

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE MONTEEK EDWARDS,

Defendant-Appellant.

UNPUBLISHED

June 21, 2011

No. 294826

Genesee Circuit Court

LC No. 08-023861-FC

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant Andre Edwards stood trial for the shooting death of Tyrell Lee, the victim, which took place in Flint during the early morning hours of October 9, 2008. Defendant admitted having shot the victim, but insisted that he had done so in self-defense. A jury convicted defendant of second-degree murder, MCL 750.317, being a 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. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to concurrent terms of 50 to 75 years' imprisonment for his murder conviction and 5 to 15 years' imprisonment for the felon in possession conviction, together with a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first challenges the trial court's jury instruction regarding whether defendant had a duty to retreat. "We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *Dupree*, 486 Mich at 712 (internal quotation omitted). "A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). This Court considers jury instructions in their entirety to ascertain if error requiring reversal

occurred. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). Even if imperfect, “reversal is not required if the[] [jury instructions] fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *Id.*

Defendant maintains that the trial court erred in instructing the jury about the duty to retreat because the victim had undisputedly subjected defendant to a sudden, fierce and violent attack. When a defendant facing a homicide charge asserts self-defense, the finder of fact must decide whether “the accused, under all the circumstances of the assault, as it appeared to him, honestly [and reasonably] believe[d] that he was in danger of losing his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger.” *People v Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002) (internal quotation omitted). “[A] person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon.” *Id.* at 119 (emphasis in original). However, “[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.” *Id.* at 129.

In this case, the trial court instructed the jury at length with respect to defendant’s self-defense, including that “defendant must have honestly and reasonably believed that he was in danger of being killed or seriously injured,” “a person may not kill or seriously injur[e] another person only to protect himself against what seems like a threat of only minor injury,” and “defendant must have honestly and reasonably believed that what he did [the amount of force he employed] was immediately necessary.” CJI 2d 7.15 (“Use of Deadly Force in Self-Defense”). In an instruction tracking CJI2d 7.16, which describes a defendant’s “[d]uty to retreat to avoid using deadly force,” the trial court additionally elaborated as follows:

A person may use deadly force in self[-]defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self[-]defense. However, a person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden and fierce and violent attack.

Further, a person’s not required to retreat if the person has not or is not engaged in the commission of a crime at the time the deadly force is used, and has a legal right to be where the person is at that time, and has . . . an honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm of the person or another.

In light of defendant’s self-defense claim, the jury had the prerogative to find as a question of fact whether it was necessary for defendant to have shot the victim under the circumstances of this case. Even assuming that the jury found credible defendant’s trial testimony, the evidence in this case concerning whether defendant could have retreated is not entirely clear. Defendant testified that he got into a vehicle with the victim. Soon after, the victim retrieved a gun and placed it in his lap. A physical altercation between defendant and the victim ensued, and the victim started choking defendant with his left hand and hitting defendant with his right hand. Eventually defendant took possession of the gun. According to defendant,

at this point he turned to exit the car, but the victim was lunging towards him, so he shot the gun. Whether defendant could have safely exited the vehicle after he obtained possession of the gun is not readily apparent. For example, a moment may have existed when defendant had possession of the gun during which a jury could reasonably have concluded that defendant had an opportunity to safely exit the vehicle. Additionally, no evidence at trial independently substantiated that an attack by the victim had inflicted any physical injuries on defendant. We conclude that the trial court did not abuse its discretion by instructing the jury on the duty to retreat. Furthermore, the trial court accurately summarized for the jury the controlling law, including that defendant had no duty to retreat if he was subject to a sudden, violent and fierce attack.

II

Defendant next complains that the prosecutor engaged in misconduct during his rebuttal closing argument by insinuating that defense counsel lacked competence and did not understand the law surrounding search warrants. “Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error.” *Unger*, 278 Mich App at 235. “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation omitted).

Generally, “[t]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). This Court considers “issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “A prosecutor cannot personally attack the defendant’s trial attorney because this type of attack can infringe upon the defendant’s presumption of innocence.” *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, we must keep in mind the context of prosecutorial remarks “because an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Id.* at 608.

Here, defense counsel made the following relevant arguments in the course of his closing:

[Flint Police Sergeant] Mitch Brown. . . . He is the officer in charge. It is his responsibility to make sure that they conduct a thorough and respectable investigation. . . . He failed to effectively search for the gun. Why? Why did he do that? Does he believe [defendant] at any point? He stated he doesn’t believe him. But, he accepts it at face value, goes out to the lot, looks for the gun. Says, “Oop [sic]. Okay, I’m done.” And then heads back on down to make his report.

He effectuates no search warrants. He doesn’t go to all of these residences that he knows that [defendant] was at. Does he . . . really look for the gun? He told you he didn’t look for the gun. Does he believe [defendant] or does he not?

In the prosecutor’s rebuttal closing argument, he responded:

Now, defense would ask, “well, what did Sgt. Brown do to try to find [the gun]? Did he look in all the houses? Did he . . . search the city?[]” Okay. Where is he going to search? Where is going to get a search warrant for? He’s gotta come to get probable cause. Does he know where the gun is? No. You can’t just go searching through the houses. You can’t do it. We have a Constitution that prohibits that.

Contrary to defendant’s position that the prosecutor’s comments insinuated that defense counsel did not know the law, the challenged passage of the prosecutor’s rebuttal embodies a proper response to defense counsel’s repeated declarations that the police had botched their investigation into the victim’s shooting. The prosecutor simply pointed out that Sergeant Brown had not searched other areas besides the field where defendant purportedly had thrown the gun, not because he believed defendant, but because he needed probable cause to do so, which he did not have. We detect no hint of any improper denigration of the defense in the challenged passage of the prosecutor’s rebuttal argument. Moreover, even assuming some improper argument in this passage of the prosecutor’s rebuttal, the trial court’s instructions remedied any error. *Chapo*, 283 Mich App at 370 (observing that jurors are presumed to have followed the jury instructions, which presumably cure most errors).

III

Defendant next avers that he was denied the effective assistance of counsel when defense counsel failed to object to the prosecutor’s rebuttal argument about the police search for the gun used in the shooting and prosecutorial demonstrations during testimony by a forensic pathologist, Dr. Allecia Wilson. As defendant did not develop a testimonial record regarding the ineffective assistance of counsel claim, we limit our review to any mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court’s findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id.*

“[T]he right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 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). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant’s claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel’s errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel’s conduct falls within the wide range of professional assistance,” and that his counsel’s actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses “wide discretion in matters of trial strategy.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This

Court may not “substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel’s competence.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

Regarding defendant’s claim of ineffectiveness by his trial counsel relating to the prosecutor’s rebuttal argument comments, we reject this claim because any objection lodged by defense counsel would have been groundless. *Unger*, 278 Mich App at 256 (noting that a defense counsel is not ineffective for neglecting to offer a futile objection). As we have discussed, the prosecutor responded directly and properly to defense counsel’s closing arguments characterizing the police investigation as inadequate and did not denigrate the defense.

With respect to the prosecutor’s demonstrations and hypothetical questions to Dr. Wilson, defendant asserts that his trial counsel should have objected because the demonstrations did not replicate the conditions that existed at the time of the shooting. A court may admit demonstrative evidence if it helps the factfinder reach a conclusion on a material matter. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). “[W]hen evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert’s testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.” *Id.* However, “[t]he facts or data . . . upon which an expert bases an opinion or inference shall be in evidence.” *Unger*, 278 Mich App at 248, quoting MRE 703. “An expert witness’s opinion is objectionable if it is based on assumptions that do not accord with the established facts.” *Id.* at 248.

We conclude that defense counsel’s lack of objection to the prosecutor’s demonstrations during Dr. Wilson’s testimony did not constitute ineffective assistance of counsel. The trial court certified Dr. Wilson as an expert in forensic pathology, she testified that she performed the victim’s autopsy, and she described the internal path of the fatal bullet. Demonstrations by both the prosecutor and defense counsel served to elucidate Dr. Wilson’s testimony about the precise trajectory of the bullet into the victim, and therefore, the attorneys’ hypothetical inquiries did not need to exactly duplicate actual events. *Bulmer*, 256 Mich App at 35. Furthermore, the demonstrations sprang from facts that Dr. Wilson had discovered in her autopsy, to which she had already testified. MRE 703; *Unger*, 278 Mich App at 248. Accordingly, we detect nothing improper in the prosecutor’s hypothetical questions, to which any objection would have been futile. *Unger*, 278 Mich App at 256.

Moreover, apart from a conclusory declaration that the prosecutor’s inquiries qualified as “highly prejudicial,” defendant has not shown that he suffered any prejudice. Dr. Wilson made clear in answering the questions that she did not know what position the victim occupied at the time of the shooting, and that she thus did not know if the demonstrations were accurate. The trial court instructed the jury that the lawyers’ inquiries were not evidence, and substantial other, properly admitted evidence in the record proved defendant’s guilt, including defendant’s admission at trial that he shot the victim and the testimony of two additional witnesses that shortly before the victim’s death he identified defendant as the shooter, among other evidence.

In summary, defendant has made no showing that the prosecutor's demonstrations, and defense counsel's lack of objection, likely affected the outcome of the trial.¹

IV

In a Standard 4² brief on appeal, defendant raises multiple other claims of prosecutorial misconduct and ineffective assistance of counsel. This Court generally reviews claims of prosecutorial misconduct according to the following standards:

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 jury 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. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).]

We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A

Defendant initially contends that the prosecutor infringed on his constitutional right to present a defense when the prosecutor improperly failed to conduct DNA, fingerprint and gunshot residue testing of the victim's vehicle, which would have yielded physical evidence corroborating defendant's trial testimony. Defendant did not move for the trial court to order DNA, fingerprint or gunshot residue testing of the victim's vehicle, and we thus employ the plain error standard of review when considering this issue. *Unger*, 272 Mich App at 235.

Due process demands that a criminal defendant have "a meaningful opportunity to present a complete defense," which includes a defendant's receipt of exculpatory evidence. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006) (internal quotation omitted). A prosecutor must disclose exculpatory and material evidence in his possession, regardless whether the defendant has asked for the disclosure. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). But,

¹ Defendant also argues that the cumulative effect of the incorrect instructions and the errors occasioned by the prosecutor and defense counsel entitle him to a new trial. However, none of the issues raised by appellate counsel evidence actual errors in the trial, and therefore, taken in the aggregate they do not entitle defendant to a new trial.

² Supreme Court Administrative Order 2004-6, Standard 4.

[f]or due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. Because the instant case involves the failure to develop evidence, as opposed to the failure to disclose existing evidence, the bad-faith test in [*Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988),] is inapplicable.

Defendant's right to present a defense was not violated because the police have no constitutional duty to assist a defendant in developing potentially exculpatory evidence. [*Antsey*, 476 Mich at 461.]

Here, defendant does not suggest that the prosecutor or the police possessed DNA, fingerprint or gunshot residue evidence derived from the victim's vehicle that could potentially have assisted the defense. Instead, defendant argues that the prosecutor should have developed that evidence by having the victim's vehicle tested in several respects. Because neither the prosecutor nor the police owed defendant a constitutional duty to develop potentially favorable forensic evidence, defendant has failed to show that any inaction by the prosecutor deprived him of his due process right to a fair trial. *Antsey*, 476 Mich at 461-462.

B

Defendant next characterizes as prosecutorial misconduct several passages of the prosecutor's closing and rebuttal arguments that purportedly referenced facts not in evidence. "Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *Unger*, 278 Mich App at 235.

1

Defendant first submits that the prosecutor improperly argued that the console in the car where the shooting occurred was askew as a result of defendant's attempts to rob the victim. The prosecutor made the following statements during his closing argument:

I think [defendant] went over there to rob [the victim]. He knew he was sitting up there. He went up there with a gun. He opened the door and he shot him. And you saw the inside of that car. There's parts [sic] of the car pulled apart. Somebody was looking for something. And what did the police find there? They didn't find anything. Whatever was there was gone.

The prosecutor elaborated in his rebuttal:

That console in the middle of the car? That little area where you can keep things? That's up.

The gearshift thing? That's popped up. It's popped up. You heard Katrina Bailey. (Indiscernible—[the prosecutor] not at microphone).

That part of the car door is pried, it's wide open. Somebody was looking for something in there. Somebody got in there with a gun and was looking for stuff.

These comments by the prosecutor represent proper argument concerning his theory of the case premised on facts in the record and reasonable inferences arising from these facts. Bailey, the victim's girlfriend and the mother of two children with the victim, testified about the condition of the car in which the victim was shot, which Bailey and the victim had recently purchased in new condition, specifically that after the shooting the gearshift was askew and the passenger-side door paneling had sustained damage. Although the prosecutor's robbery theory may not have in fact actually happened, the prosecutor permissibly proffered to the jury, on the basis of the damage to the victim's car and reasonable inferences arising from this evidence, that defendant had killed the victim in the course of a robbery.

2

Defendant also asserts that the prosecutor engaged in misconduct when he told the jury defendant said, "I shot at him and I don't think I hit him. I didn't do anything wrong." Defendant insists that, in fact, he testified, "I didn't shoot at him." The entire relevant exchange between defendant and the prosecutor at trial went as follows:

Q. If you shot him You knew you shot him?

A. I didn't know I shot him.

Q. You knew you shot Okay.

You're saying, according to you, you're saying you didn't know that you hit him. Correct?

A. Yes. Exactly.

Q. Okay.

You shot at him. Is that You don't think that you did anything wrong when you shot at him?

A. I didn't shoot at him. I didn't—I didn't point—aim the gun particularly at him. I switched the gun in my other hand, and in the motion of what was going on, I pulled the trigger, yes, 'cause he was coming at me. I didn't point the gun at him. I shot the gun to put a time—let me stop—stop, 'cause everything was going too quick—to (indiscernible) so I can get out this car. I needed to get out that car.

Q. Okay.

And you felt like you didn't do anything wrong, even after you found out he died. Is that right?

A. I protected my life.

The prosecutor mischaracterized during his closing argument defendant's trial account of his firing of the gun. In contrast to defendant's testimony that he did not shoot at the victim, the prosecutor told the jury that defendant had acknowledged shooting at the victim. But defendant has not shown that this unpreserved error affected the outcome of the proceedings in light of the trial court's instructions to the jury that the prosecutor's closing argument was not evidence and the properly admitted evidence of defendant's guilt. *Unger*, 272 Mich App at 235.

3

Defendant additionally challenges as improper the prosecutor's declaration, "Now, . . . the defendant testified, and he told you he knew that [the victim] would be there. That he's always there. He told you he hangs out there. And then he told you, again, his version of what he thought happened, or what he claims happened, rather." Defendant disputes that he ever testified that the victim was always around the house near which the shooting occurred. Our review of the record reveals that the prosecutor's argument had a foundation in defendant's testimony. Defendant explained at trial that the shooting had happened near 906 East York Street, in a neighborhood where he had lived for a long time and that he traversed by foot "all the time." Defendant expressed that he had known the occupants of 906 East York, Michael Johnson and Ricky Johnson, for around 12 years, the Johnsons and the victim were friends, and defendant's acquaintance with the victim stretched back approximately 15 years. In defendant's direct examination, when asked whether he knew if the victim "h[u]ng out at 9-0-6 East York," defendant replied, "Outside. Basically, it be next door." Defendant later specified the location where the victim routinely parked his van near 906 East York and his knowledge that the victim often played "a video game TV in" his van. In summary, the prosecutor accurately argued on the basis of defendant's testimony and reasonable inferences flowing from defendant's testimony that defendant knew the victim always or frequently spent time near 906 East York.

4

Defendant further criticizes the following, italicized portions of the prosecutor's rebuttal argument made in the course of the prosecutor's discussion that "[t]he physical evidence doesn't support [defendant's] story, either":

There was no fight in that car. There was no fight in that car. Look at the photos. *Look at the photos of the seats in that car. The passenger's seat was leaning way back.*

* * *

The defendant would have you believe that [the victim] was able to grab him by one hand, his left hand, and *showed him sitting in the car while the passenger's seat is way back, while at the same time, balancing a gun on his lap and punching him like this. He's gonna be holding him up there with just one hand while he's leaning over and punching him.*

And he's claiming that he couldn't get out of that position. Just think about it. It doesn't make sense. Let's apply the laws of physics. Okay? Can someone actually hold someone up like that? If it were really the case, [the victim] would've been having to grip him so hard to hold him up to keep him from leaning back and leaning against the door. If he was leaning all the way against that door, [the victim] could not have stayed in the driver's seat and done that. And if he had to lean over like that, do you think he could've held a gun on his lap? It just doesn't make sense.

The defendant would've been able to get out. I mean, . . . it doesn't take much to jerk back. In fact, wouldn't that be your natural response? . . .

* * *

. . . *And most importantly, what flies is the explanation of how he was positioned when he shot. It flies in the face, and it's— it's just unbelievable. It defies belief the way the car was set up.* [Emphasis added.]

Defendant avers in his Standard 4 brief that “[t]here was no evidence in the record (1) that the actual positions of the car seats were discussed or duplicated, (2) that [the victim] was ‘balancing’ the gun on his lap, (3) that [the victim] was ‘holding’ [defendant] up, or (4) that [the victim] had the gun on his lap when [defendant] was leaning towards the door.”

We conclude that the prosecutor did not engage in misconduct. The prosecutor relied on the evidence admitted at trial, and reasonable inferences derived from the evidence, to advance his theory that defendant's account of the fatal confrontation between him and the victim lacked credibility. The prosecutor introduced into evidence at trial photographs of the interior of the victim's vehicle, including one showing the front passenger seat leaning back. An evidence technician testified that the photographs depicted what she found at the scene on the morning of the shooting. Consequently, evidence substantiated the prosecutor's argument concerning the position of the seat. Moreover, defendant testified that the victim choked him with his left hand and punched him with his right, and that defendant grabbed the gun from the victim's lap. Because the prosecutor premised his argument on facts of record and reasonable inferences arising from the evidence, no misconduct occurred.

B

In a final claim of prosecutorial misconduct, defendant contends that the prosecutor improperly bolstered the credibility of Michael Johnson, a friend of the victim's who briefly interacted with the victim after the shooting. “A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness.” *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor may, however, argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *Id.*; *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

The prosecutor discussed as follows in his rebuttal closing argument Johnson's testimony:

Michael Johnson, [defense counsel] says, said nothing important. He told you that [the victim] names his murderer, Yogi. That's what Michael Johnson told you. That was true. He told you that [the victim] fell dead in his arms, and he got blood on him. That was true. He told you that [the victim] was in pain, that he was yelling. Both Rickey and Michael Johnson told you that.

And he was honest to you. He said he didn't want to be here. He didn't want to get involved. He didn't want to talk to the police. He didn't want to be a snitch. That's probably the worst thing that can happen in that neighborhood. He doesn't want to be a snitch. ... He's friends with 'em both. He didn't want to be here, but he came in here and he told you the truth.

Michael Johnson told you that he had seen [the victim] with a gun before. That's true. I asked him and he told you.

And the defendant would have you believe that that is the only useful information that anyone has told you, that is not named on the evidence. [sic] But that's just not true.

The defendant wants you to remember only the parts that might help with his case. Not the fact that it wasn't even [the victim]'s gun that was used. Because what did Michael Johnson say? He'd seen it before, now and then, (indiscernible—[the prosecutor] not at microphone). Now and then he's seen him with a .45.

And as Ryan Larrison told you from the lab, a .45 is a bigger gun than a 9mm. It's a much bigger gun. We know a 9 mm was used in this case because we got the casing. And we got the bullet. So it was not [the victim]'s gun.

But when he testified that it was a .45, what was the cross-examination like? What did [defense counsel] ask him? "You talked to the prosecutor, didn't you?" What's that about? He tried to make it sound like I did something improper by interviewing him. That I shouldn't discuss the case with him.

He told you I didn't tell him what to say. And I didn't tell him what to say. I don't tell any witness what to say [sic]. I told him—what did he say when I asked him? What did I tell you? I told him to tell the truth.

So, the gun that the defendant says was [the victim]'s, that wasn't [the victim]'s. In fact, Michael Johnson said [the victim] did not even always carry a gun. Guess what? The gun that the defendant murdered [the victim] with is not his. Of course, . . . [defense counsel] didn't discuss that, did he?

Our review of the record reflects that the prosecutor accurately summarized Johnson's testimony, and properly argued on the basis of Johnson's testimony that he was worthy of belief. *Seals*, 285 Mich App at 22; *Dobek*, 274 Mich App at 67. In no respect did the prosecutor insinuate that he possessed some special knowledge about Johnson's veracity. *People v Bahoda*, 448 Mich 261,

276; 531 NW2d 659 (1995). In summary, defendant has not shown improper prosecutorial vouching.

C

Defendant also sets forth several instances in which his trial counsel rendered ineffective assistance, specifically by failing to present a defense, acting on the basis of loyalty to the prosecution, not keeping defendant adequately informed, neglecting to call crucial witnesses, and failing to request a jury instruction on involuntary manslaughter. In reviewing defendant's ineffective assistance contentions, we keep in mind the legal standards set forth in Part III, *supra* at 6-7.

1

Defendant initially contends that defense counsel should have presented a trial defense premised on the victim's vehicle having been parked on the street at the time of the shooting, instead of in the driveway of 906 East York as depicted in some police photographs, and the existence of an additional bullet casing collected by the victim's mother, Maxine Lee, from the scene. In support of this ineffective assistance claim, defendant attached to his Standard 4 brief a written statement from Lee, which does not appear in the trial court record. Nor did defendant develop an evidentiary record for us to consider regarding whether Lee should have testified about collecting a second shell casing. Because we must limit our review of trial counsel's performance to mistakes apparent in the record, we decline to consider Lee's written statement. More importantly, our review of the entire record in light of the argument in defendant's Standard 4 brief convinces us that defense counsel competently, professionally and thoroughly presented defendant's self-defense theory to the jury.

2

Defendant also asserts that defense counsel was ineffective because of his loyalty to the prosecution and a conflict of interest. To the extent that defendant reiterates his complaints about defense counsel's presentation of the self-defense theory at trial, the record confirms that defense counsel adequately presented the self-defense theory and in no respect deprived defendant of a substantial defense. Defendant has not otherwise shown that any actual conflict of interest prevented defense counsel from suitably and vigorously representing defendant. It appears that defendant was displeased with defense counsel based primarily on hindsight, which does not suffice to show ineffective assistance of counsel.

3

Defendant additionally complains that defense counsel did not apprise him before trial of counsel's decision against "present[ing] an accurate defense." Presumably, defendant's argument concerning this shortcoming of defense counsel intends to reference the perceived shortcomings in the self-defense presentation at trial. However, as we have already observed, the record reveals that defense counsel argued defendant's self-defense claim to the jury, introduced evidence supporting the defense, and effectively cross-examined the prosecution witnesses, and did not deprive defendant of a substantial defense. In light of the existing record, no evidence tends to show that defense counsel failed to adequately communicate with

defendant. To the contrary, when defendant took the stand to testify on his own behalf, defendant indicated that he and defense counsel had discussed trial strategy and that counsel did not deem it necessary for defendant to testify, but defendant nonetheless opted to testify.

4

Defendant further argues that defense counsel should have called two witnesses, defendant's mother, Carolyn Edwards, and his girlfriend, Victoria McCree, to corroborate that defendant suffered injuries as a result of his altercation with the victim. "Decisions . . . whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant did not move for a new trial or a *Ginther*³ hearing with respect to this alleged instance of ineffective assistance of counsel, thus limiting our review to mistakes apparent on the existing record. Although defendant attached written statements by Edwards and McCree to his Standard 4 brief, no evidence in the trial record exists that defense counsel was ineffective for failing to call Edwards or McCree because no information in the record substantiates to what they might have testified. Even were we to consider the contents of Edwards's and McCree's statements, the statements, which in pertinent part describe Edwards's and McCree's sightings of swelling in defendant's face and possible bruising around his neck near the time of the shooting, corroborate defendant's trial account that the victim attacked him before the shooting. Given the corroborative nature of Edwards's and McCree's statements, trial counsel's failure to produce these witnesses at trial would not have deprived defendant of a substantial defense that "might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grounds 453 Mich 902 (1996).

5

In defendant's ultimate ineffective assistance contention, he urges that defense counsel should have requested an instruction on the lesser-included offense of involuntary manslaughter. "When a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Involuntary manslaughter is "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001) (internal quotation omitted).

In this case, the facts did not support instructing the jury on involuntary manslaughter. Defendant consistently testified at trial that he *intentionally* pulled the trigger in self-defense when the victim physically assaulted him. Defendant's act of pulling the trigger on a gun in close proximity to the victim amounted to an unlawful act that "tend[ed] to cause death or great bodily harm," rendering inapplicable the elements of involuntary manslaughter. *Herron*, 464

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Mich at 604. Accordingly, the evidence did not support an involuntary manslaughter instruction, and defense counsel was not ineffective for failing to request an inapplicable charge to the jury.

D

Lastly, in a supplement to defendant's Standard 4 brief, he asserts that the trial court violated his federal and state constitutional rights to a public trial when the court cleared the courtroom of spectators for the voir dire of potential jurors. "A defendant is guaranteed the right to a public trial by the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20." *People v Bails*, 163 Mich App 209, 210; 413 NW2d 709 (1987). The United States Supreme Court has recently clarified that a defendant's "Sixth Amendment right to a public trial extends to the voir dire of prospective jurors." *Presley v Georgia*, 558 US ___; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). "Although the right to an open trial is not absolute, that right will only rarely give way to other interests. *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984). In *Waller*, the Court . . . emphasized the need for specific findings to help determine whether an order of closure is proper" *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). "However, this right is not self-executing: the defendant must timely assert the right." *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385), slip op at 7.

The trial court announced before beginning jury selection, "And, ladies and gentlemen, the unfortunate thing, I'm really sorry, is, we just don't have room for you. We're going to fill up this whole room with jurors. So, just wait out in the hallway. It's going to take us several hours to do this." The record gives no indication of the identities of the "ladies and gentlemen" that the court excluded, neither the prosecutor nor defendant voiced any concern about the courtroom closure, and the courtroom remained closed over the course of around 5-1/2 hours of voir dire.

Defendant characterizes this constitutional error as structural in nature, but a review of Michigan case law examining public trial violations reveals that reversal is not always warranted, especially when a defendant fails to raise a timely objection.

In discussing a defendant's right to a public trial under the Sixth Amendment, the United States Supreme Court has made the matter of the accused's objection a pivotal point. *Waller*[, 467 US 39.] If an objection had been made, other alternatives could have been considered. Given the lack of an objection, the short period the courtroom doors were locked, and the court's motive for ordering the closure, this Court finds the defendant's Sixth Amendment right to a public trial was not violated. [*Bails*, 163 Mich App at 211.]⁴

⁴ This Court in *Kline*, 197 Mich App at 172 n 4, declined to apply the harmless-error analysis set forth in *Bails*, 163 Mich App at 211. However, *Kline* does not control the outcome of this case because the defendant in *Kline* did lodge a constitutional objection to a courtroom closure, whereas defendant here raised no objection. *Id.*

More recently, in *Vaughn*, slip op at 7, a case in which the defendant offered no objection to a courtroom closure during jury voir dire, this Court rejected as follows the defendant's protestation on appeal that the trial court had committed a structural error:

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. Although there are exceptions to the right, the trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding. However, this right is not self-executing: the defendant must timely assert the right. . . . [T]he failure to timely assert the right to a public trial forecloses the later grant of relief.

Here, defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury. Therefore, the error does not warrant relief. [*Id.* (citations omitted).]

In light of the absence in this case of a defense objection that might have prompted the trial court to consider alternatives to courtroom closure, we conclude that the allegedly erroneous courtroom closure "does not warrant relief." *Vaughn*, slip op at 7.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens