

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMY JUNIOR DOSS,

Defendant-Appellant.

UNPUBLISHED
November 29, 2011

No. 299519
Kalamazoo Circuit Court
LC No. 2009-001893-FC

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant Timmy Junior Doss appeals as of right his jury trial convictions of voluntary manslaughter, MCL 750.321; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 12 to 30 years' imprisonment for voluntary manslaughter, 4 to 10 years' imprisonment for felon in possession of a firearm, and a consecutive two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that the trial court erred in admitting his prior conviction for attempted first-degree home invasion under MRE 609(a)(1) because the conviction did not contain an element of dishonesty or false statement. While we recognize that attempted first-degree home invasion does not contain an element of dishonesty or false statement, see *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), we find it unnecessary to address this issue further because defendant waived his right to have this Court consider the propriety of the admission of this evidence where defendant was the first to introduce the evidence. See *Ohler v United States*, 529 US 753, 755, 760; 120 S Ct 1851; 146 L Ed 2d 826 (2000) (reaching a similar conclusion under FRE 609). Defendant's trial counsel intentionally adduced evidence of defendant's prior conviction *before* the prosecutor introduced the prior conviction. "Waiver is the "intentional relinquishment or abandonment of a known right." *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). A party who waives his right may not seek appellate review "for his waiver has extinguished any error." *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Nevertheless, we reviewed the claim of error and find that the evidence would have been admissible under MRE 609(a)(2). Where the trial court reaches a correct result, albeit for the wrong reason, reversal is not warranted. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

Defendant next argues that the trial court erred in denying his motion for a mistrial based on comments the prosecution made during closing argument relating to society and race. Defendant preserved this issue by making a timely motion for a mistrial before the trial court. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

“The trial court’s grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). “[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion is found “when the trial court chooses an outcome falling outside this principled range of outcomes.” *Id.* “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.” *Haywood*, 209 Mich App at 228 (citation omitted).

We find no merit in defendant’s claim that the prosecutor improperly referenced a civic duty to convict defendant. “Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence and because they encourage the jurors to suspend their own powers of judgment.” *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). None of the prosecutor’s comments about society suggested there was a civic duty to convict defendant. The comments did not improperly “appeal to the fears and prejudices of jury members,” but instead asked the jury to consider whether defendant really acted in self-defense, the crux of defendant’s defense. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may comment on the evidence presented at trial. *Id.* at 284. In the present case, the prosecutor was responding to defendant’s claim of self-defense and it is not improper for a prosecutor to respond to “defendant’s theory of the case.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Similarly, we find no merit in defendant’s claim that the prosecutor’s one reference to the race of the crowd on the night of the shooting was improper. Generally, it is improper to inject “racial or ethnic remarks into any trial because it may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused.” *Bahoda*, 448 Mich at 266. In reviewing claims of improper references to race, the remarks are examined “in context to determine whether they denied defendant a fair trial.” *Id.* at 266-267. In the present case, we find the prosecutor’s comment properly responded to defendant’s implication that “a crowd like that” was likely to have a gun. A prosecutor may argue “the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *Id.* at 282 (citation omitted). Further, a reference to race for the purposes of responding to defendant’s testimony is not improper. See *People v Foster*, 138 Mich App 734, 741; 367 NW2d 349 (1984).

Defendant next makes several arguments to this Court in propria persona. He first argues that the trial court erred in denying his motion for a directed verdict. Defendant’s trial counsel, at the close of the prosecution’s case, moved for a directed verdict as to the “murder” charges; therefore, this issue is preserved for appellate review. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

“A challenge to the trial court’s decision on a motion for a directed verdict has the same standard of review as a challenge to the sufficiency of the evidence.” *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010). The difference is that only the evidence presented before the motion for a directed verdict was made is considered. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). When reviewing a trial court’s decision on a motion for a directed verdict, the evidence is viewed de novo “in a light most favorable to the prosecution” to determine “whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). The trial court, in ruling on a directed verdict, cannot determine the credibility of witnesses and this remains true “no matter how inconsistent or vague that testimony might be.” *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

Defendant is correct that the trial court misstated the standard of review for a directed verdict as: “[f]or purposes of the directed verdict, the standard is not beyond a reasonable doubt but simply whether there are — there is evidence to support each of the elements of the charged offense.” However, defendant has not demonstrated that he was prejudiced by this. Defendant’s trial counsel asked for a directed verdict on the “murder” charges. Defendant was not convicted of murder, he was convicted of manslaughter. Additionally, defendant has failed to present any argument demonstrating that, in viewing the evidence in a light most favorable to the prosecution, he was entitled to a directed verdict on either the first- or second-degree murder charge. *Riley*, 468 Mich at 139-140. Instead, defendant merely presents a summary of witness testimony and asks this Court to consider certain exhibits attached to his brief, but these exhibits are not properly part of the record on appeal and cannot be considered. *People v Shively*, 230 Mich App 626, 629 n 1; 584 NW2d 740 (1998); MCR 7.210(A)(1). Because defendant has merely announced a position and left it to this Court to rationalize it, we find defendant has abandoned the argument that he was entitled to a directed verdict. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next argues his trial counsel provided ineffective assistance of counsel. Because defendant failed to “move for a new trial or request a *Ginther*¹ hearing below,” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), “review is limited to errors apparent on the record.” *People v Seals*, 285 Mich App 1, 19; 776 NW2d 314 (2009).

“The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo.” *Id.* at 17 (citations omitted). The burden is on defendant to establish “the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To prove ineffective assistance of counsel defendant must demonstrate: (1) his counsel’s performance fell below objective standards of reasonableness; (2) it is reasonably probable that the results of the proceeding would have been different but for counsel’s alleged error; and (3) the result was fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

NW2d 713 (2007), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant’s first claim of ineffective assistance stems from his trial counsel’s failure to object to the erroneous standard of review applied by the trial court to defendant’s motion for a directed verdict. Despite the trial court’s applying the wrong standard, defendant has made no showing he was entitled to a directed verdict. Thus, he cannot prevail on his claim. *Frazier*, 478 Mich at 243.

Defendant’s second claim regarding ineffective assistance is that his trial counsel was ineffective in failing to make a second motion for a directed verdict at the close of defendant’s proofs. As noted above, when reviewing a trial court’s decision on a motion for a directed verdict, the evidence is viewed de novo “in a light most favorable to the prosecution” to determine “whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *Riley*, 468 Mich at 139. The trial court, in ruling on a directed verdict, cannot determine the credibility of witnesses and this remains true “no matter how inconsistent or vague that testimony might be.” *Mehall*, 454 Mich at 6. Another motion for a directed verdict was not warranted after defendant presented his version of events because the evidence would still have been viewed in a light most favorable to the prosecution. *Riley*, 468 Mich at 139-140. “Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.” *Id.* at 142. Because defendant would not have been entitled to a directed verdict at the close of his proofs, his trial counsel was not ineffective in failing to make a meritless motion and we find defendant has failed to demonstrate his counsel’s performance was deficient or that defendant was prejudiced in any way. See *Frazier*, 478 Mich at 243.

Defendant’s third claim regarding ineffective assistance is that his trial counsel was ineffective in failing to fully investigate the case and call certain witnesses. “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant fails to explain how his attorney’s decision not to call certain witnesses did not constitute a valid trial strategy and what, if any, beneficial testimony the uncalled witnesses would have provided. A party may not merely announce a position and leave it to this Court to rationalize that position; therefore, we find defendant has abandoned this argument. *Harris*, 261 Mich App at 50.

To the extent defendant makes the additional arguments, under the ambit of ineffective assistance of counsel, that his trial counsel failed to properly impeach witnesses and of prosecutorial misconduct, we need not consider these issues because they were not properly raised in defendant’s statement of questions presented. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

Defendant next argues he was entitled to jury instructions on common-law self-defense and duress with respect to his felon in possession of a firearm conviction. Defendant waived this claim of error because he failed to request the instructions before the trial court and defendant’s

trial counsel expressly approved the final jury instructions. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). As noted above, “[w]aiver is the intentional relinquishment or abandonment of a known right.” *Olano*, 507 US at 733. A party who waives his right may not seek appellate review “for his waiver has extinguished any error.” *Griffin*, 84 F3d at 924. The error, if any, has been extinguished.

Finally, defendant argues that the cumulative effect of the alleged errors mandates reversal. We disagree. While “the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not” defendant has only demonstrated one error we may consider: the trial court’s application of the wrong standard to defendant’s motion for a directed verdict. Because there was not more than one error, there is no error to aggregate in considering the cumulative effect of the error. See *Bahoda*, 448 Mich at 292 n 64.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer