

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC EDWARD SEABROOKS,

Defendant-Appellant.

UNPUBLISHED

April 19, 2005

No. 252736

Wayne Circuit Court

LC No. 03-010105-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to fifty to one hundred years in prison for the second-degree murder conviction, life in prison for the assault with intent to murder conviction, forty to sixty months in prison for the felon in possession of a firearm conviction, to run consecutive to two years in prison for the felony-firearm conviction. We affirm.

I. Jury Instructions

Defendant first argues that the trial court erred by failing give the jury his requested self-defense instruction and by giving the jury an erroneous reasonable doubt instruction. We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). To preserve a claim of instructional error for appeal, the party must object on the record to the trial court's failure to give an instruction before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999). Here, defendant requested a self-defense instruction on the record; therefore, that issue is preserved for review. However, defendant failed to object to the trial court's reasonable doubt instruction on the record; therefore, that issue is unpreserved and our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.¹

¹ We note our Supreme Court's decision in *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (continued...)

A. Self-Defense Instruction

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). “When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction.” *Id.* “However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court’s failure to give the requested instruction resulted in a miscarriage of justice.” *Id.*; MCL 769.26. “The defendant’s conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative.” *Riddle, supra* at 124-125.

At trial, defendant testified that at the time of the incident, he was driving a Cadillac Seville, and that “Moe” was riding as a passenger. Defendant testified that after he and “Moe” were fired upon by the occupants of an Escalade, “Moe” returned fire. Defendant vehemently maintained that he never possessed or fired a weapon. His own testimony notwithstanding, defendant requested a self-defense instruction based on the prior sworn testimony of his fiancée, Sharon Poindexter, that he told her that he had shot someone *back*. However, at trial, Poindexter did not recall defendant making such a statement.

While it is true that defendants have the right to advance inconsistent defenses, MCR 2.111(A)(2), our Supreme Court has explained that the right “is not unlimited.” *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). “[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.” *Riddle, supra* at 127; CJI2d 7.15. It is true that a self-defense instruction is appropriately given where there is some evidence to support the theory. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). Here, however, defendant failed to come forward with some evidence to support the critical elements of the affirmative defense of self-defense—that he honestly and reasonably believed that he was in danger of being killed or seriously injured, and that it was immediately necessary to exercise deadly force to protect himself. CJI2d 7.15. Defendant’s sole evidence in support of his request for a self-defense instruction was Poindexter’s sworn testimony from a pretrial proceeding—which, at trial, she was unable to recall defendant making—that defendant told her that he had

(...continued)

(2000), which provides that unpreserved constitutional error classified as structural error requires automatic reversal. We conclude that this case does not present any structural error. While the United States Supreme Court has classified a seriously defective reasonable doubt instruction as a structural error subject to automatic reversal, *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), this case is distinguishable in that it involves a largely correct definition of reasonable doubt that included one arguably incorrect statement. Thus, any error here was more akin to an error involving the instruction on one element of a crime (not structural) rather than an erroneous failure to instruct on the elements of a crime altogether (structural). *Duncan, supra* at 54. Defendant was not denied a “basic protection” and his conviction was not rendered “unfair or unreliable” because of the minor reasonable doubt instructional error at issue. *Duncan, supra* at 52, quoting *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

shot someone back, i.e., returned fire after being fired upon. We conclude that the facts of this case were legally insufficient to require the requested self-defense instruction. *Lemons, supra* at 249. The trial court did not err in declining to instruct the jury on self-defense, and defendant is not entitled to relief on this issue.

B. Reasonable Doubt Instruction

“To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt.” *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Here, the trial court gave the following instructions to the jury concerning reasonable doubt:

And a reasonable doubt, no matter how many times it’s defined, just certainly means a doubt that’s based on reason and common sense. *A doubt that you can assign a reason for having.* A fair, honest and reasonable doubt.

It would be the kind of a doubt that would make you hesitate before making an important decision.

A reasonable doubt, however, is not a vain, or fictitious, or emotional, or fraudulent, a hunch or a feeling, or a possibility of innocence. That is not a reasonable doubt.

A reasonable doubt is the kind of doubt you can assign a reason for having. The kind of doubt that would make you hesitate before making an important decision.

This instruction was largely based on standard jury instruction CJI2d 3.2. Defendant complains that, in addition, the trial court added the italicized sentences suggesting that a juror have “*a reason*” before concluding that he or she has a reasonable doubt concerning defendant’s guilt.

A panel of this Court has suggested, in dicta, that, when a trial court instructs a jury to base its decision on “a reason,” it calls upon the jury to justify its decision, and such an instruction improperly shifts the burden of proof to the defendant by requiring the jurors to have a reason to doubt the defendant’s guilt. See *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988) (“[a]n instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant’s guilt”); *People v Foster*, 175 Mich App 311, 316, 319; 437 NW2d 395 (1989), overruled on other grounds in *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995) (prosecutor committed error requiring reversal when he argued, inter alia, that jurors must have “a reason” for their doubt). But see *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995), where this Court held that it was not error requiring reversal for a prosecutor to argue that a juror must have a reason for any doubt, but noted that the trial court properly instructed the jury regarding what constituted a reasonable doubt.

We note initially that, in apparent contrast to *Jackson* and *Foster*, the trial court’s instruction included an appropriate definition of reasonable doubt. The United States Supreme Court has held that “so long as the court instructs the jury on the necessity that the defendant’s

guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994) (citations omitted). Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury. *Id.* The Court held that the relevant inquiry is not whether the instruction could have been applied in an unconstitutional manner, but rather, whether there is a reasonable likelihood that the jury did apply the instruction in an unconstitutional manner. *Id.* at 6. Stated differently, the relevant inquiry is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standard that the government must prove every element of a charged offense beyond a reasonable doubt. *Id.*

Here, the jury convicted defendant of the lesser offense of second-degree murder, and acquitted him of first-degree murder. Thus, the jury had an apparent doubt as to defendant's state of mind, and acquitted him on the greater charge. This reflects the jury's ability to apply the proper definition of reasonable doubt as given by the trial court. Because the instructions taken as a whole correctly conveyed the concept of reasonable doubt to the jury, there was "no reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution" by lowering the government's burden of proof. *Id.* at 22-23.

For these reasons, we find that defendant has not met his burden of demonstrating plain error that affected his substantial rights. *Carines, supra* at 763. Further, even if defendant had demonstrated prejudice, reversal is only warranted if the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* There is no showing that defendant is actually innocent, and we are not persuaded that the fairness, integrity, or public reputation of the proceedings was seriously affected. A correct definition of reasonable doubt was included in the trial court's instructions and the jury's willingness to convict on the lesser offense demonstrates that they were not unduly influenced by the improper portions of the trial court's instructions.

II. Prosecutorial Misconduct

Defendant next alleges several instances of prosecutorial misconduct. We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, defendant failed to object to the alleged instances of prosecutorial misconduct; therefore, they are unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Id.*

A. Use of Defendant's Post-*Miranda*² Silence for Impeachment Purposes

Defendant argues that the prosecutor improperly impeached him by cross-examining him concerning his post-*Miranda* invocation of his right to remain silent. On direct examination, defendant testified concerning the circumstances surrounding his invocation of his right to remain silent:

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Q. Did you tell [the police officer] the truth about what happened; did you tell him anything?

A. I didn't tell him anything.

Q. Why not?

A. Because when he came, he came and told me that I was being charged with a murder and attempt [sic] murder. And that I should make it easy on myself and make a statement now.

Q. And your response to that was what?

A. That, "I don't have anything to say to you. I need a[n] attorney."

On cross-examination, the prosecutor impeached defendant's explanation of the incident, offered for the first time at trial—that he was present during the shooting, but never possessed or fired a weapon—by questioning him about his failure to give the same explanation after receiving *Miranda* warnings:

Q. You had nothing to hide?

A. Correct.

Q. Is that what you told the [] police when they came and talked to you?

A. I wouldn't talk to them.

Q. You had nothing to hide, though; right?

A. But they came and charged me with a crime. So, why would I talk with them?

The use for impeachment purposes of a defendant's silence after receiving *Miranda* warnings violates the Due Process Clause of the Fourteenth Amendment. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). It is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. Contrary to the prosecutor's argument on appeal, "[e]ven though defendant raised the issue of his choice to remain silent after his arrest [on direct examination], this did not open the door for the prosecutor to elicit details about whether defendant denied the allegations against him." *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001).

Defendant has demonstrated plain error; however, he has failed to demonstrate that the error affected the outcome of the proceedings. *Carines, supra* at 763. Moreover, "no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Had defense counsel objected, any error could have been cured

by the trial court issuing an appropriate cautionary instruction. Therefore, defendant is not entitled to relief on this unpreserved issue.

B. Erroneously Asserting that Defense Counsel Injected the Issue of Narcotics into the Case

Defendant next argues that the prosecutor erroneously asserted that defense counsel injected the issue of narcotics into the case by stating on rebuttal:

Who's the first person that ever mentioned the word drug related? [Defense counsel]. Who's the first person who ever said that the victim was a drug dealer? [Defense counsel]. . . . [Defense counsel] is the one who introduces that whole dirty business of narcotics

However, the record reveals that the prosecutor's assertion was not erroneous where defense counsel did in fact inject the issue of narcotics into the case by eliciting testimony from various witnesses which implied that the crimes in the instant case were drug-related. We consider issues of prosecutorial misconduct on a case-by-case basis by examining the pertinent portion of the record and evaluating a prosecutor's remarks in context. *Id.* "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." *Id.* Moreover, "[p]rosecutors 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." *Id.* Taken in context, the prosecutor's statement was a fair comment on the evidence, and was responsive to defense counsel's arguments that the incident stemmed from a territorial drug war. *Id.* Defendant has failed to demonstrate plain error; therefore, this unpreserved issue is forfeited.

C. Improperly Denigrating Defense Counsel

Defendant next argues that the prosecutor improperly denigrated defense counsel by stating on rebuttal: "[p]erhaps [defense counsel] is too used to hanging out with drug dealers because he thinks everyone else is a drug dealer." While it is true that a prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), defendant misconstrues the prosecutor's comment, and quotes it out of context.

Throughout trial and during closing argument, defense counsel attacked the credibility of the occupants of the Escalade by suggesting that they were drug dealers, and that the incident stemmed from a territorial drug war. On rebuttal, the prosecutor argued that there was no evidence that the occupants of the Escalade were involved with drugs, and that defense counsel's suggestion to the contrary was based primarily on the fact that they were riding in an expensive vehicle. On rebuttal, the prosecutor suggested that as a result of defense counsel's representation of criminal defendants, his perspective had become jaded, and he assumed that everyone was involved with drugs. The prosecutor's comment was not intended to purport that defense counsel consorted with drug dealers. Taken in context, the prosecutor's statement was responsive to defense counsel's arguments and did not constitute improper denigration of defense counsel. *Schutte, supra* at 721. Defendant has failed to demonstrate plain error; therefore, this unpreserved issue is forfeited.

D. Improper Vouching

Defendant next argues that the prosecutor improperly vouched for the truthfulness of his case by stating on rebuttal: “[m]y job is to present the facts. And I’ve done that the best I can . . . My job is to present to you the facts.” Here, the prosecutor’s comment did not “suggest that the evidence presented by the prosecution must be true and, by logical inference, that the prosecutor ha[d] special knowledge of the veracity of the witnesses.” *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004). Nor did the comment improperly invoke the prestige of the prosecutor’s office. *Id.* at 55. The prosecutor merely reiterated to the jury that his duty was to present them with the facts, and that he had attempted to fulfill that duty to the best of his ability. The prosecutor’s comments were not objectionable, and defendant has failed to demonstrate plain error; therefore, this unpreserved issue is forfeited.

E. Cumulative Error

Defendant next argues that the cumulative effect of the various instances of alleged prosecutorial misconduct requires reversal. The cumulative effect of several minor errors may warrant reversal where the individual errors would not. *Ackerman, supra* at 454. However, reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* Here, none of the alleged instances of prosecutorial misconduct were unfairly prejudicial to defendant; therefore, there are no errors that can aggregate to deny defendant a fair trial. *Id.*

III. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or for a *Ginther*³ hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664.

A. Failing to Object to the Trial Court’s Reasonable Doubt Instruction

Defendant argues that defense counsel was ineffective for failing to object to the trial court’s reasonable doubt instruction. However, as noted above, the instructions taken as a whole

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

correctly conveyed the concept of reasonable doubt to the jury, and the jury's willingness to convict on the lesser offense of second-degree murder demonstrates that they were not unduly influenced by the improper portions of the trial court's instructions. Even assuming defense counsel's failure to object to the trial court's reasonable doubt instruction constituted deficient performance, defendant has failed to show a reasonable probability that but for counsel's failure to object, the outcome of the trial would have been different. *Id.* at 663-664. Therefore, defendant is not entitled to relief on this unpreserved issue.

B. Failing to Object to the Alleged Instances of Prosecutorial Misconduct

Defendant next argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. However, as noted above, the unpreserved allegations of prosecutorial misconduct were not prejudicial to defendant. *Ackerman, supra* at 455. Moreover, defense counsel is not ineffective for failing to raise futile objections. *Id.* Therefore, defendant is not entitled to relief on this unpreserved issue.

IV. Cumulative Error

Defendant next argues that the cumulative effect of the errors asserted above entitle him to a new trial. We review this issue to determine whether the combination of alleged errors denied defendant a fair trial. *Knapp, supra* at 387. While "the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not," "only actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). Because the trial court's instruction concerning reasonable doubt was the only actual error, there are no other errors with which to aggregate it to constitute cumulative error. *Id.* at 591-592 n 12. Moreover, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Knapp, supra* at 388. And as noted above, the trial court included a correct definition of reasonable doubt in the jury instructions, and the jury's willingness to convict on the lesser offense demonstrates that they were not unduly influenced by the improper portions of the trial court's instructions. Defendant was not denied a fair trial; therefore, he is not entitled to relief on this issue.

We affirm.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello