

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS LEE CASTLEBERRY,

Defendant-Appellant.

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UNPUBLISHED

October 2, 2003

No. 238900

Berrien Circuit Court

LC No. 01-402307-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; assault with intent to do great bodily harm, MCL 750.84; carrying a concealed weapon, MCL 750.227; and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction, 57 to 120 months' imprisonment for the assault conviction, 24 to 60 months' imprisonment for the carrying a concealed weapon conviction, and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Facts

On May 15, 2001, Rodney Lewis and Perry Walker drove to a neighborhood store. Both men had been drinking earlier in the evening. As they pulled into the store parking lot, they narrowly missed hitting defendant. After Mr. Lewis parked the vehicle, defendant approached and began to speak with him. Mr. Walker testified that he exited the vehicle to find out what was happening. At some point during the conversation, Mr. Lewis opened the trunk of his vehicle. Mr. Walker claimed that while Mr. Lewis was looking in the trunk, defendant pulled a gun from inside his waistband and shot Mr. Lewis. Defendant then turned and fired his weapon at Mr. Walker. Several witnesses testified that defendant ran across the street after the shootings but returned a few seconds later to shoot Mr. Lewis in the head.

Early the next morning, defendant turned himself into the police. While defendant informed the police that he shot Mr. Lewis and Mr. Walker, he maintained that he acted in self-defense. Defendant asserted that he thought Mr. Lewis was looking for a weapon in his trunk. A subsequent search of the area revealed no weapons other than a small souvenir-type baseball bat in the trunk. The autopsy showed that Mr. Lewis was shot twice in the back and once to the right

side of his head. Dr. Robert Clark testified that Mr. Lewis died as a result of the gunshot wound to the head.

## II. Jury Instructions

Defendant initially argues that the trial court's jury instructions failed to fairly present the issue of self-defense to the jury. Specifically, defendant asserts that the instructions failed to clearly inform the jury that he did not bear the burden of proving self-defense. "We review jury instructions in their entirety to determine if error requiring reversal occurred."<sup>1</sup> Defendant's failure to object to the jury instructions as given, however, limits our review to plain error affecting his substantial rights.<sup>2</sup>

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.<sup>3</sup> Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence.<sup>4</sup> Even if somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.<sup>5</sup>

We find no error with the instructions provided by the trial court. The standard self-defense jury instructions that the trial court provided the jury fairly presented the self-defense issue and protected defendant's rights.<sup>6</sup> While defendant maintains that the instructions improperly shifted the burden of proof to defendant, we note that the trial court informed the jury that "[t]he defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense." Jurors are generally presumed to follow their instructions.<sup>7</sup>

To the extent defendant argues that the trial court negatively conveyed defendant's theory of the case by stating that "[t]he defendant *claims* he acted in lawful self-defense[.]" we find no error. Defendant fails to cite any authority to support this argument.<sup>8</sup> Regardless, the term

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<sup>1</sup> *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

<sup>2</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>3</sup> *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff 468 Mich 272; 662 NW2d 12 (2003).

<sup>4</sup> *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

<sup>5</sup> *Aldrich*, *supra* at 124.

<sup>6</sup> See *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993); see also CJI2d 7.15; CJI2d 7.16, CJI2d 7.19, CJI2d 7.20.

<sup>7</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>8</sup> See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000) (noting that the failure to cite supporting authority abandons a claim on appeal).

“claim,” which means to maintain or assert as a fact, was used properly in this instance.<sup>9</sup> We find no error.

### III. Prosecutorial Misconduct

Defendant further argues that the prosecution made several improper comments during the trial that amounted to prosecutorial misconduct and denied him a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.<sup>10</sup> Because defendant failed to object to this alleged misconduct, our review is again limited to plain error affecting his substantial rights.<sup>11</sup> “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.”<sup>12</sup>

Defendant claims that the prosecutor improperly testified to facts of his own personal knowledge and bolstered the credibility of his witnesses. The law is clear that a prosecutor may not personally vouch for a witness’ credibility or suggest that the government has special knowledge that a witness testified truthfully.<sup>13</sup> However, where the jury is faced with a credibility question, the prosecutor is free to argue a witness’ credibility from the evidence.<sup>14</sup>

After reviewing the disputed comments in context, we find no error requiring reversal. The prosecutor’s statements were fair comments on the evidence presented.<sup>15</sup> To the extent that any error could be imparted to the prosecution’s brief comment during closing argument regarding what a witness told him the week before trial, reversal is not required. A prompt instruction could have cured any taint caused by this remark.<sup>16</sup> We further note that it appears that the prosecutor’s statement was responsive to defense counsel’s claim during closing arguments that the prosecution’s witnesses were coached.<sup>17</sup>

Similarly, we find no error requiring reversal with regard to the prosecutor’s statements concerning Comon Rimpson. While some of these statements arguably bordered the line between vouching for a witness and arguing a witness’ credibility from the evidence, defendant

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<sup>9</sup> See *Random House Webster’s Unabridged Dictionary* (1998).

<sup>10</sup> *Aldrich, supra* at 110.

<sup>11</sup> *Carines, supra* at 763-764.

<sup>12</sup> *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

<sup>13</sup> *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

<sup>14</sup> *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

<sup>15</sup> See *People v Buckley*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

<sup>16</sup> *Knapp, supra* at 382.

<sup>17</sup> See *Schutte, supra* at 721.

failed to show plain error affecting his substantial rights.<sup>18</sup> There was overwhelming evidence of defendant's guilt presented at trial and the record does not support a finding of self-defense.

The defense of self-defense requires a situation where: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor.<sup>19</sup> Here, defendant shot two unarmed men. Most notably, one of these men was shot in the back. Defendant also returned to shoot Mr. Lewis in the head after he was already on the ground. There is no evidence that any threatening moves were made towards defendant. This record does not support a finding that defendant reasonably believed that he was in imminent danger of death or serious bodily harm.<sup>20</sup>

Because defendant cannot prove that the result of the proceedings would have been different but for his trial counsel's failure to object to the prosecution's alleged misconduct, his ineffective assistance of counsel claim on this ground must also fail.<sup>21</sup>

#### IV. Ineffective Assistance of Counsel

Defendant, in propria persona, argues that he was denied the effective assistance of counsel. Because defendant did not move for a *Ginther*<sup>22</sup> hearing, our review is limited to the existing record.<sup>23</sup> An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights.<sup>24</sup>

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.<sup>25</sup> To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.<sup>26</sup> Defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy.<sup>27</sup>

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<sup>18</sup> *Carines, supra* at 763-764.

<sup>19</sup> *Kemp, supra* at 322-323.

<sup>20</sup> *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).

<sup>21</sup> See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

<sup>22</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>23</sup> *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

<sup>24</sup> *Carines, supra* at 763-764.

<sup>25</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>26</sup> *Carbin, supra* at 599-600.

<sup>27</sup> *Id.* at 600.

Defendant initially contends that his trial counsel was ineffective for failing to move for a change of venue or disqualification of the trial judge. He claims that reversal is required because St. Joseph Circuit Court Judge Dennis Wiley “may” have prejudged the case given his involvement in the preliminary examination. As a general rule, a judge will not be disqualified absent a showing of actual bias or prejudice.<sup>28</sup> We note, however, that defendant was tried and convicted by a jury in this case. A review of the record further fails to reveal any instance wherein Judge Wiley could have used his knowledge of the preliminary examination to make a ruling, let alone prejudice defendant’s case. Absent evidence that Judge Wiley possessed personal knowledge of any disputed evidentiary facts, beyond what he learned during the course of the judicial proceedings, disqualification is unwarranted.<sup>29</sup> For these reasons, defendant has also failed to show that good cause existed to warrant a change of venue.<sup>30</sup> Defense counsel is not required to make frivolous or meritless motions.<sup>31</sup>

Defendant further alleges that his trial counsel rendered ineffective assistance when he promised the jury that defendant would testify and then failed to call defendant as a witness. A review of the record, however, does not support defendant’s claim. Rather, the record shows that defense counsel was referring to the taped statement that defendant made to the police explaining that he acted in self-defense. This taped statement was ultimately played for the jury at trial.

Next, defendant insists that his trial counsel was ineffective for failing to object when witness Brandon Hill testified to an out-of-court statement. This argument is without merit because the prosecution only used the challenged statement to impeach Brandon Hill’s trial testimony. Under MRE 613, a witness may be examined concerning a prior inconsistent statement for impeachment purposes.<sup>32</sup> Because the prosecution could properly impeach Brandon Hill with this evidence, any objection by defense counsel would have been futile.<sup>33</sup> We note that the trial court instructed the jury that it could only consider this statement to help them decide if Brandon Hill was truthful.<sup>34</sup>

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<sup>28</sup> *People v Houston*, 179 Mich App 753, 756; 446 NW2d 543 (1989).

<sup>29</sup> See MCR 2.003(B)(1) and (2); see also *First Michigan Bank v Bailey*, 232 Mich App 711, 728-729; 591 NW2d 676 (1998).

<sup>30</sup> See MCL 762.7.

<sup>31</sup> *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

<sup>32</sup> *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002).

<sup>33</sup> See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

<sup>34</sup> See *Graves*, *supra* at 486.

## V. Cumulative Error Doctrine

Defendant ultimately contends that the cumulative effect of the errors necessitates reversal. Because there were no errors of consequence, which combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable.<sup>35</sup>

Affirmed.

/s/ Jessica R. Cooper  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly

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<sup>35</sup> *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).