

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 28, 2013

V

No. 309552
Washtenaw Circuit Court
LC No. 11-000429-FC

DARNELL JAVON BROWN, a/k/a
TEDDY GARDNER,
Defendant-Appellant.

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant Darnell Javon Brown appeals as of right his convictions of second-degree murder, MCL 750.317; assault with intent to commit murder (AWIM), MCL 750.83; assault with a dangerous weapon (felonious assault), MCL 750.82; carrying a concealed weapon, MCL 750.227(2); possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm defendant’s convictions but remand for modification of defendant’s judgment of sentence in accordance with this opinion.

Defendant’s convictions stem from a shooting that occurred at party hosted by Marcus Jones, the victim. When defendant arrived at Jones’s residence, Jones and Antoine Toliver told him that he was not welcome. Two witnesses testified that after being told this, defendant responded by saying, “If [I] can’t party, can’t nobody party,” and began shooting. Jones died from his multiple gunshot wounds, while Toliver was wounded from being struck in the arm by one bullet. The jury convicted defendant of second-degree murder for killing Jones and convicted defendant of AWIM for shooting Toliver.

Defendant first argues that the evidence produced at trial was insufficient to support his convictions of second-degree murder and AWIM. “We review de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court “examine[s] the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine[s] whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.*

We find the evidence was sufficient for a rational jury to find defendant guilty of second-degree murder and AWIM beyond a reasonable doubt. Defendant’s argument related to both

offenses rests on his contention that the jury should have believed his testimony that he acted in self-defense. A killing done in self-defense is justifiable homicide “if the defendant honestly and reasonably believes that his life is in imminent danger or there is a threat of serious bodily harm.” *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (quotations omitted). Defendant’s argument is without merit because there was evidence that after defendant was told he was not welcome at the house party, he replied, “If [I] can’t party, can’t nobody party” and fired the first shot, thereby contradicting his claim of self-defense. The resolution of this credibility dispute was a matter for the jury to decide. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We conclude that the evidence was sufficient for the jury to resolve this conflict in favor of the prosecution, and defendant’s claim fails.

Defendant also argues that a rational jury could not have found him guilty of murder because ballistics testing never matched the bullets found in Jones’s body to a gun he possessed. However, such scientific evidence is not necessary to support a conviction. The evidence is sufficient if it allows for a jury to make reasonable inferences establishing the presence of each element of the crime. See *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). When viewed in a light most favorable to the prosecution, the testimony that defendant shot Jones in the head was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant’s actions caused Jones’s death, in spite of the fact that there was no ballistics evidence in this case.

Next, defendant argues that the prosecutor suppressed evidence of Toliver’s criminal history in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). He argues that he was prejudiced by the prosecutor’s suppression of this evidence because he was unable to effectively cross-examine Toliver with his prior convictions. Defendant did not raise a *Brady* violation at trial; thus, this unpreserved issue is reviewed is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To establish a *Brady* violation, a defendant must prove

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).]

“Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence may make the difference between conviction and acquittal.” *Id.* at 280-281 (quotation omitted).

Defendant’s *Brady* claim fails because he fails to establish either that the prosecution had material impeachment evidence or that the prosecution suppressed this evidence. First, nothing in the record shows that the prosecutor possessed Toliver’s criminal history. See *People v Cox*, 268 Mich App 440, 448-449; 709 NW2d 152 (2005) (holding that a defendant cannot prove a *Brady* violation where he does not establish that the prosecution withheld evidence). Second, assuming arguendo that the prosecution did have Toliver’s criminal history, defendant does not

establish that Toliver could have been impeached by it because nothing in the record shows that Toliver had been convicted of a crime that involved an element of theft or dishonesty. See MRE 609(a). Consequently, defendant fails to establish a *Brady* violation, much less plain error affecting his substantial rights.

In a related argument, defendant asserts that the prosecutor had an affirmative duty to search the Law Enforcement Information Network (LEIN) and provide him with Toliver's criminal history. In support, he cites this Court's decision in *People v Mack*, 218 Mich App 359, 362-363; 554 NW2d 324 (1996). Defendant's citation to *Mack* is unavailing because our Supreme Court ruled that this Court's opinion in *Mack* "shall have no precedential force or effect." *People v Mack*, 455 Mich 865; 567 NW2d 251 (1997). Moreover, the prosecution does not have an affirmative duty to seek out and provide to a defendant LEIN information regarding the criminal histories of its witnesses. *People v Elkhoja*, 467 Mich 916; 658 NW2d 153 (2003) (adopting the dissenting opinion in *People v Elkhoja*, 251 Mich App 417, 452-453; 651 NW2d 408 (2002) (SAWYER, J., dissenting)).

Defendant also argues that the prosecutor committed misconduct by failing to disclose Toliver's criminal history and that the prosecutor's failure to disclose this information denied him his right to present a defense. As we have already noted, however, this argument is unfounded because there was no evidence that the prosecution possessed Toliver's criminal history in the first place. Moreover, a defendant is not denied his right to present a defense where the prosecution does not produce evidence that it had no duty to produce. *People v Anstey*, 476 Mich 436, 461-462; 719 NW2d 579 (2006).

Next, defendant raises two issues related to the trial court's jury instructions. He preserved both of these issues by raising objections at trial. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant's preserved instructional claims are reviewed de novo to the extent that they involve a question of law. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation omitted).

Defendant first argues that the trial court abused its discretion by giving a flight instruction. "Jury instructions must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *Id.* "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Further, "[t]he defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

The prosecution introduced evidence that defendant left the scene of the shooting in a prompt fashion and that he later received medical treatment for a gunshot wound he suffered in the shooting. The prosecution also presented testimony that the car in which defendant was riding that evening was involved in an accident because it was traveling too fast for the snowy

conditions. The trial court gave the jury the following instruction as it related to the evidence that defendant left the scene of the shooting:

There has been some evidence that the defendant tried to ran [sic] away, ran away, hid after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear.

However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true and if true whether it shows that the defendant had a guilty state of mind.

Defendant argues that the trial court abused its discretion by giving a flight instruction because the only inference that could be drawn from the evidence is that he left the scene of the shooting because he sought medical treatment. We disagree.

Evidence of flight is admissible to support an inference of “consciousness of guilt.” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). “The term ‘flight’ has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although flight can indicate consciousness of guilt, “[f]light can result from factors other than guilt, and it is for the jury to determine what caused defendant to flee.” *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).

Here, the trial court did not abuse its discretion by instructing the jury that it could consider defendant’s decision to leave the scene of the shooting as evidence of his consciousness of guilt, or as evidence that he left the scene for innocent reasons. Contrary to defendant’s argument, the evidence produced at trial supported such an instruction. On the one hand, the evidence that defendant left the scene of the shooting in an abrupt manner, in a car traveling at a high rate of speed, and that that vehicle subsequently was involved in an accident because of that speed, could rationally support an inference that defendant left the scene of the crime because he was seeking medical treatment. On the other hand, the evidence also could rationally support the conclusion that defendant left the scene of the crime because he had a guilty conscience. Given the evidence, then, and the various ways it could be interpreted by the jury, the trial court’s instruction was proper, see *Taylor*, 195 Mich App at 63-64, and defendant cannot satisfy his burden of demonstrating that the trial court’s instructions did not present the issues to be tried in a fair manner, *Dupree*, 486 Mich at 702.

Next, defendant argues that the verdict form and jury instructions as to AWIM, assault with intent to do great bodily harm (AGBH) (of which defendant was acquitted), and felonious assault did not present the matters to be tried in a fair manner because double jeopardy precluded his being convicted on both felonious assault and one of the aggravated assault counts. We disagree.

“The guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the ‘same offense.’” *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). The proper test for determining whether two offenses are the “same offense” such that double jeopardy is implicated is the *Blockburger*¹ or “same elements” test. *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004). The test “‘focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.’” *Id.*, quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975).

We conclude that the trial court’s instructions were appropriate because double jeopardy was not implicated. First, the trial court instructed the jury that it was to consider Count II–AWIM and Count III–AGBH as alternatives, which the verdict form reflected. This was proper because AGBH is a necessarily lesser-included offense of AWIM, *People v Brown*, 267 Mich App 141, 150-151; 703 NW2d 230 (2005), and double jeopardy prohibits a defendant from being convicted of both a greater and necessarily lesser-included crimes for the same offense, see *Denio*, 469 Mich at 576. Second, the trial court permissibly instructed the jury regarding felonious assault. Felonious assault requires proof of an element that is not present in AWIM or AGBH—primarily that the assault occurred with a dangerous weapon. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).² And AWIM and AGBH both require an elevated *mens rea* that felonious assault does not require—that the defendant possessed an intent to kill for AWIM or an intent to inflict great bodily harm less than murder for AGBH. *Brown*, 267 Mich App at 147. Thus, being charged and convicted of felonious assault in conjunction with either AWIM or AGBH does not implicate double jeopardy, and the jury was properly instructed. Finally, we reject defendant’s accompanying claim for ineffective assistance of counsel. Defendant’s trial counsel objected to the instructions, and defendant cannot show that counsel was deficient because any additional objection would have been meritless. *Ericksen*, 288 Mich App at 201.

Defendant next argues that the trial court erred when it scored offense variables (OVs) 3 and 5. “A trial court’s scoring decision ‘for which there is any evidence in support will be upheld.’” *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Defendant first challenges the scoring of OV 3. MCL 777.33(1)(c) directs the trial court to score 25 points for OV 3 if a “[l]ife threatening or permanent incapacitating injury occurred to a victim.” Defendant contends that the trial court cannot score 25 points for a life threatening injury when the victim dies. However, our Supreme Court expressly rejected this argument in *People v Houston*, 473 Mich 399, 406-407; 702 NW2d 530 (2005), and we are bound by that decision, *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001).

¹ *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

² “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *Avant*, 235 Mich App at 505.

Next, defendant challenges the trial court's scoring of OV 5. We find that defendant waived this issue when his trial counsel expressly stated on the record that he approved of the scoring of OV 5. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). We also reject defendant's accompanying claim for ineffective assistance of counsel. MCL 777.35(1)(a) directs the trial court to score 15 points under OV 5 when "[s]erious psychological injury requiring professional treatment occurred to a victim's family." Despite defendant's contentions, there was evidence to support the trial court's scoring decision under OV 5 because the presentence investigation report indicated that Jones's children had nightmares after his death. The emotional trauma suffered by Jones's children is sufficient to support the trial court's scoring decision. See *Apgar*, 264 Mich App at 329 (holding, in the context of OV 4, that an expression of fear is sufficient to find a serious psychological injury requiring professional treatment). Accordingly, because there was evidence to support the trial court's scoring decision under OV 5, any objection raised by defendant's trial counsel would have been meritless. Thus, defendant cannot prevail on his ineffective assistance of counsel claim. *Ericksen*, 288 Mich App at 201.

Defendant next raises a host of unpreserved sentencing issues. We conclude that he is not entitled to relief on any of these issues because he failed to demonstrate plain error requiring reversal. *Carines*, 460 Mich at 463. First, defendant argues that the trial court erred by failing to consider mitigating evidence when it sentenced him. However, the trial court is not required to consider such evidence. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Next, defendant argues that he was entitled to a downward departure from the guidelines range because of his mental illness. A downward departure requires a "substantial and compelling reason" for departing from the guidelines range. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Defendant's argument fails because he does not cite any authority that a mental illness requires a downward departure from the guidelines. Moreover, even if such authority was provided, the record belies defendant's claim that he suffered from a mental illness.

Defendant also argues that the trial court failed to assess his rehabilitative potential and, as a result, sentenced him based on incomplete information. Although MCR 6.425(A)(1)(e) requires a defendant's PSIR to include a report on the defendant's health, substance abuse history, and mental health history, it does not require the trial court to order an assessment of the defendant's rehabilitative potential in light of these factors. Further, defendant fails to identify any authority that supports his position. Consequently, the information contained in defendant's PSIR was accurate and complete, and defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant next argues that the trial court failed to satisfy the articulation requirement when it imposed his sentence. "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). At sentencing, the prosecutor asked the trial court to sentence defendant at the top of the guidelines range. And the trial court acknowledged this recommendation immediately before it sentenced defendant to a minimum within the applicable guidelines range. We therefore conclude that defendant's argument is meritless because it was "clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id.*

Next, defendant asserts without any accompanying argument that “the sentence imposed” was “excessive under both federal constitutional and state law principles.” He cites among other provisions US Const, Am VIII, and Const 1963, art 1, § 16, so we assume he argues that his sentence was cruel and/or unusual. However, his second-degree murder sentence was within the guidelines range, and a sentence that is within the guidelines range is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Additionally, because we reject each of defendant’s claims of error related to his sentence, we also reject his claim that his trial counsel was ineffective for failing to raise these meritless objections. *Ericksen*, 288 Mich App at 201.

Defendant next contends that the trial court erred when it ordered that his felony-firearm sentence was consecutive to and preceding his sentence for carrying a concealed weapon (CCW). The judgment of sentence indicates that defendant’s felony-firearm sentence is consecutive to each of his felony sentences, including his CCW sentence. The prosecution concedes this argument, and we agree that the trial court erred. A CCW conviction under MCL 750.227 cannot serve as the underlying predicate felony for felony-firearm. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). Accordingly, we remand with instructions to amend defendant’s judgment of sentence to reflect that defendant’s felony-firearm sentence is not consecutive to his CCW sentence. Additionally, defendant is entitled to credit against his CCW sentence for time served on the felony-firearm sentence. See *People v Clark*, 463 Mich 459, 465 n 14; 619 NW2d 538 (2000).

Next, in his Standard 4 Brief, defendant raises a host of unpreserved prosecutorial misconduct claims. We review his claims for plain error affecting substantial rights. *Carines*, 460 Mich at 763. Because defendant failed to preserve his claims, “we will not find error requiring reversal if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

He first contends that the prosecutor used the prestige of her office, improperly vouched for defendant’s guilt, and improperly vouched for the credibility of her own witnesses when she called defendant a liar during cross-examination and closing argument. During cross-examination, defendant admitted to the prosecutor that he lied about a number of things during the investigation. The prosecutor’s comments and arguments were not improper because she simply highlighted the fact that defendant admitted that he lied. See, e.g., *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (the prosecutor may argue that the defendant is not credible). Moreover, the prosecutor does not commit misconduct by calling the defendant a liar when the evidence produced at trial demonstrates that the defendant lied. *Id.* Indeed, the prosecutor “need not confine argument to the blandest possible terms.” *People v Marshall*, 298 Mich App 607, 621; ___ NW2d ___ (2012), quoting *Dobek*, 274 Mich App at 66. Accordingly, defendant failed to establish plain error requiring reversal.

Likewise, we reject defendant’s claim that the prosecutor improperly vouched for the credibility of her own witnesses. It is well established that a prosecutor may not vouch for the credibility of witnesses by implying that she has some special knowledge of the witnesses’ truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can the prosecutor place the prestige of her office behind the testimony of witnesses. *McGhee*, 268 Mich

App at 633. Here, the prosecutor argued that her witnesses were worthy of belief *based on the evidence*, which is permissible. *Dobek*, 274 Mich App at 67. Further, there is no support in the record for defendant's claim that the prosecutor appealed to the prestige of her office or that she injected her personal beliefs into the matter.

Defendant's next series of prosecutorial misconduct claims involve the prosecutor's arguments about shell casings recovered by police officers at the scene of the shooting. Police officers initially analyzed five .40-caliber shell casings that were recovered at the scene. Detective Sergeant Robert Rayer of the Michigan State Police compared the shell casings with bullet fragments removed from Jones's body but was unable to find a conclusive match. He was only able to testify that there were some consistencies between the bullets and the shell casings. In addition to the shell casings that were analyzed, police officers returned to the scene of the shooting approximately one week after the first shell casings were recovered and found additional .40-caliber shell casings, as well as one .38-caliber shell casing. These casings were never analyzed, however.

Defendant first argues that the prosecutor argued facts not in evidence; he alleges that she told the jury that the .40-caliber shell casings matched the bullets that were removed from Jones's body. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). The prosecutor's argument was not improper because she did not argue that the bullet fragments were a conclusive match to the recovered shell casings; rather, she merely argued that there were consistent features between the shell casings and bullet fragments. This inference was not improper because it was supported by Rayer's testimony. See *id.*

We also reject defendant's claim that the prosecutor deliberately misled the jury when she argued that the additional .40-caliber shell casings and the .38-shell casing were not related to the instant prosecution. Defendant's trial counsel mentioned the additional shell casings and argued that there may have been additional shooters and that defendant was not responsible for Jones's death. The prosecutor's argument that the shell casings were not related to the instant prosecution was not improper because there was no evidence at trial connecting the subsequently recovered shell casings to the shooting. As such, the prosecutor was allowed to argue the reasonable inference that the shell casings were unrelated to the case. See *id.*

Further, we reject defendant's claim that the prosecutor improperly vouched for the credibility of her witnesses with her arguments about the shell casings. Contrary to defendant's claims, nothing in the prosecutor's argument suggested that she had special knowledge concerning any of the witnesses' credibility. See *Thomas*, 260 Mich App at 455.

Next, defendant appears to accuse the prosecutor of committing a *Brady* violation for failing to disclose exculpatory evidence regarding the shell casings that were subsequently recovered at the scene of the shooting. On this record, defendant cannot establish a *Brady* violation as it pertains to the shell casings because the record reveals that his trial counsel was aware of the additional shell casings. Indeed, he asked two police officers about the shell casings on cross-examination. Thus, defendant's *Brady* claim fails because there is no evidence that the

prosecution withheld this evidence or that defendant did not know about it. See *Lester*, 232 Mich App at 281.

Next, defendant argues that the cumulative effect of each of the alleged instances of prosecutorial misconduct entitles him to relief. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not.” *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). But because we have found no errors by the prosecutor, “a cumulative effect of errors is incapable of being found.” *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Additionally, because all of defendant’s arguments lack merit, his accompanying ineffective assistance of counsel claim must also fail. *Ericksen*, 288 Mich App at 201.

Finally, defendant contends that the trial court abused its discretion when it ordered him to pay restitution for Jones’s funeral costs. We find defendant waived this issue because his trial counsel expressed satisfaction with the trial court’s restitution order. *Carter*, 462 Mich at 216. Moreover, we have reviewed the issue and found that it lacks merit.

Affirmed in part and remanded for modification of defendant’s judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder