

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN HABIB SHAMMAMI,

Defendant-Appellant.

UNPUBLISHED

July 16, 2013

No. 309603

Oakland Circuit Court

LC No. 11-236750-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a prison term of 16 and one-half months to 10 years for the assault conviction and to a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of an incident that happened on the evening of February 10, 2011, into the early morning hours of February 11, 2011, at a club in Southfield that resulted in the shooting of Michael Yasso. Yasso was shot twice, first in the stomach and then in the arm. Defendant's theory of the case was that the shots occurred quickly, both before Yasso fell to the ground, and were fired in self-defense. The prosecution's theory of the case was that both gunshots constituted unnecessary force and that, even if the second shot occurred before Yasso fell to the ground, the shots were not fired in self-defense.

Defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to interview defendant's cousin, Firas Shammami, and his failure to call his cousins, Firas, Randy Awdish, and Justin Awdish, as witnesses during trial. Defendant claims that the men would have testified that the two shots were fired in rapid succession, thereby casting doubt on the prosecution's theory that defendant had an intent to kill when he approached Yasso and fired the second shot, and boosting defendant's theory of self-defense. After a review of the record, we conclude that Defendant cannot overcome the strong presumption that counsel's failure to call these witnesses was strategic. Contrary to defendant's argument, defense counsel's decision not to present the testimony of the witnesses in question did not deprive defendant of an adequate self-defense defense.

Whether a defendant's trial lawyer was ineffective involves mixed questions of fact and law. *People v. Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864. This Court reviews de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial. *Id.* at 19–20. However, this Court reviews the trial court's findings of fact underlying a claim of ineffective assistance for clear error. *Id.* at 20.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.* Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999), which this Court will not second-guess with the benefit of hindsight, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Dixon*, 263 Mich App at 398. “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

The Self-Defense Act (SDA), MCL 780.971 *et seq.*, provides that “an individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if . . . [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). “If the defendant could have safely retreated but did not do so, [jurors] may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use deadly force in self-defense.” *People v Richardson*, 490 Mich 115, 118; 803 NW2d 302 (2011), quoting CJI2d 7.16.

The record reveals that defense counsel interviewed Randy and Justin before trial. Randy and Justin told defense counsel that they did not see the fight between defendant and Yasso and that they did not see Yasso fall. At the *Ginther* hearing, both Randy and Justin testified that they provided written statements to the police at the time of the shooting and both acknowledged that they did not tell the police that the two gunshots were fired in rapid succession. With regard to Firas, defense counsel testified that he did not interview him, but that he reviewed Firas's videotaped police interview. Firas testified at the *Ginther* hearing that he did not see the shooting and only heard the gunshots, which he described as occurring in rapid succession. Firas did not recall telling the police at the time of the shooting that the gunshots occurred six seconds apart. Defense counsel testified that he did not call the three men as witnesses because he did not think that they would be credible witnesses, that they did not see the shooting, and that surveillance tapes of the area that were played for the jury depicted the events. Defense counsel also concluded that the men's value as witnesses was diminished because they went to the nightclub with defendant, whom they knew was angry and seeking a confrontation with a man named Kelsey Bashi. It was defense counsel's decision whether to call and question Randy,

Justin, and Firas, *Rockey*, 237 Mich App at 76-77. This Court will not second guess defense counsel's strategy regarding not calling witnesses which counsel believed lacked credibility and knowledgeable testimony, *Dixon*, 263 Mich App at 398. Further, defendant has failed to show that defense counsel's decision not to call these witnesses to testify comprised a lack of trial strategy.

Further, defense counsel argued that the shots occurred within a period of two seconds, and that the shots were taken by defendant in self-defense. The videotape of the incident, which was silent, was played several times for the jury. While there was evidence that defendant shot Yasso a second time while Yasso was on the ground, defendant testified that he shot Yasso a second time while Yasso was still standing because it looked like Yasso was grabbing for something. Yasso testified that defendant shot him the second time while he was leaning against a car, after he raised his hand. Both defendant and Yasso described the shots as being two seconds apart. Because there was evidence presented that the gunshots were in quick succession, and evidence presented that defendant shot Yasso a second time before Yasso fell to the ground, defendant has failed to show that he was denied an adequate self-defense defense. See *Dixon*, 263 Mich App at 398.

Nevertheless, during the *Ginther* hearing, defense counsel recognized that the prosecution's theory of the case did not rely on whether the second shot was fired in rapid succession to the first shot, or whether the shot was fired while Yasso was on the ground. While the prosecution asserted that there was evidence that defendant shot Yasso a second time while he was down on the ground, the prosecution argued that both shots comprised unnecessary force. In accordance with the SDA, the jury was able to consider whether defendant could retreat when determining whether defendant honestly and reasonably believed he needed to use deadly force in self-defense against Yasso. *Richardson*, 490 Mich at 118. There was overwhelming evidence that defendant could have retreated before this altercation occurred. Defendant went to the Regency Manor upset with Bashi, and wanting to fight him. After a physical confrontation with Bashi and his group inside the Regency Manor, defendant and his group waited outside for Bashi and his group for 18 minutes. Defendant retrieved his gun from his car before the physical altercation leading up to this shooting ensued. This evidence supports a finding that defendant did not reasonably believe that he needed to shoot Yasso at all in order to prevent imminent death or great bodily harm, because if so, defendant would not have sought the initial confrontation with Bashi, or would have retreated well before the altercation with Yasso. Defendant has failed to show that the lack of testimony from Firas, Randy, or Justin affected the outcome of trial. See *Chapo*, 283 Mich App at 371. Therefore, defendant has failed to show that he was denied the effective assistance of counsel, and thus, failed to show that the trial court abused its discretion by denying his motion for a new trial.

Next, defendant argues that the prosecution committed misconduct during its closing argument. We disagree.

In order to properly preserve a claim of prosecutorial misconduct for review by this Court, the defendant must object to the prosecutor's conduct. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Defense counsel objected to the alleged misconduct described *infra*. The trial court instructed the jury that the prosecution's statements were just arguments and that the trial court would give the jury the law regarding the burden of proof. This Court

reviews preserved issues regarding prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

“Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented.” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution’s theory of the case. *Dobek*, 274 Mich App at 66. Also, “[a] prosecutor may fairly respond to an issue raised by the defendant.” *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Attacking the theory of the defense does not shift the burden of proof and commenting on the weaknesses in the defendant’s case is not prosecutorial misconduct. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

Defendant argues that the prosecution’s rebuttal argument that defendant was with his cousins, Randy and Justin, during this incident, but “they couldn’t come in and [testify] about what happened,” was improper and shifted the burden of proof to defendant. The prosecution argues that the statement was in response to defense counsel’s argument regarding the type of confrontation defendant was expecting on the night in question. Defendant argued in his closing argument that he went to the Regency Manor to have a fist fight with Bashi. The prosecution argued in its rebuttal argument, in relevant part, as follows:

He talks about, well, we went to have a fist fight. All of these witnesses are probably inclined to believe that something might go down. And who’s the guy that’s really promoting it, or starting the whole thing by coming to the Regency Manor, staying there, not leaving when he’s told to leave, hanging out, the guy with the gun, Mr. Shammami, along with his cousins, and I don’t know where -- apparently Randy and Justin, it’s a busy day, they couldn’t come in and testimony [sic] about what happened.

The prosecution’s theory of the case was that defendant brought a gun to the Regency Manor and retrieved his gun before the physical altercation with Yasso, and that defendant shot Yasso with the intent to murder him.

The prosecution did not commit misconduct by pointing to weaknesses in defendant’s case, which included a lack of testimony to rebut the prosecution’s theory regarding defendant and his group’s intentions in going to the Regency Manor on the night in question, and the intent to engage in this altercation. Defendant has also failed to show that the prosecution erred by attacking his theory that he went to the Regency Manor seeking merely a fist fight. *McGhee*, 268 Mich App at 635.

Nevertheless, defense counsel objected to the alleged misconduct. The trial court instructed the jury that the prosecution’s statements were just arguments and that the trial court would give jurors the law regarding the burden of proof. Error, if any, was cured by the trial

court's jury instruction. "Jurors are presumed to follow their instructions..." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause