id*. (quotation marks and citation omitted)

"A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). Self-defense is a complete, affirmative defense that justifies otherwise punishable criminal conduct. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). Michigan's self-defense act provides in relevant part under MCL 780.972(1):

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if . . . the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

MCL 780.974 provides:

> This act does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006.

At common law, self-defense justified the killing of another person if the defendant "honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013) (citations omitted). A defendant does not act in justifiable self-defense if he uses excessive force or when he is the initial aggressor. *Id*. At common law, defendant could use self-defense to justify killing Manley if he honestly and reasonably believed Manley presented imminent danger to defendant's life or he believed that Manley presented him a threat of serious bodily harm that required defendant to exercise deadly force to prevent such harm to himself. Defendant, however, could not be found to act in justifiable self-defense if he used excessive force or if he was the initial aggressor.

"Once a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt." *Dupree*, 486 Mich at 712. "The sufficiency of the evidence of a defendant's self-defense theory is for the jury to decide under proper instructions[.]" *People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020) (quotation marks, ellipsis, and citation omitted).

At trial, defendant testified that Manley acted as the aggressor, lunged at defendant, and verbally threatened to kill defendant. Defendant also testified that Manley had a gun and while trying to disarm him defendant shot Manley. Such evidence presented sufficient facts to support the trial court's instructing the jury on self-defense under either MCL 780.791(1) or the common law. The record, however, reflects that the prosecution presented evidence of each element of

second-degree murder. Defendant admitted during his testimony that Manley's death occurred because defendant shot him with defendant's handgun. The prosecution also presented evidence from which the jury could infer that defendant intentionally set in motion a force likely to cause death or great bodily harm. Farria testified that defendant barged uninvited into Young's apartment with a handgun in pursuit of Manley. From defendant's disparaging angry words and conduct the jury could conclude that defendant intended to harm Manley.

The prosecution also presented the surveillance video which showed defendant in the parking lot brandishing his handgun while approaching Manley stealthily from behind, whereupon defendant attacked Manley. The video indicated that Welch unsuccessfully attempted to break up the men but defendant and Manley struggled until defendant shot Manley at point-blank range. Then, when Manley limped away with his back turned to defendant, defendant pointed his gun again at Manley's back. The video then showed defendant rack the slide on his handgun and point it at Manley. Even after Manley fully retreated into his vehicle, defendant went up to Manley's window and pointed his gun at Manley's face. Young testified that defendant went up to Manley's car, looked in at Manley, and asked hostilely whether Manley still breathed.

From this evidence, a reasonable jury could infer malice and conclude that defendant shot Manley without justification. Moreover, the video evidence and prosecution witnesses' testimonies starkly contrasted with defendant's rendition of the facts. No witness saw Manley with a gun and the police investigating the shooting found no gun or weapon on Manley's person or in Manley's vehicle. The jury could find defendant guilty of second-degree murder beyond a reasonable doubt based upon the ample evidence presented by the prosecution. Further, from the evidence presented at trial, the jury could find beyond a reasonable doubt that the prosecution proved that defendant did not act in self-defense. Therefore, sufficient evidence in the record supported the jury's rejection of defendant's self-defense theory and supported the jury's decision to find defendant guilty of second-degree murder.

Affirmed.

/s/ James Robert Redford
/s/ Stephen L. Borrello
/s/ Jonathan Tukel