

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 20, 2014

v

ANTHONY DANIEL PRITCHELL,

Defendant-Appellant.

No. 311052
Wayne Circuit Court
LC No. 11-009262-FC

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ The trial court sentenced defendant to 18 years and 9 months to 25 years' imprisonment for the second-degree murder conviction, 10 years and 6 months to 15 years' imprisonment for the assault with intent to murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals by right, and we affirm.

Sometime between the evening of August 12th and the morning of August 13, 2011, five people were shot in the backyard of a Detroit home. Tramaine Matlock died as a result of a gunshot wound to the chest. The remaining four victims, one of whom was Devonta Washington, were not fatally injured. Nine, .45-caliber casings were found in a straight line along the fence in the backyard. According to testimony at trial, this evidence supported that there was one shooter, who stood in one place while firing a .45-caliber gun. Defendant, who was a member of a gang called The Take Over (TTO), was later arrested and charged with first-degree murder, second-degree murder, four counts of assault with intent to murder, a gang membership felony, and felony-firearm. Three of the assault with intent to murder charges were dismissed before trial. Washington testified at defendant's preliminary examination. However, he did not appear at trial. Detroit Police Detective Theopolis Williams testified that police officers were unable to locate Washington to serve him with a subpoena.

¹ Defendant was acquitted of first-degree murder, MCL 750.316(1)(a), and a gang membership felony, MCL 750.411u(1).

At trial, defendant raised a claim of self-defense. He testified that, while he was at a party in August of 2011, a group of men arrived. Of the men in the group, defendant recognized Washington and a man named “Vonte,” who was a member of a rival gang. Defendant testified that he and the group of men were 10 to 12 feet away from one another in the backyard when he saw Vonte displaying a rival gang sign and Washington holding a clip in his hand and reaching for his pocket. Defendant testified that he believed that Washington was reaching for a gun, and so he fired his .45-caliber pistol four times in the direction of Washington. Defendant was convicted by the trial court of second-degree murder for the death of Matlock, assault with intent to murder with respect to Washington, and felony-firearm.

Defendant first argues on appeal that the prosecution failed to present sufficient evidence to sustain his convictions. Defendant does not address how the record evidence was insufficient to establish the elements of the crimes for which he was convicted. Rather, he contends that the prosecution failed to present sufficient evidence to refute his claim of self-defense.

“[O]nce the defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a [fact finder] could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of proof to exclude the possibility that the killing was done in self-defense.” *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010) (internal quotations omitted). The Self-Defense Act, MCL 780.971 *et seq.*, “codified the circumstances in which a person may use deadly force in self-defense . . . without having the duty to retreat.” *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013) (citation omitted). In order to justify the use of “deadly force,” a defendant must “have an honest and reasonable belief that there is a danger of [imminent] death,” or imminent “great bodily harm” and that it is necessary to exercise deadly force to prevent such harm. *Id.* at 35-36, citing MCL 780.972(1).

Here, there was sufficient evidence from which a reasonable fact finder could find that defendant did not act in self-defense. Defendant testified at trial that he became afraid for his life after Vonte displayed a rival gang sign and Washington held a clip in his hand while reaching for his pocket. According to defendant, Washington was affiliated with two gangs that did not like defendant’s gang. However, defendant never saw Washington with a gun, only a clip, thus establishing that defendant was not in imminent danger because the clip was clearly not inside of a gun. Moreover, defendant’s belief that Washington was reaching into his pocket for a gun was not supported by any verbal threats by Washington. The defense cannot “manufacture a self-defense theory from the innocent act of placing a hand in a pocket.” *People v Squire*, 123 Mich App 700, 708-709; 333 NW2d 333 (1983). Further, defendant’s testimony at trial was inconsistent with his August 23, 2011, statement to Williams that Vonte, not Washington, held the clip and reached for his pocket. Based on these inconsistencies, the trial court found that defendant’s testimony at trial was not credible, and this Court does not interfere with the fact finder’s role of deciding the credibility of witnesses on appeal. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Moreover, the physical evidence established that the shooter stood in one place and fired nine rounds. After the shooting, defendant fled the scene, discarded the weapon, and did not report the incident to the police. Therefore, the physical evidence and defendant’s behavior after the shooting was inconsistent with his assertion that he acted in self-defense based on an honest belief that he was in imminent danger. See *People v Yost*, 278 Mich App 341, 357; 749 NW2d 753 (2008). The evidence, when viewed in a light most favorable to

the prosecution, was sufficient to enable the fact finder to conclude that defendant did not have an honest and reasonable belief that he was in imminent danger at the time of the shooting. *Wolfe*, 440 Mich at 514-515. Therefore, the prosecution met its burden of proof and defendant is not entitled to relief on this issue.

In reaching our conclusion, we reject defendant's argument that, pursuant to the missing witness instruction, CJI2d 5.12, the trial court was required to infer that Washington's testimony would have been unfavorable to the prosecution's case. Jury instructions were not read at the bench trial. Nevertheless, in a bench trial, the trial court "is presumed to know" the applicable law. *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006). Moreover, "in every instance, the propriety of reading CJI2d 5.12 will depend on the specific facts of that case." *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). In *Perez*, *id.* at 417-418, 420, our Supreme Court affirmed our holding that the trial court did not improperly deny the defendant's request for CJI2d 5.12 where "it did not appear that the [missing] witness would have offered testimony helpful to [the] defendant." Here, Washington testified at the preliminary examination that he was socializing with friends when defendant unexpectedly shot him. Washington further testified that he did not have a gun when defendant shot him and that he did not see anyone at the party displaying gang signs. Therefore, because the record establishes that Washington's testimony was not expected to present evidence favorable to defendant's self-defense theory, we conclude that it would have been improper for the trial court to infer that Washington's testimony "would have been unfavorable to the prosecution's case." See *id.* at 417-418, 420.²

Next, defendant argues that the admission of Washington's preliminary examination testimony tainted the outcome of the proceedings. We disagree. Initially, the trial court admitted the preliminary examination testimony. However, before rendering the verdict, the court indicated that it had conducted additional research, excluded the testimony, and expressly stated that it did not consider the testimony in rendering its verdict. This unpreserved issue is without merit. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). It is well settled that a judge, unlike a jury, "possesses an understanding of the law which allows him to ignore such errors and decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (citation omitted). Defendant's contention that the court could not "unring the bell" is contrary to the law, and this claim of error does not entitle defendant to appellate relief.³

² In the discussion section of this issue, defendant asserts that the lesser offense of manslaughter should be considered. However, this issue was waived because it was not raised in the statement of questions presented, MCR 7.212(C)(5); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000), and the issue was abandoned by the failure to cite authority, *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

³ In his Standard 4 supplemental brief, Administrative Order, No. 2004-6, defendant challenges the admission of the preliminary examination transcript as violative of his right of confrontation, improper hearsay, and improper substantive evidence mandating reversal. However, in light of

Defendant next makes cursory arguments that the prosecutor committed misconduct on three separate instances at trial. Specifically, defendant argues that the prosecutor attempted to shift the burden of proof during closing arguments and that the prosecutor improperly cross-examined defendant concerning whether TTO members committed crimes together and whether defendant was arrested for robbery on August 20, 2011. However, because defendant does not cite any authority to support his assertions, these issues are abandoned. *Matuszak*, 263 Mich App at 59. Nonetheless, we have examined the prosecutor's comments and cannot conclude that defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Lastly, in his Standard 4 brief, defendant contends that he was denied effective assistance of counsel at sentencing because counsel failed to object to his second-degree murder sentence, which he alleges violates the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). However, there is no *Tanner* violation where the maximum possible sentence is "life or any term of years" because "the minimum will never exceed 2/3 of the statutory maximum sentence of life," *People v Harper*, 479 Mich 599, 617 n 31; 739 NW2d 523 (2007). Here, defendant challenges his minimum sentence for second-degree murder. Second-degree murder carries a sentence of "life, or any term of years." MCL 750.317. Therefore, defendant's argument that his second-degree murder sentence violated the two-thirds rule of *Tanner* is without merit. Counsel is not ineffective for failing to raise a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

the trial court's subsequent decision to exclude the testimony, *Taylor*, 245 Mich App at 305, this challenge fails.