STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2012
v	No. 301559 Wayne Circuit Court
HOWARD LEVAR SMITH, Defendant-Appellant.	LC No. 10-007618-FC

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Following a bench trial, Howard Levar Smith was convicted of second-degree murder,[1] carrying a concealed weapon (CCW),[2] felon in possession of a firearm,[3] and possession of a firearm during the commission of a felony (felony-firearm).[4] Smith was sentenced to concurrent prison terms of 20 to 35 years for the second-degree murder conviction, and one to five years each for the CCW and felon-in-possession convictions, together with a consecutive two-year term of imprisonment for the felony-firearm conviction. Smith appeals as of right. We affirm.

Smith's convictions arise from the shooting death of Farrod Potter during the early morning hours of June 27, 2010, outside a lounge in Detroit. At trial, several witnesses, including Raymond Grant, testified that they had celebrated a family birthday at the lounge. As Grant was entering the lounge, he accidentally stepped on Smith's shoe. Grant apologized to Smith before they continued on their separate ways. Near the lounge's closing time, Smith followed Grant's aunt across the street to talk. Shortly thereafter, Grant and a group of friends, including Potter, came across the street. Grant again apologized to Smith, who declined to acknowledge his acceptance of the apology. Although Grant became irritated by Smith's attitude, the testimony of the several trial witnesses consistently described that Grant and his acquaintances walked away from Smith back toward the lounge or their cars. Smith, who was

[1] MCL 750.317.

[2] MCL 750.227.

[3] MCL 750.224f.

[4] MCL 750.227b.

armed with a .25-caliber handgun, jogged or walked in pursuit of Grant and his acquaintances. Smith declared that he should shoot someone in the back, after which Smith drew his handgun. Grant grabbed Smith around his arms to prevent Smith from shooting, but Smith was able to raise the gun toward Potter and shoot him once in the chest. No evidence suggested that Grant or his acquaintances possessed weapons of any kind that morning, or that any of them ever threatened Smith. Smith raised a self-defense claim at trial.

Smith's initial argument on appeal puts forth a proposition that has been rejected by a consistent line of Michigan cases, namely that his convictions of both felon in possession of a firearm and felony-firearm violate constitutional double jeopardy principles. We disagree. As Smith acknowledges, our Supreme Court has addressed this question and held that a defendant's punishment for both felon in possession of a firearm and felony-firearm does not amount to multiple punishments for the same offense, explaining:

> In considering MCL 750.227b in *Mitchell*,[5] we concluded that, with the exception of the four enumerated felonies [MCL 750.223 (unlawful sale of a firearm), MCL 750.227 (carrying a concealed weapon), MCL 750.227a (unlawful possession by licensee), and MCL 750.230 (alteration or removal of identifying marks)], it was the Legislatures intent "to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute."[6]
>
> We follow, as did the Court of Appeals in *Dillard*,[7] our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b.[8]

The Michigan Supreme Court decisions in *Calloway* and *Mitchell* and this Court's decision in *Dillard* control the resolution of this issue.[9] Moreover, Smith has offered no persuasive authority casting doubt on *Calloway*, *Mitchell*, and *Dillard*. He invokes only a federal district court's analysis in a case that was subsequently reversed by the United States Court of Appeals for the Sixth Circuit.[10] Accordingly, we reject Smith's first claim of error.

---

[5] *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998).

[6] *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), quoting *Mitchell*, 456 Mich at 698.

[7] *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001).

[8] *Calloway*, 469 Mich at 452.

[9] *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

[10] See *White v Howes*, 586 F3d 1025 (CA 6, 2009).

Smith next argues that the prosecutor failed to disprove that Potter's shooting occurred in self-defense. We disagree. The applicability of the doctrine of self-defense "presents a question of law, which [an appellate court] review[s] de novo."[11]

> As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat.[12]

But "[o]ne who is involved in a physical altercation in which he is a willing participant . . . is required to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter."[13] "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt."[14]

In this case, the evidence presented by the prosecutor showed that (1) Grant and several others approached Smith as he talked to Grant's aunt; (2) Grant and Smith exchanged some brief, contentious discussion about whether Smith should accept Grant's apology; (3) shortly thereafter, Grant and his acquaintances began walking away from Smith; (4) Smith then decided to pursue Grant and his acquaintances, and announced moments later that he should shoot someone in the back; and (5) at no point around the time of the shooting did Grant or any of his acquaintances have any kind of weapon or threaten Smith in any way. From these circumstances, a rational trier of fact could find beyond a reasonable doubt that Smith did not possess an honest and reasonable belief that he faced an imminent danger of death or great bodily harm. Furthermore, the testimony of the prosecution witnesses does not support a finding that Smith necessarily employed deadly force when he shot Potter. To the contrary, the testimony showed that Smith ignored "an obvious and safe avenue of retreat" and became the aggressor in the situation when he decided to pursue and threaten Grant and his acquaintances as they walked away from Smith.[15] Accordingly, there was sufficient evidence to disprove Smith's theory of self-defense beyond a reasonable doubt.

---

[11] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

[12] *Id.* at 119.

[13] *Id.* at 120 (emphasis omitted).

[14] *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (internal quotation omitted).

[15] *Riddle*, 467 Mich at 119, 129 ("[i]f it is possible to safely avoid an attack then it is not *necessary*, and therefore not permissible, to exercise deadly force against the attacker") (emphasis in original).

Smith also asserts that there was insufficient evidence to support his second-degree murder conviction. We disagree. We review de novo a challenge to the sufficiency of the evidence.[16]

> When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.[17]

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."[18]

"The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death."[19]

> 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. Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.[20]

The evidence introduced by the prosecutor supported that the discharge of Smith's handgun caused Potter's death. Concerning the requisite malice element, the trial court justifiably found that, at a minimum, the record reflected that Smith intentionally committed "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."[21] Grant's aunt recalled seeing Smith holding his handgun minutes before the shooting. The testimony of Grant and three of his acquaintances who were

---

[16] *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

[17] *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation omitted).

[18] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

[19] *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009), aff'd 488 Mich 922 (2010).

[20] *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotation omitted).

[21] *Id.*

outside the lounge established that Smith drew his handgun while pursuing Grant and his acquaintances, that Smith and Grant wrestled, that Smith managed to point the handgun toward Potter, and that seconds later Smith fired a shot into Potter's chest. This testimony was sufficient to enable the trial court to find beyond a reasonable doubt that Smith "inten[ded] to do an act that is in obvious disregard of life-endangering consequences."[22] In regard to the final element necessary to show second-degree murder, with the absence of any justification or excuse for the killing, as previously discussed above, the trial court reasonably found that the evidence did not support Smith's theory of self-defense, and that there was no other excuse or justification for the shooting. Viewed in the light most favorable to the prosecution, the evidence at trial belies Smith's suggestion that the shooting was accidental, most significantly the testimony about Smith's threat to shoot moments before he discharged his gun, together with the evidence that Grant never touched Smith's handgun while wrestling with Smith, and that Smith successfully raised the gun toward Potter immediately before the shooting.[23]

Smith further argues that several instances of prosecutorial misconduct deprived him of a fair trial. We disagree. Because Smith did not object to the prosecutor's conduct at trial, we consider these unpreserved claims only to ascertain whether a plain error affected Smith's substantial rights.[24]

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the [fact finder] that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.[25]

Smith characterizes as improper a portion of the prosecutor's closing argument that purportedly misstated a stipulation of the parties about Potter's autopsy, specifically that the autopsy uncovered no evidence of close-range gunfire. Our review of the terms of the parties' stipulation concerning Potter's autopsy revealed no reference by the medical examiner to any indicia of close-range gunfire. Consequently, the prosecutor reasonably argued that "there was no evidence of close range firing." Furthermore, the prosecutor's reference to the absence of close-range gunfire was directly relevant to rebut the defense theory that Potter and others had assaulted him, causing Smith to fire his gun in self-defense. Thus, the prosecutor properly

---

[22] *Id*.

[23] *Nowack*, 462 Mich at 399-400.

[24] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[25] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

"argue[d] the evidence and all reasonable inferences arising from it as they relate to the theor[ies] of the case."[26]

Smith additionally suggests that the prosecutor inaccurately mentioned in his closing argument that Grant had "testified that he overheard . . . [Smith] stating to him[,] 'I should have shot you in the back.'" Our review of the prosecutor's closing and rebuttal arguments reveal no quotation matching that challenged by Smith. The prosecutor invoked Smith's threat on three occasions: (1) "He chose to follow that group and three different witnesses said . . . , he said words to the effect of I should just shoot you in the back right now"; (2) "There was no need for him to say, if he said as three witnesses said he said, I should shoot you in the back"; and (3) "[Y]ou heard three [witnesses] . . . testif[y] that [Smith] said I ought to shot [sic] you in the back." The prosecutor properly summarized the consistent trial testimony by Grant, and witnesses Kyrie Kirby and Darius Rolack, that they heard Smith express his intent to shoot someone in the back. Nowhere did the prosecutor suggest, as Smith seems to insinuate, that Grant testified that Smith threatened to shoot Grant. In conclusion, the prosecutor again properly "argue[d] the evidence."[27]

Smith next contends that the prosecutor misrepresented the trial testimony of Grant concerning whether Grant observed Smith aiming his gun. Specifically, Smith challenges the prosecutor's statement, "Raymond Grant tried to grab [Smith] after he pulled out the gun and after he was aiming the gun." A review of the challenged excerpt, however, shows that the prosecutor did not attribute to Grant alone the trial testimony regarding Grant's struggle with Smith, who had drawn and aimed his gun. Testimony at trial by Grant, Kirby, Rolack, and Chelsie Hicks described Grant's struggle with Smith, which began after Smith drew his gun. Other testimony by Rolack reasonably tended to establish that Grant physically struggled with Smith only after Smith drew and aimed his gun. Therefore, the challenged portion of the prosecutor's closing argument constituted proper argument on the basis of the evidence admitted at trial.[28]

In Smith's final prosecutorial misconduct claim, he maintains that the prosecutor should have asked Rolack whether Potter participated "with . . . Grant . . . in the struggle with [Smith] just prior to or during the time he heard a gun shot." Smith submits that the prosecutor unfairly tried to slant Rolack's account at trial, notwithstanding the prosecutor's awareness that in a statement to the police, Rolack had referenced Potter's involvement in an assault of Smith. On direct examination, the prosecutor questioned Rolack about his recollections of the events leading up to Potter's shooting, including that Potter "was standing directly in front of" Smith "when he lifted his hand up like this, [and] a gun shot noise went off." Defense counsel cross-examined Rolack concerning a statement that he gave to the police, in which Rolack mentioned that just before the shooting Potter "jumped in on it." In the course of the prosecutor's redirect examination, Rolack clarified that his police statement had mentioned that "[Potter] jumped in

[26] *Id.*

[27] *Id.*

[28] *Id.*

it," which Rolack elaborated did not signify that Potter had physically jumped on Smith, but only that "[Potter] jumped in trying to stop [Smith] from pulling the gun out," although "[h]e never got a chance to touch [Smith]." In conclusion, we detect no prosecutorial misconduct because (1) Rolack's statement to the police did not, as Smith suggests, establish that Potter participated in an assault of Smith; and (2) the prosecutor otherwise, in apparent good faith, thoroughly questioned Rolack about his knowledge of the shooting.[29]

Last, Smith asserts several instances of allegedly ineffective assistance by his trial counsel. We disagree. Because Smith neglected to raise before the trial court any purported instance of ineffective assistance by his trial counsel, we limit our review "to mistakes apparent on the record."[30] Whether Smith received the effective assistance of counsel comprises "a mixed question of fact and constitutional law."[31] We consider a trial court's findings of fact for clear error and questions of constitutional law de novo.[32]

"'[T]he right to counsel is the right to the effective assistance of counsel.'"[33] "Reversal of a conviction is required where counsel's performance falls below an objective standard of reasonableness, and the representation so prejudices the defendant as to deprive him of a fair trial"[34] With respect to the prejudice aspect of the test for ineffective assistance, Smith must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed.[35] Smith must also overcome the presumption that his attorney's actions represented sound trial strategy.[36]

Smith contends that trial counsel should have objected to the prosecutor's closing argument comments regarding (1) Potter's autopsy; (2) Grant allegedly testifying to hearing Smith express his intent to shoot Grant in the back; and (3) Grant grabbing Smith after Smith drew and aimed his gun. Because all of the challenged portions of the prosecutor's closing argument are accurately depicted the trial record, defense counsel need not have lodged meritless objections to the prosecutor's remarks.[37]

---

[29] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[30] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[31] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[32] *Id*.

[33] *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

[34] *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

[35] *Solmonson*, 261 Mich App at 663-664.

[36] *Cline*, 276 Mich App at 637.

[37] *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Smith also contends that trial counsel was ineffective because a portion of his closing argument "verif[ied] and confirm[ed] . . . the prosecutor's version of" the stipulation regarding Potter's autopsy. Our reading of the challenged excerpt of defense counsel's closing argument illustrates, to the contrary, that defense counsel repeatedly emphasized in plain terms that the record did not discount the possibility that Smith shot Potter at close range, an argument consistent with the defense theory of self-defense. In summary, the challenged portion of defense counsel's closing argument depicts no objectively unreasonable conduct, and no reasonable probability that counsel's argument adversely affected the verdict in some respect.[38]

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot

[38] *Solmonson*, 261 Mich App at 663-664.