STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 2, 2013
v	No. 310179 Wayne Circuit Court
DEON CRAWFORD, Defendant-Appellant.	LC No. 11-009682-FC

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; felonious assault, MCL 750.82; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a prison term of 25 to 50 years for the second-degree murder conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm conviction, and to time served for the felonious assault and felon-in-possession convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand this case for correction of defendant's felony-firearm sentence to reflect a reduced term of two years.

Defendant lost control of a stolen car and crashed into several parked vehicles. He and his passengers, Stacey Harris and Rasheed Washington, fled. Othell Lightfoot, who owned one of the damaged vehicles, his brother David Hicks, Jr., and two companions left their homes to investigate. They encountered and confronted Harris. According to Hicks, defendant and another man approached the group and Lightfoot told Hicks, "I peep gang," which Hicks understood to mean that Lightfoot thought the men were "up to no good." When Lightfoot stepped down from the curb, defendant shot him in the face from a distance of approximately 2-1/2 feet. After defendant shot Lightfoot, the man who was with defendant asked defendant, "Hey, what []ya doin'?" and hit defendant's hand, pushing the gun down. Hicks ran away. Defendant fired three or more shots at Hicks as he ran away. Hicks's foot and calf were injured by the gunfire. At trial, defendant admitted shooting Lightfoot and firing shots at Hicks. The principal issue at trial was whether defendant acted in self-defense. When the police discovered Lightfoot's body, his arm was extended into the waist area of his pants. Defendant testified that he shot Lightfoot because he thought Lightfoot had a weapon, but defendant acknowledged that he did not see one. There was no evidence that either Lightfoot or Hicks was armed with a weapon.

The jury acquitted defendant of first-degree premeditated murder, MCL 750.316(1)(a), but convicted him of second-degree murder for the shooting death of Lightfoot. Although defendant was charged with assault with intent to commit murder, MCL 750.83, with respect to Hicks, the trial court granted defendant's motion for a directed verdict on that charge and instead instructed the jury on the lesser offense of felonious assault, without objection by defendant. The jury convicted defendant of that offense, as well as felon in possession of a firearm and felony-firearm.

I. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that he is entitled to a new trial because the jury's verdict was against the great weight of the evidence. Defendant preserved this issue by filing a motion for a new trial, which the trial court denied. Cf. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). On appeal, however, in addition to referring to the great weight of the evidence, defendant's substantive argument also includes a challenge to the sufficiency of the evidence.

Defendant contends that the evidence was insufficient to disprove self-defense beyond a reasonable doubt. In analyzing a challenge to the sufficiency of the evidence, this Court "reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (internal citation and quotation marks omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

When a defendant claims self-defense, the defendant has the initial burden of producing some evidence from which a fact-finder could conclude that the elements necessary to establish a prima facie case of self-defense exist. *Reese*, 491 Mich at 155-156. "[O]nce the defendant satisfies the initial burden of production, the prosecution bears the burden of disproving the common-law defense of self-defense beyond a reasonable doubt" (internal citation and quotation marks omitted). *Id*. at 155.

"[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes that 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." *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). The initial aggressor is not entitled to use the doctrine of self-defense as justification. *Reese*, 491 Mich at 158. A defendant's actions are judged from the circumstances as they appeared to him at the time and not as they actually existed. *Hurd v People*, 25 Mich 405, 412 (1872), superseded by statute on other grounds as recognized in *People v Koonce*, 466 Mich 515, 518-521; 648 NW2d 153 (2002); *People v Green*, 113 Mich App 699, 703-704; 318 NW2d 547 (1982).

Defendant's claim of self-defense turned on whether he honestly and reasonably believed that his life was in imminent danger and that use of deadly force was necessary. The police found Lightfoot with his left hand in his pants. Defendant testified that Lightfoot put his hand in his pants a couple of seconds before defendant pulled out his gun and shot Lightfoot. No one

directly testified to the contrary. However, Hicks testified that after defendant fired the shot, defendant's companion pushed defendant's arm down and said, "Hey, what []ya doin'?" This evidence supported an inference that defendant's companion did not perceive that Lightfoot was an imminent threat to their safety. Defendant's subsequent actions also called into question the credibility of his claim that he feared for his life. Defendant admittedly fired more than three shots at Hicks, who was fleeing, even though defendant did not see Hicks with a weapon. Moreover, defendant admitted that he initially lied to the police about his involvement in the offense and did not assert that he acted in self-defense until his lawyer suggested that the doctrine might apply.

Whether defendant had an honest and reasonable belief that his life was imminently endangered by Lightfoot and that shooting Lightfoot was necessary to prevent such harm was a question of fact for the jury. The jury could have determined that defendant was the initial aggressor. The jury also could have determined that defendant did not have a reasonable belief that his life was in imminent danger in that Lightfoot had not displayed a gun. The jury could have determined that defendant did not have an honest and reasonable belief that shooting Lightfoot in the face[1] when Lightfoot was standing five feet away with his hand in his pants was necessary to prevent death or bodily harm. The jury also could have credited Hicks's testimony that defendant's companion questioned defendant's conduct immediately after the shooting and found that it demonstrated that defendant could not have honestly and reasonably believed that his life was in imminent danger or that Lightfoot presented a threat of serious bodily harm. In addition, the jury could have viewed defendant's conduct in firing additional shots at an unarmed Hicks, as Hicks was fleeing, as an indication that defendant's act of shooting Lightfoot was the product of a felonious intent and was not motivated by any concern for defendant's personal safety. Ultimately, the jury's verdict reflects its assessment of defendant's credibility. This Court does not interfere with the jury's determination of credibility. *Unger*, 278 Mich App at 222. "'Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.'" *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant did not act in self-defense.

Defendant also argues that the jury's verdict was against the great weight of the evidence. He notes discrepancies in the accounts of the witnesses and asserts that the trial was "contaminated with unreliable testimony." He contends that the evidence showed that he went to aid Harris, but was met with aggressive actions by Lightfoot, and, in fear of his life, he defended himself.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 6.431(B); MCR 2.611(A)(1)(e). "New trial motions based solely

[1] Defendant testified that he pulled out his gun, *aimed*, and fired, suggesting that he had the opportunity to determine where to shoot.

on the weight of the evidence regarding witness credibility are not favored." *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998). Even if the "testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury." *Id*. at 643 (internal citation and quotation marks omitted). Exceptional circumstances that may justify a new trial include situations where "testimony contradicts indisputable physical facts or laws, [w]here the testimony is patently incredible or defies physical realities, [w]here a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror, or where the witness'[s] testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id*. at 643-644 (internal citations and quotation marks omitted). A trial court may grant a new trial "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 627. A judge does not sit as a thirteenth juror. *Id*. However much courts are "'discontented with the result, they cannot usurp the functions of the jury.'" *Id*. at 644 n 24 (citation omitted.) This Court reviews a trial court's decision that the verdict was not against the great weight of the evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *Id*.

Defendant is correct that there are several discrepancies in the accounts of the witnesses concerning the events before and after the shooting. However, defendant's own testimony corroborated the accounts of the witnesses in several respects. In spite of the discrepancies, the testimony of the prosecution witnesses was not so far impeached that it was deprived of all probative value such that the jury could not believe it. The jury's verdict reflects its assessment of defendant's credibility and its evaluation of the reasonableness of his actions. This is not a case involving a factual issue where the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The trial court did not abuse its discretion in determining that the jury's verdict was not against the great weight of the evidence.

Defendant also argues that the trial court's ruling denying his motion for a new trial was based on a misunderstanding of the law of self-defense. In making its ruling, the trial court referred to defendant's "escalation" when he "voluntarily came back" to the accident scene. The court's statements seem to suggest that defendant forfeited his right to self-defense because he committed a crime when he damaged the parked cars and the criminal transaction was ongoing when defendant later voluntarily approached Lightfoot at a location nearby. Whether an individual is engaged in the commission of a crime is pertinent to the modified duty to retreat under the Self-Defense Act (SDA), MCL 780.971 *et seq*. See MCL 780.972(1). However, the SDA and the duty to retreat were not implicated here because defendant claimed that he feared Lightfoot was about to use a deadly weapon. Under the common law, a person has no duty to retreat from "an attacker who he reasonably believes is about to use a deadly weapon." *Riddle*, 467 Mich at 119. The SDA "does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.974. Regardless of the uncertainty concerning this basis of the trial court's ruling, remand for clarification is unnecessary. Defendant, through his arguments, sought to have the trial court act as a thirteenth

juror and effectively overrule the jury's assessment of whether defendant acted in self-defense. Granting a new trial in this situation would have been an improper usurpation of the jury's role and would have been an abuse of discretion. Because the trial court reached the right result in denying defendant's motion for a new trial, a remand to enable the trial court to revisit its ruling is unnecessary.

II. ADDITION OF FELONIOUS ASSAULT

Defendant next argues that the trial court erred by allowing the jury to consider the uncharged offense of felonious assault after the court granted defendant's motion for a directed verdict regarding the charge of assault with intent to commit murder. The trial court reasoned that the evidence did not support a conviction of assault with intent to commit murder with respect to Hicks because Hicks had refused medical treatment, he did not know if the shots were being fired at him, and his injuries did not prevent him from returning to the crime scene. The court then stated:

> I'm not even satisfied that the proofs have shown that it's even an assault with intent to commit great bodily harm less than murder.
>
> I am going to reduce it to felonious assault. I am satisfied that a rational trier of fact could in fact find that it was-- the elements of felonious assault.
>
> So, that's-- as to that count, I am going to grant the motion.

Defense counsel did not object to the jury considering the offense of felonious assault.

On appeal, defendant analyzes this issue as a matter of instructional error. Defendant argues that it was improper to submit the felonious assault charge to the jury because felonious assault is a cognate lesser offense of assault with intent to commit murder, and MCL 768.32(1) only permits instructions on necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 354-357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

Defendant did not preserve this issue by raising it below.[2] An unpreserved claim of error is subject to review under the plain-error rule from *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), in which the Michigan Supreme Court stated:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally

[2] Defendant contends that the issue was preserved by the prosecutor when she asked the court to reconsider its ruling on the motion for a directed verdict. However, defendant did not join in the objection. The prosecutor's objection did not preserve the issue for defendant. See *People v Woods*, 416 Mich 581, 610; 331 NW2d 707 (1982).

> requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

Defendant is correct that felonious assault is a cognate lesser offense of assault with intent to commit murder because felonious assault requires an element—use of a dangerous weapon—that is not an element of assault with intent to murder. *People v Wheeler*, 480 Mich 965; 741 NW2d 521 (2007); *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006); *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). However, the present issue is more appropriately analyzed as a mid-trial amendment of the information, rather than an instructional issue. The trial court did not submit felonious assault to the jury as an alternative lesser offense to assault with intent to commit murder. Rather, at the close of the prosecutor's proofs, the trial court granted defendant's motion for a directed verdict regarding the charge of assault with intent to commit murder and stated that it was reducing the charge to felonious assault. We conclude that the trial court's action was the functional equivalent of an amendment of the information. Therefore, MCL 768.32(1), *Cornell*, and its progeny, which concern uncharged offenses, are inapplicable.

"A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, 278 Mich App at 221; see also *People v McGee*, 258 Mich App 683, 687-691; 672 NW2d 191 (2003), citing MCR 6.112(H). Defendant cannot establish unfair surprise or prejudice stemming from the court's decision to "reduce" the charge of assault with intent to commit murder to felonious assault. It is true that felonious assault contains an element—use of a dangerous weapon—that is not required for conviction of assault with intent to murder. *Vinson*, 93 Mich App at 486. Here, however, the charge of assault with intent to commit murder was based on evidence that defendant used a dangerous weapon, i.e., a gun, to fire shots at Hicks. The information also listed assault with intent to commit murder as a predicate felony for the felony-firearm charge. The reduction did not prejudice the defense. We note that the trial court's decision to reduce the charge to felonious assault was made before defendant testified and provided the facts on which his claim of self-defense was based.

In light of MCR 6.112(H), the trial court's decision to amend the information did not amount to plain error affecting defendant's substantial rights. To the extent that the court's decision to add felonious assault by amendment could be considered erroneous because the prosecutor did not request the action, the error was not "plain" (i.e., clear or obvious). *Carines*, 460 Mich at 763. Moreover, as previously explained, any error did not affect defendant's substantial rights, and the alleged error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings; indeed, defendant accepted the benefit of the court's questionable dismissal of the charge of assault with intent to commit murder and remained silent

when the prosecutor urged the court to reconsider its ruling because felonious assault was not an applicable lesser included offense.

Defendant is not entitled to relief with respect to this unpreserved issue.

III. FELONY-FIREARM SENTENCE

Defendant lastly argues that the trial court erred when it imposed a five-year sentence for his felony-firearm conviction even though his first felony-firearm conviction did not occur until after the charged offense. The prosecution concedes that the trial court erred in imposing a five-year sentence for defendant's felony-firearm conviction. See *People v Stewart*, 441 Mich 89, 94-95; 490 NW2d 327 (1992), and *People v Sawyer*, 410 Mich 531, 536; 302 NW2d 534 (1981). As a remedy, we conclude that it is sufficient to remand for correction of defendant's judgment of sentence to reflect a lesser two-year term for defendant's felony-firearm conviction, rather than remand for a full resentencing (which defendant does not request). A full resentencing hearing is not necessary because the required modification is ministerial; indeed, the error in the sentence was not the result of inaccurate information, but rather was attributable to a misunderstanding of the law; the appropriate sentence for the offense is not discretionary; due-process concerns are not at issue; and defendant does not request a full resentencing. Cf., generally, *People v Miles*, 454 Mich 90, 100-101; 559 NW2d 299 (1997).

Defendant's convictions are affirmed but this case is remanded for correction of defendant's felony-firearm sentence to reflect a reduced term of two years, consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio