

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 5, 2014

v

CIDNEY BOWDEAN INGRAM,

Defendant-Appellant.

No. 315078
St. Clair Circuit Court
LC No. 12-001654-FC

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison for first-degree murder and two years for felony-firearm. We affirm.

I. FACTUAL BACKGROUND

Defendant and his girlfriend returned to their townhouse during the early morning hours of June 15, 2012. Defendant went inside the townhouse and his girlfriend went to the parking lot to retrieve something from her car. When she returned, she informed defendant that some men in the parking lot made sexual comments to her. The defendant became angry. According to his girlfriend, defendant walked into the living room and retrieved a gun. Defendant then engaged the men in the parking lot, including the victim, in a verbal confrontation.

The argument ensued, and one of the men with the victim saw defendant come to the door with a gun. Another eyewitness testified that he did not see anything in the victim's hands. Defendant's girlfriend testified that defendant racked the gun and fired a warning shot while he was inside the apartment. She then saw defendant fire several other shots. The man with the victim heard a gunshot, which appeared to hit the victim in the chest. He then saw the victim turn and attempt to leave, but defendant came out of the apartment and shot the victim in the back. The victim died of his wounds.

While defendant admitted to verbally confronting the men, he claimed that the three men approached the apartment before he retrieved his gun and loaded it. Defendant testified that he fired a warning shot but the men kept coming toward the apartment. Defendant claimed that he backed up, but when the victim stepped inside of the apartment, defendant shot him. Defendant

claimed that the victim was so close that he felt the victim's body on the gun. He also claimed that the victim tried to enter the home again, which is when defendant shot the victim in the chest. According to defendant, he fired the gun because the victim was trying to enter the apartment, and defendant feared that he or his family would be hurt.

The jury found defendant guilty of first-degree murder and felony-firearm. He was sentenced to life imprisonment for first-degree murder, and two years for felony-firearm. Defendant now appeals.

II. SUFFICIENCY & GREAT WEIGHT

A. STANDARD OF REVIEW

Defendant first argues that there was insufficient evidence to sustain his first-degree murder conviction, and the verdict was against the great weight of the evidence. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196.

We review for an abuse of discretion a trial court's determination that the verdict was not against the great weight of the evidence. *People v Kosik*, 303 Mich App 146, 154; 841 NW2d 906 (2013). An abuse of discretion exists if the trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *Id.* “A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Id.* (quotation marks and citation omitted).

B. ANALYSIS

“[T]o prove first-degree murder, the prosecutor was required to establish defendant's premeditated intent to kill. Premeditation and deliberation, for purposes of a first-degree murder conviction, require sufficient time to allow the defendant to take a second look.” *People v Orr*, 275 Mich App 587, 591; 739 NW2d 385 (2007) (quotation marks and citation omitted). An individual may, however, use force to defend himself if he is not engaged in criminal activity and “[t]he individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.” MCL 780.972(1)(a); *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). A person attacked in his or her home has no duty to retreat. *People v Richardson*, 490 Mich 115, 120; 803 NW2d 302 (2011). Generally, a porch is part of a home. *Id.* at 121; *People v Riddle*, 467 Mich 116, 138; 649 NW2d 30 (2002). Moreover, “once the defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury 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.” *Dupree*, 486 Mich at 709-710 (quotation marks and citation omitted).

In the instant case, the evidence submitted demonstrates that defendant became angry after hearing that one of the men in the parking lot made a rude comment to his girlfriend. Immediately after hearing about the comment, defendant's girlfriend saw him retrieve a gun, open the front door, and yell at the three men. This evidence supports the prosecutor's theory that defendant shot the victim, not because he was in fear, but because he was angry about being "disrespected." Moreover, while one of the men testified that the victim might have pulled up his pants, this witness did not actually see this.

A police officer also testified that when a shotgun is fired, the cartridges are ejected to the right. The two shotgun cartridges in this case were found on a grassy area next to the porch, indicating that defendant was outside of the apartment door when he fired the shots. This evidence casts doubt on defendant's testimony that the victim was entering the home when shot. Moreover, the medical examiner testified that defendant was probably two to five feet from the victim when he shot him in the chest, and three to six feet from the victim when he shot him in the back. This contradicts defendant's testimony that he was so close to the victim that he could feel the victim's body on the other side of the gun.

Furthermore, an eyewitness testified that he did not see anything in the victim's hands, and a police officer testified that the only items retrieved from the victim's body were a cellular phone, an identification card, and credit cards. While defendant may not have had a duty to retreat, he was not permitted to use deadly force unless he honestly and reasonably believed that deadly force was necessary to prevent death or imminent great bodily harm. *Richardson*, 490 Mich at 120-121. Given the lack of evidence that the victim threatened death or imminent great bodily harm, the evidence does not support a conclusion that defendant relied on justifiable self-defense.

Viewing the evidence in a light most favorable to the prosecution, we find that a reasonable jury could have concluded that defendant did not honestly and reasonably believe that deadly force was necessary to protect him or another from death or imminent great bodily harm. The evidence was sufficient to support defendant's conviction, and the verdict was not against the great weight of the evidence.¹

III. PROSECUTORIAL MISCONDUCT & INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Defendant next argues that the prosecutor committed misconduct when she elicited evidence that his nickname was "Psycho." Defendant further argues that defense counsel's failure to object constituted ineffective assistance of counsel. We disagree.

¹ To the extent that defendant also is challenging the denial of a directed verdict motion, for the same reasons articulated *supra*, we find no error.

Because defendant failed to preserve his claim of prosecutorial misconduct, our review is limited to plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). “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, independent of defendant’s innocence.” *Id.* at 448-449. Moreover, “where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal.” *Id.* at 449.

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a “trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court’s factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

B. ANALYSIS

When the prosecution asked two witnesses about the identity of those living in the residence in question, the witnesses referred to defendant by his nickname “Psycho.” Contrary to defendant’s assertions on appeal, the prosecution was not eliciting improper character evidence, but was verifying that the witness knew defendant by the name he went by, and that they were referring to the correct person. See *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996) (“because defendant was known to the prosecution’s witnesses under various names, testimony concerning defendant’s use of those names was necessary to show that defendant was the person to whom the testimony pertained.”) (Quotation marks and citations omitted). This testimony was not used to impeach defendant, and any error in the fleeting references was harmless beyond a reasonable doubt. MCR 2.613. We find no plain error affecting defendant’s substantial rights. *Ackerman*, 257 Mich App at 448.

Furthermore, defendant has not overcome the strong presumption that defense counsel’s failure to object was sound trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007) (“[w]e will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.”). Even if this testimony was improper, “[c]ertainly there are times when it is better not to object and draw attention to an improper comment.” *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Instead of objecting to the testimony, defense counsel allowed defendant to explain that he was a rap music performer and that “Psycho Cid” was his stage name, which had nothing to do with his behavior in the community. In light of this sound trial strategy, defendant has not established ineffective assistance of counsel.

IV. ADMISSION OF EVIDENCE

A. STANDARD OF REVIEW

Defendant also contends that the trial court erred in excluding evidence of the victim’s prior conviction for resisting and obstructing a police officer. A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409,

412; 670 NW2d 659 (2003). Where the decision involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, the question is reviewed de novo. *Id.*

B. ANALYSIS

Pursuant to MRE 404(a)(2), “[e]vidence concerning the aggressive character of a homicide victim, even if the defendant was unaware of it at the time, is admissible in furtherance of a self-defense claim to prove that the victim was the probable aggressor.” *People v Orlewicz*, 293 Mich App 96, 104; 809 NW2d 194 (2011) remanded on different grounds 493 Mich 916 (2012). “However, this type of character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense.” *Id.*; see also *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998); MRE 405.

Here, defendant contends that the trial court should have allowed evidence of the victim’s prior conviction because the prosecution opened the door when it elicited testimony that the victim had not performed recent armed robberies and was planning to attend college. Contrary to defendant’s assertions on appeal, this testimony did not open the door to the victim’s prior conviction. Evidence that the victim planned to go to college did not portray him as nonviolent or implicate his prior conviction. Moreover, testimony regarding the victim’s noninvolvement in robberies merely clarified that while defendant claimed to have bought the gun because of recent crime, that had nothing to do with a specific threat from the victim. We find no error in the trial court’s ruling.

V. JUROR MISCONDUCT

A. STANDARD OF REVIEW

Lastly, defendant argues that the trial court erred in failing to hold an evidentiary hearing on the issue of juror misconduct. A trial court’s denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216.

B. ANALYSIS

Jurors are presumed to be impartial, unless the contrary is shown. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). “The burden is on the defendant to establish that the juror was not impartial or at least that the juror’s impartiality is in reasonable doubt.” *Id.* As the Michigan Supreme Court has explained:

It is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury. . . . A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial. . . . The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had. [*Id.* at 551. (quotation marks, citations, and brackets omitted).]

In the instant case, defendant presented evidence that he and one of the jurors worked at the same company for a couple of months. Even accepting defendant's allegations as true, he has not shown, nor even alleged, that the juror was biased or that there was any reason to believe the juror could not be impartial. The affidavit of a fellow coworker did not reveal the size of the company or the extent to which the juror was allegedly acquainted with defendant. Moreover, defendant has proffered no explanation for why he failed to inform the court that he knew or recognized the juror. See *People v Grissom*, 492 Mich 296, 320; 821 NW2d 50 (2012) (in order to satisfy the newly discovered evidence test, defendant must show that "using reasonable diligence, [he] could not have discovered and produced the evidence at trial[.]").

Under these circumstances, we find no abuse of discretion in the trial court's decision declining to hold an evidentiary hearing and denying defendant's motion.

VI. CONCLUSION

Defendant's first-degree murder conviction was supported by sufficient evidence, and the verdict was not against the great weight of the evidence. We also find no instances of prosecutorial misconduct, ineffective assistance of counsel, improperly admitted evidence, or juror misconduct warranting reversal or an evidentiary hearing. We affirm.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood