STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v SHANNON J. ANDERSON, Defendant-Appellant.	No. 284953 Macomb Circuit Court LC No. 2007-002162-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v SHANNON J. ANDERSON, Defendant-Appellee.	No. 290688 Macomb Circuit Court LC No. 2007-002162-FC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

In Docket No. 284953, defendant Shannon J. Anderson appeals as of right his jury convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of a firearm while ineligible to do so (felon-in-possession), MCL 750.224f, and second-degree murder, MCL 750.317. The trial court sentenced Anderson to serve four to ten years in prison for the assault with intent to do great bodily harm conviction, 25 to 40 years for the second-degree murder conviction, two years for the felony-firearm conviction, and five years for the felon in possession conviction. In Docket No. 290688, the prosecution appeals by leave granted the trial court's decision to order a new trial. The primary issues on appeal are whether the trial court erred when it granted Anderson a new trial on the basis of its conclusion that Anderson did not have the effective assistance of counsel at trial and whether the prosecutor engaged in misconduct during the trial that was so prejudicial that it would independently warrant a new trial. We conclude that the trial court did not err when it granted defendant's motion for a new trial. We also agree that the prosecutor engaged in misconduct when he improperly solicited testimony about Anderson's trial counsel's discussions with the police

concerning evidence and argued to the jury that it could draw improper inferences from those discussions. However, in light of our decision in docket no. 290688, we decline to determine as moot whether that misconduct would independently warrant a new trial. For these reasons, we affirm in docket no. 290688 and dismiss the appeal in docket no. 284953.

I. Basic Facts and Procedural History

Anderson's convictions arise from a shooting incident at Anderson's hair salon on January 15, 2007. During the incident, Anderson shot Troy Christian and shot and killed Stanley Rhynes.

Christian testified that he was friendly with Rhynes, who he had known for about twenty years, and that they worked together at a Chrysler plant. Christian stated that he first met Anderson in August 2006. At that time, Christian inquired around the plant about someone who could sell some marijuana. Anderson's sister worked at the plant and she gave Anderson's phone number to Christian.

Christian stated that he purchased marijuana from Anderson five or six times between August 2006 and the shooting in January 2007. He said he served as the middleman for Rhynes and that he would get about $75 per pound out of the deal. They purchased about ten pounds from Anderson at each sale. Christian said that he did not know what Rhynes did with the marijuana after each purchase.

On January 15, 2007, Christian called Anderson to arrange another purchase of ten pounds of marijuana. Phone records show several calls between Anderson and Christian during the hours preceding the incident. Christian stated that Anderson agreed to meet him and Rhynes in an Applebees parking lot near Anderson's salon. Christian drove his Durango with Rhynes in the front passenger seat, but they did not immediately go to Applebees. Instead, they went to a fast-food restaurant where Rhynes got something to eat. They then drove to Applebees and waited 15 minutes, but then moved to a nearby McDonald's parking lot.

Christian said he had a permit to carry a concealed weapon and, on the day at issue, he had a .380 semi-automatic pistol in his belt and that he also had a .357 revolver in the Durango's armrest. Christian also said he had a small pocketknife with him that he used to open the marijuana's packaging during the previous transactions.

At some point, Anderson drove through the lot at Applebees and saw Christian and Rhynes waiting at the McDonald's parking lot. Christian said that Anderson drove over to the McDonald's lot and nodded at them. Christian understood this to mean that they should follow Anderson, which they did. Anderson drove across the street to his salon. Anderson backed his Cadillac into a space in front of the salon and Christian backed his Durango in next to it. Christian testified that Anderson opened the doors to the salon with his keys.

Christian testified that, after some small talk, Anderson went out to his car and retrieved a large gray trash bag, which he put down near the doorway to a small utility room in the salon. Anderson also retrieved a scale and set it inside the utility room. At first they were going to do the deal in the utility room, but Anderson suggested that they go back into the main area because the utility room was too cramped. Christian testified that, after they reentered the salon's main

room, Anderson dropped the gray trash bag on the floor "and he says 'you all are going to love this. This is some fine (inaudible) I got right here.' And when he reaches down to open up the bag, he comes back up with a pistol." Christian stated that he ran to the back of the salon after Anderson pointed the gun at them.

As he ran, Christian heard a shot and felt pain in his arm. He said he fell and then got around a partition where he pulled his own gun. He said he heard some more gunshots: "Pop, pop, pop, pop, like four pops. And then I kept yelling for Stan, you know. I kept yelling: Stan, Stan, Stan." Christian said he tried to "rack" his gun but couldn't because he had no feeling in his left hand. Christian said he turned and pointed his gun at Anderson, who was running toward the front doors with his gun. After Anderson went out the doors, Christian moved toward the front of the salon and saw Rhynes face down on the floor near the doors. Christian said he shook Rhynes and called to him, but he did not move. He noticed the butt of a revolver in Rhynes' jacket pocket and pulled out the .357 pistol that had been in his Durango's armrest. Christian then left the salon.

After leaving the salon, Christian fired a shot into the back of Anderson's Cadillac and broke the rear window. Christian said he then began to scream for help. Witnesses from nearby businesses testified that a man holding a gun was screaming for help and stating that he had been shot. Christian then saw Anderson near an adjacent business. Christian said he yelled: "'What did you do?' You know. And he was like: 'Fuck you.'" Anderson then pointed his gun and fired at Christian and Christian returned fire. A witness testified that the man yelling for help pointed his gun and fired at another man who was in the back of the lot and that, after the man who was screaming for help fired, she heard another shot. Shortly thereafter several police officers arrived, but Anderson had fled the scene.

The police officers were initially unable to enter the salon because the doors were self-locking and could not be forced with a baton. However, an officer forced entry with a ram. Rhynes was found dead on the floor face down. The officers found over $30,000 in cash bagged and stuffed into the sleeve of his jacket. The officers also found a gray trash bag in the middle of the floor with clothing in it, including a pair of shoes. They found a scale in a small utility room just off the main area of the salon and found Christian's pocketknife, which was open, under some sinks in the main area. The officers also observed several drops of blood in the back of the salon by a partition and found a semi-automatic pistol near Rhynes' body. The officers were unable to find any marijuana even after a drug-sniffing dog was brought in.

The medical examiner testified that Rhynes had been shot four times. One shot grazed the back of Rhynes' head, but did not penetrate his skull. Another shot struck Rhynes' left arm, went through, and then proceeded through Rhynes' pectoral muscle, but did not pierce any vital organs. A third shot hit Rhynes on the left side of his face, broke some teeth and bone, and then exited. Finally, a fourth shot hit Rhynes in his left side and went through his lung and heart. This last shot was fatal. The medical examiner stated that Rhynes would have had about two or three minutes before he lost consciousness and another two or three minutes before he died, but that he could likely still move before falling unconscious. The medical examiner said that the fatal shot was fired at less than six inches range.

A firearms expert testified that Christian's .380 semi-automatic had not been fired and that there was no evidence that Christian's .357 revolver had been fired in the salon. There was,

however, evidence that a third unidentified .38 pistol had been fired in the salon. The expert also testified that the shots that killed Rhynes were all fired from the same gun and that the shots did not come from either of the guns found at the scene.

At trial, Anderson's trial counsel indicated that it was his intent to show that the case was one of self-defense. However, Anderson did not testify and there was no evidence from which a reasonable jury could conclude that Anderson acted in self-defense other than the evidence that Christian and Rhynes were armed. The jury ultimately rejected Anderson's defense and convicted him of the charges described above.

After the jury had completed its deliberations, but before the verdict had been read, Anderson told his trial counsel that he heard a juror through the walls of the jury room state that Anderson had a prior conviction for armed robbery. After some inquiry, the trial court found that the jury had been erroneously provided with a copy of Anderson's criminal record. However, the trial court questioned the jury and found that they had not relied on the record in their deliberations.

Anderson eventually retained a new lawyer and moved for a new trial, in part, on the ground that his prior lawyer, Ronnie Cromer, had not provided him with the effective assistance of counsel. Anderson also appealed his convictions.

In November 2008, the trial court held a hearing to take evidence concerning Cromer's representation of Anderson. After the hearing, the trial court determined that Cromer's representation was deficient and that the deficiencies were so serious as to warrant a new trial. The trial court entered an order granting Anderson's request for a new trial in February 2009. The prosecution then appealed this order.

II. Ineffective Assistance of Counsel

A. Standard of Review

In Docket No. 290688, the prosecution argues that the trial court erred when it determined that Anderson did not have the effective assistance of counsel at trial and abused its discretion when it ordered a new trial for that reason. This Court reviews a trial court's decision to grant a new trial for an abuse of discretion. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). In evaluating a claim for ineffective assistance of counsel, this Court reviews a trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, this Court reviews de novo whether the defendant was deprived of the effective assistance of counsel as a question of constitutional law. *Id.*

B. The Applicable Law

A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish that his counsel was not constitutionally effective, a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Bell v Cone, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). That is, the defendant must show that counsel's error was so serious that he was deprived of a fair trial. *LeBlanc*, 465 Mich at 578.

In reviewing claims of ineffective assistance of counsel, this Court must indulge a strong presumption that the defendant's trial counsel's decisions and conduct fell within the range of reasonable professional assistance. *Id.*, quoting *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997), quoting *Strickland*, 466 US at 689. However, although this Court will not evaluate trial counsel's decision with the benefit of hindsight, we must nevertheless "ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

C. Analysis

1. The Trial Court's Findings and Conclusions of Law

In the present case, the trial court determined that Cromer's performance fell below an objective standard of reasonableness in several instances. First, the trial court noted that there was testimony at trial that Cromer had told the police that he would turn over the gun and clothing that Anderson used during the incident. At the hearing on Anderson's motion for a new trial, Cromer testified that he did not actually say that he would give them the gun and clothing, but rather had expressed a general desire to cooperate with the police investigation. Although the trial court did not make a specific finding that resolved the discrepancies in the testimony, it is clear that the trial court believed the officers' testimony that Cromer had offered to turn the gun and clothing over to the police. Indeed, the trial court determined that there was no valid reason to make such an offer and then fail to actually turn the gun and clothing over to the police.

The trial court also determined that Cromer was deficient in his handling of the trial testimony about his purported offer to turn the gun over. The court recognized that Cromer had objected on the basis of hearsay when the prosecutor first asked an officer about the offer to turn over the gun, but felt that Cromer "failed to provide a coherent legal argument in response to the prosecutor's assertion that the statement was admissible" under the rules applicable to hearsay. The court also stated that the admission of this testimony implicated Anderson's attorney-client privilege and should have been the subject of a motion in limine. The trial court then concluded that the failure to properly object to this testimony fell below an objective standard of reasonableness. The court also found it worthy of note that Cromer failed to address the improper arguments the prosecutor made during his closing arguments regarding this testimony.

In analyzing the prejudice, the trial court stated that the prosecutor used the testimony about the defense's failure to turn over the gun to "devastating effect." The trial court explained that the prosecution improperly argued that this was evidence that the defense was in possession of the gun and clothing and refused to turn them over. The court stated that this argument shifted the burden of proof by telling the jury that Anderson had to prove his own innocence. For this reason, the trial court concluded that Cromer's handling of this evidence and the prosecutor's arguments with regard to the evidence independently warranted a new trial.

The trial court also found fault with Cromer's decision to call Christian's lawyer to the stand in order to attempt to solicit testimony tending to suggest that Christian's lawyer helped Christian fabricate his testimony. The court stated that it was highly unlikely that Christian's lawyer would offer any testimony to that effect and that Cromer had no reason to believe that any such communications between Christian and his lawyer would not be subject to privilege. The court also noted that Cromer had not interviewed Christian's lawyer before calling him and that, in the end, Christian's lawyer actually bolstered Christian's credibility. Under these circumstances, the trial court concluded that the decision to call Christian's lawyer was unreasonable and warranted a new trial.

The trial court determined that Cromer's decision to recommend that Anderson not testify in his own defense was similarly deficient. Specifically, the trial court stated that it was not professionally reasonable for Cromer to make this recommendation on the sole basis that he did not want the jury to learn of Anderson's prior convictions without making any effort to preclude the admission of his prior convictions. The court concluded that this decision too warranted a new trial.

Finally, the trial court determined that Cromer's decision not to move for a mistrial after Anderson told him that he overheard a juror discussing his criminal record also fell below and objective standard of reasonableness and that this decision also warranted a new trial.

Although we do not join the specific analyses proffered by the trial court, we agree that Cromer's performance at trial fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that the errors affected the outcome of the proceeding. *Toma*, 462 Mich at 302-303.

2. Self Defense

In his opening statement, Cromer told the jury that this was "a case regarding self-defense and that [the] evidence is going to be overwhelming in that regard." He explained that the jury would see that Anderson "was being set up to be robbed and that he knew it" and that Christian's version of events was simply not credible. By stating that the events at issue involved self-defense, Cromer in essence acknowledged that the evidence would show that Anderson was at the salon during the incident at issue, possessed a gun, and shot both Christian and Rhynes. Thus, in the absence of any evidence that Anderson was privileged to momentarily possess a firearm, see *People v Dupree*, 284 Mich App 89; 771 NW2d 470 (2009), Cromer effectively conceded that his client was guilty of being a felon-in-possession and guilty of felony firearm. See MCL 750.227b and MCL 750.224f. In addition, by admitting that Anderson possessed a gun during the incident, Cromer's decision to pursue self-defense immediately made Anderson's disposition of the gun used in the shooting relevant to his state of mind immediately during the period at issue. MRE 401.

The decision to pursue a particular defense is normally a matter of trial strategy committed to trial counsel's professional judgment. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). And Cromer may very well have been justified in making the concessions that accompanied use of this defense in order to gain the possibility of an acquittal on the more serious charges of murder and assault with the intent to murder. *Id.* After all, under the facts of this case, it would have been very difficult to challenge whether Anderson was

present at the salon during the shooting—it was his salon, his car was parked outside, and Christian clearly and unequivocally identified Anderson as the shooter. Nevertheless, Cromer could not reasonably pursue this defense—especially in light of the concessions that accompanied this defense—without the ability to present at least some evidence tending to permit the jury to find that Anderson acted in self-defense. See *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002) (noting that a trial court is only required to instruct the jury on a defense when the defense is supported by the evidence). Yet Cromer did not present any physical evidence or elicit any testimony from which the jury could have concluded that Anderson honestly and reasonably believed that his life was in imminent danger or that he was under a threat of serious bodily harm and that it was necessary to use deadly force to prevent that harm. See *id.* at 127 (listing the elements of common law self-defense); MCL 780.972 (providing that a person may use deadly force against another if the person "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."). Rather, as presented to the jury, Cromer's theory of self-defense was founded on complete speculation: he invited the jury to speculate that Anderson might have acted out of self-defense on the basis of the evidence that both Christian and Rhynes were armed, that the drug transaction did not occur in the parking lot at Applebees as originally intended, and the evidence that Christian's version of events had changed. Cromer invited this speculation despite the nearly overwhelming evidence tending to show that it was Anderson who lured Christian and Rhynes to the salon and then ambushed them.

The phone records clearly established that Christian and Anderson spoke several times during the day and Christian testified that they arranged to meet Anderson in order to buy drugs. Although they did not actually meet at the Applebees, Christian's testimony that Rhynes bought food at a nearby restaurant was corroborated by a receipt. Further, once they went to the salon, the only way Christian and Rhynes could have gotten into the salon was if someone let them in, which permits an inference that Anderson was not too alarmed by their presence to let them in. Likewise, in his testimony, Christian stated that Anderson left the salon twice and retrieved a trash bag and scale. Both these items were found at the scene and both are consistent with a planned drug transaction. The fact that Christian's open pocketknife was found at the seen, which he said he used to open the marijuana's packaging, also permits an inference that Christian merely expected to finalize a drug sale at the salon. Moreover, the evidence that more than $30,000 was found hidden on Rhynes also strongly suggested that Christian and Rhynes were only at the salon to purchase drugs—one does not normally bring $30,000 in cash to a robbery. In addition, because the trash bag did not actually have marijuana in it, the jury could reasonably infer that Anderson did not have any marijuana, but brought out the bag because he wanted Christian and Rhynes to believe that he did.

The evidence of the shooting also largely corroborated Christian's testimony that Anderson ambushed them. Although both Christian and Rhynes were armed, Anderson somehow managed to shoot Rhynes four times and shoot Christian before either could fire a single shot. Indeed, the evidence also showed that Rhynes suffered at least one gunshot from less than six inches range. This evidence suggests that Anderson either surprised Rhynes at close range or advanced to the point where Rhynes fell and fired the fatal shot. The blood evidence at the scene also corroborated Christian's version of the shooting. Finally, there was witness testimony that supported Christian's testimony that he called for help as soon as he left the salon,

which Anderson did not do, and that Christian waited for the police whereas Anderson fled the scene.

In light of this evidence and Cromer's inability to present independent evidence tending to suggest that Anderson acted in self-defense, the only way that Cromer could reasonably present a claim of self-defense would be to call Anderson to the stand and allow him to present his version of events. At the hearing on his motion for a new trial, Anderson explained that he wanted to testify and made Cromer aware of that desire, but ultimately acquiesced to Cromer's advice not to testify. At the hearing, Anderson testified about his version of the events—the version that he ultimately did not get to present to the jury for fear that the jury would learn about his prior conviction for armed robbery.

Anderson stated that he was not meeting with Christian and Rhynes to set up a drug sale, but rather was meeting to settle Christian's debt for $30,000 from earlier drug deals. He also said that he went to Applebees, but left for his nearby salon when he did not see Christian or Rhynes. Anderson said he was alarmed to see Christian and Rhynes arrive at the salon and only let them in because he did not want to show any kind of fear. He also said that Christian and Rhynes looked around in a way that made Anderson suspicious. Anderson explained that he was nervous because he had been shot just nine days earlier in a robbery where he was unable to identify his assailants. Anderson testified that Christian mentioned the prior shooting, even though he had not told either Christian or Rhynes about it, and that this also alarmed him. Anderson said that at some point Christian and Rhynes appeared to go for their guns and that he responded by pulling his own gun and firing.

With this testimony, Cromer could have convincingly argued self-defense. Nevertheless, he advised Anderson not to testify based on his belief that the prosecutor would successfully impeach Anderson with his prior record. That is, Cromer decided to forego compelling testimony that explained much of the more damaging evidence against his client and clearly established a basis for concluding that Anderson acted in self-defense on the sole basis that the jury might be prejudiced against his client given that he had once been convicted of armed robbery. Moreover, Cromer came to this decision without filing a motion in limine to prevent the admission of Anderson's prior record and after he already fully committed to the theory of self-defense in his opening statement. According to Anderson, Cromer also never made any attempt to prepare him to testify or test his ability to react to cross-examination.

We conclude that Cromer's decision to advise his client not to testify and yet still advance the theory that Anderson was justified in shooting Rhynes and Christian on grounds of self-defense fell below an objective standard of reasonableness under prevailing professional norms. Without Anderson's testimony, there was no evidence from which a jury could conclude that Anderson acted out of an honest and reasonable fear that his life was in imminent danger or that he was under a threat of serious bodily harm and that it was necessary to use deadly force to prevent the harm. *Riddle*, 467 Mich at 127; MCL 780.972. Indeed, based on the evidence actually presented at trial, the trial court likely erred when it instructed the jury on self-defense. See *Riddle*, 467 Mich at 124. Moreover, by arguing self-defense, Cromer abandoned any ability to argue reasonable doubt about whether his client was present during the shooting, possessed a gun, or fired the shots that struck Christian and killed Rhynes. Thus, by arguing self-defense without Anderson's testimony, Cromer effectively conceded that his client was guilty of being a felon-in-possession and guilty of felony firearm without any strategic benefit, see *People v*

Krysztopaniec, 170 Mich App 588, 596; 429 NW2d 828 (1988) (noting cases where courts have held that a trial counsel was ineffective where he expressly conceded or strongly implied that his client was guilty), and virtually ensured that his client would be found guilty of some form of murder and assault. See, e.g., *Grant*, 470 Mich at 491-493 (stating that trial counsel's failure to fortify an otherwise sound trial strategy through the presentation of easily ascertained evidence was unreasonable in light of the weakness of the defense). For that reason, we agree with the trial court's determination that Anderson did not receive the effective assistance of counsel and that the defective performance warrants a new trial.

3. Other Deficient Conduct

We also agree with the trial court's determination that Cromer's performance fell below an objective standard of reasonableness when he failed to properly object to the prosecutor's questions with regard to whether Cromer offered to turn over the gun and clothing that Anderson used during the incident and when he failed to object to the prosecutor's improper arguments concerning the inferences to be drawn from this testimony.

Cromer failed to object when the prosecutor mentioned in his opening statement that he would offer evidence that Cromer had promised to turn over the gun to the police. And, although Cromer objected when the prosecutor first asked an officer to relate Cromer's statements about the gun, he did so on hearsay grounds. Cromer did not argue that the testimony improperly shifted the burden to the defense to prove innocence, did not argue that the testimony infringed on his client's attorney-client privilege, and did not develop his argument that this line of questioning was improper because it would force him to testify, which he could not do without securing a new lawyer for Anderson. Further, Cromer did not renew his objection when the prosecutor questioned other witnesses about the value of having the gun turned over and did not object when the prosecutor asked a second officer about Cromer's statements. Finally, Cromer did not object when the prosecutor used the testimony about Cromer's offer to turn over the gun to improperly suggest that Cromer had illegally concealed evidence.

The prosecutor's arguments with regard to this testimony were plainly improper; the prosecutor's arguments suggested that Cromer himself did not believe that his client was innocent and even helped to illegally conceal or destroy evidence in order to help his client evade justice. See *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988) (noting that a prosecutor may not suggest that a defendant's trial counsel does not believe his own client because it undermines the presumption of innocence). The prosecutor's arguments also improperly suggested that Anderson had the burden to prove his own innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Cromer's decision to abandon any effort to curtail these improper arguments or object to the underlying testimony was not reasonable and cannot be attributed to trial strategy.

Likewise, the trial court correctly recognized that Cromer's decision to call Christian's lawyer to the stand was not reasonable under prevailing professional norms. We agree with the trial court's assessment of this decision: Cromer could not reasonably expect Christian's lawyer to testify that he suborned perjury from his client and should have realized that any discussions between Christian and his lawyer concerning his professional recommendations would likely have been privileged. We also agree with the trial court that it was patently unreasonable for Cromer to call Christian's lawyer without at least investigating what his testimony might be. See

Grant, 470 Mich at 485 (noting that strategic decisions based on less than complete investigations are reasonable only to the extent that the decision to limit the investigation was itself reasonable). Had Cromer interviewed Christian's lawyer he would have realized that he would not offer any testimony useful to the defense and may very well have realized the potential that Christian's lawyer would offer testimony that was harmful to the defense. Thus, we agree with the trial court that Cromer's decision to call Christian's lawyer without taking minimal steps to investigate how he would testify fell below an objective standard of reasonableness under prevailing professional norms.

We do not, however, agree that Cromer's performance was deficient with regard to how he responded to Anderson's report that he heard a juror discussing his criminal record. Under the totality of the circumstances, we conclude that Cromer acted reasonably. The trial court had the authority to grant a new trial even after the jury returned its verdict. See MCR 6.431(A). Therefore, Cromer was not deficient for declining to interrupt the proceedings before the jury was seated and the verdict read. Indeed, after Cromer raised the matter, the trial court was afforded the opportunity to investigate the matter and determine what course of action to take and declined to take any action at that time. We fail to see how the result would have been any different if Cromer had raised the matter a few minutes earlier.[1]

D. Conclusion in Docket No. 290688

Cromer's decision to pursue a self-defense theory without recommending that Anderson testify on his own behalf—and especially in light of the evidence—fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for this error, the outcome would have been different. *Toma*, 462 Mich at 302-303. For that reason, the trial court did not err when it concluded that Anderson did not receive the effective assistance of counsel and ordered a new trial on that basis. Furthermore, even if we were to conclude that Cromer's deficient handling of Anderson's defense did not itself warrant a new trial, we would nevertheless conclude that Anderson was deprived of the effective assistance of counsel on the basis of the cumulative effect of the deficiencies noted above and, for that reason, would still agree with the trial court's decision to order a new trial. *LeBlanc*, 465 Mich at 591.

The trial court did not abuse its discretion when it ordered a new trial for ineffective assistance of counsel.

[1] On appeal, Anderson has not argued that the erroneous submission of his criminal record to the jury independently warrants a new trial. Rather, Anderson has incorporated his discussion of the erroneous submission into his analyses of the claims that he was not provided with the effective assistance of counsel and that the prosecutor engaged in misconduct. Therefore, we shall limit our analysis accordingly. However, we note that this error alone—and without evidence of deliberate misconduct or negligence on the part of either the prosecutor or Anderson's trial counsel—might have warranted a new trial. See *People v Clark*, 220 Mich App 240, 244-247; 559 NW2d 78 (1996).

III. Prosecutorial Misconduct

A. Standard of Review

In Docket No. 284953, Anderson argues that the prosecutor engaged in misconduct and that the misconduct warrants reversal of his convictions. We review claims of prosecutorial misconduct de novo. *Brown*, 279 Mich App at 134. The test for prosecutorial misconduct is whether the misconduct deprived the defendant of a fair and impartial trial. *Id.* However, because Anderson's trial counsel did not object to or request a curative instruction for any of the claimed misconduct, our review is limited to ascertaining whether there was plain error affecting substantial rights. *Id.*

B. The Prosecutor's Evidence and Arguments

On appeal, Anderson contends that the prosecutor committed misconduct by improperly eliciting testimony regarding Anderson's purported failure to turn over to the police the gun he used during the shooting and by arguing improper inferences from the evidence that he did not turn over the gun.[2]

At trial the prosecutor sought to counter Anderson's defense by presenting evidence that Anderson's behavior after the incident was not consistent with someone who acted in self-defense. To that end, the prosecutor sought to elicit testimony that, after Anderson turned himself in, the police inquired about the gun and clothing that Anderson had at the time of the incident, but Anderson did not turn those items over to the police.

During opening remarks, the prosecutor mentioned that Cromer allegedly offered to provide the police with Anderson's gun and clothing and then failed to produce the items. Although it was not improper for the prosecutor to note that the murder weapon was missing, he continued: "we know that [Anderson] had access to the gun because when his attorney arrives at the police station with his client, *he says* as an officer of the court I'll get you the gun . . . . I know you need the gun and I know you need my client's clothing. *That's what his attorney says*. So *they* have the gun but *they* don't turn over the gun. And why don't *they* turn over the gun? Because that's the murder weapon and *they* don't want it examined at a crime lab."

During his case-in-chief, the prosecutor asked Lieutenant Leo Borowsky whether he had made any inquiries about the murder weapon and Borowsky answered that he had asked Cromer about the gun. When the prosecutor asked Borowsky to relate what Cromer had said, Cromer objected on hearsay grounds, "unless they are going to call me as a witness."[3] The prosecutor

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[2] Anderson also argued that the prosecutor engaged in misconduct by either permitting or causing a certified copy of Anderson's criminal record to be submitted to the jury. However, there is no evidence that the prosecutor knew that the record had been submitted to the jury.

[3] Cromer did not otherwise object to the prosecutor's opening remarks, questioning of any witnesses, or closing remarks with regard to this evidence.

responded that because Cromer was Anderson's agent, Cromer's statements to police were "clearly" not hearsay. The trial court agreed with the prosecutor and overruled the objection.

After the trial court's ruling, Borowsky testified that, "Cromer told us, he assured us in fact, that he as an officer of the court would produce that weapon for us. And I remember it because he handed me his business card at the same time . . . ." He further testified that he "was looking forward to getting that evidence," because he could then "exonerate [Cromer's] client or point to the guilty party that we were looking for." But Cromer did not turn over the gun or clothing, although he again promised that he would when asked a second time. Detective David Teolis testified that he was present during Borowsky's conversation with Cromer and largely corroborated Borowsky's version of events. The prosecutor also asked other witnesses about the missing gun and asked whether production of the gun would have been useful in determining what happened on the day in question.

The prosecutor also attempted to raise this issue while questioning Christian's lawyer, by asking him to explain the proper procedure for a defense attorney whose client is charged with murder and who has access to or possession of the gun used in the murder. But, on its own initiative, the trial court prevented the witness from answering. Nevertheless, the prosecutor persisted, arguing that the question was proper: "*Mr. Cromer is forcing himself in the case* by telling the police officer and handing him a business card, I'm an officer of the court, I want to cooperate, I wan[t] to provide the gun. It's an issue now and I want to ask this attorney what he would have done with the gun."

In his closing arguments, the prosecutor argued that the failure to produce the gun was substantive evidence of Anderson's guilt:

> But we don't have the gun. Why not? We know that the gun did not grow wings and fly away. It doesn't happen. Laws of physics tells us that. The gun was carried away from the scene by the shooter, and we know who the shooter is. Why did the shooter not produce the gun when he turned himself in 72 hours later? That is interesting because that is concealment of evidence. It's consciousness of guilt. It's an indication that this person knew what I did was wrong. I'm not going to give up the gun.

The prosecutor also suggested that Anderson's attorney knew that Anderson was guilty and refused to turn over the gun for that reason: "By the way, you have his attorney, you have [Anderson's] attorney when meeting with Lieutenant Leo Borowsky and Detective David Teolis . . . saying— . . . Here is my business card and I am an officer of the court. I'm going to turn the gun in. Great. Good, thank you very much. *You draw whatever inference you want from that conduct. Where is the gun*?" Similarly, after discussing flight as consciousness of guilt, the prosecutor referred to the "refusal of [the] *defense* to turn over the gun," and stated, "I mean *they* probably have *the key piece of evidence* in this case, the murder weapon. And *they* keep it from the police. What does that tell you? That is consciousness of guilt. That is *concealment of evidence*."

C. Analysis

The burden in a criminal case is on the prosecution to prove guilt beyond a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). And a prosecutor may not normally attempt to shift that burden by improperly commenting on the defendant's exercise of his right not to testify or by asserting that the defendant has the burden of production or persuasion on an element of the crime charged. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995). Indeed, a defendant has no burden to produce physical evidence or witnesses at trial. *Id.* at 115. Therefore, Anderson had no obligation to explain the whereabouts of the gun he used during the shooting or to explain what happened to his clothing. Further, although Michigan law permits a prosecutor to submit discovery requests to a defendant, the scope of discovery requests are limited by a defendant's right not to be compelled to testify against himself. See MCR 6.201(C); *Fisher v United States*, 425 US 391, 410-411; 96 S Ct 1569; 48 L Ed 2d 39 (1976) (noting that the act of complying with a subpoena for records has communicative aspects aside from the contents of the records produced, which could be testimonial and incriminating and, therefore, might implicate a defendant's right against self-incrimination). Thus, where a defendant's compliance with a discovery request—that is, his act of producing the requested discovery—amounts to testimony that could be used against him, the defendant cannot be compelled to comply with the discovery request. See *Massachusetts v Hughes*, 380 Mass 583, 592-594; 404 NE2d 1239 (1980) (holding that the defendant could not be compelled to comply with a court order to produce the gun allegedly used in the crime at issue because the act of producing it would amount to incriminating testimonial statements regarding his possession at the critical time in violation of his Fifth Amendment right against self-incrimination); see also *Goldsmith v Superior Ct*, 152 Cal App 3d 76, 85-86; 199 Cal Rptr 366 (1984) (holding that the compelled production of a weapon allegedly used in a crime is a testimonial statement within the meaning of the privilege against self-incrimination).

In this case, there was evidence that a police officer made an informal discovery request for Anderson's gun and clothing after Anderson turned himself in. Normally, Anderson could not have been compelled to comply with the request because the act of producing those items would have amounted to an admission that he was present at the shooting and possessed the gun at issue, and he could not be compelled to make such admissions. *Hughes*, 380 Mass at 592-594. Similarly, under those circumstances, the prosecution could not have raised Anderson's refusal to comply with the request without implicating his right against self-incrimination and improperly shifting the burden of proof to the defense. *Fields*, 450 Mich at 112-113; *Hughes*, 380 Mass at 592-594. However, the facts of this case are different. Once Anderson asserted his theory of self-defense, he effectively admitted that he was at the salon during the shooting, possessed a gun, and shot Christian and Rhynes. Thus, there was no longer any concern that the act of production itself—as opposed to the evidence that could be derived from the items surrendered—would violate Anderson's right against self-incrimination. Because the act of production would no longer violate Anderson's right against self-incrimination, the prosecutor might have been able to present evidence that Anderson failed to produce the items after an informal request and might have been able to make a limited argument concerning the inference to be drawn from the failure to comply with the request. See, e.g., *Fields*, 450 Mich at 105-106 (discussing the inferences that may be drawn from a defendant's failure to produce a witness or evidence that is peculiarly within the defendant's power to produce). However, whatever the extent of the prosecutor's ability to use this evidence under the facts of this case, the prosecutor

could not solicit testimony concerning Anderson's trial counsel's discussions with police officers and the prosecutor regarding defense matters, and could not argue that Anderson or his trial counsel actively concealed or destroyed evidence.

An attorney who may be called upon to testify in a criminal case cannot serve as an advocate in that same case. See *People v Tesen*, 276 Mich App 134, 143; 739 NW2d 689 (2007), citing MRPC 3.7. The purpose of this rule "is to prevent any problems that would arise from a lawyer's having to argue the credibility and the effect of his or her own testimony, to prevent prejudice to the opposing party . . ., and to prevent prejudice to the client if the lawyer is called as an adverse witness . . . ." *Tesen*, 276 Mich App at 143. Although the prosecutor could have solicited testimony that the police requested the gun and clothing and that the items were not turned over after that request without referring specifically to Cromer's statements, the prosecutor elected to directly interject Cromer's statements into the trial. Thus, the prosecutor made Cromer a necessary witness, see *id.* at 144, and forced Cromer to either cease representing Anderson and ask for an adjournment to seek new counsel or continue to represent him and be unable to effectively counter the testimony. For this reason, we conclude that the prosecutor's decision to interject Cromer into the case was itself improper under the circumstances.

Further, the prosecutor was not content to suggest that this evidence was inconsistent with Anderson's theory of self-defense. See *Fields*, 450 Mich at 105-106. In addition to needlessly interjecting Cromer into the matter, the prosecutor repeatedly suggested that Cromer actively helped Anderson conceal the gun from the police and otherwise obstructed the police's investigation. The prosecutor made this argument without any evidence or testimony to suggest that Cromer actually had access to the gun or could otherwise ensure its submission; and it is well settled that a prosecutor may not misstate the facts or argue facts that are not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Likewise, by arguing that Cromer participated in the obstruction of the police officers' investigation, the prosecutor improperly implied that Cromer himself did not believe Anderson was innocent and impermissibly shifted the jury's focus from the evidence to Cromer's character. See *Dalessandro*, 165 Mich App at 580. Finally, by expanding his argument beyond the inference that Anderson's failure to turn the gun in was inconsistent with his claim of self-defense, the prosecutor improperly shifted the burden of proof to Anderson—that is, the prosecutor invited the jury to conclude that Anderson's failure to produce the gun was substantive evidence of his guilt as to the underlying crimes as well as evidence that he did not act in self-defense. See *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999) (stating that a prosecutor may not use a defendant's failure to present evidence as substantive evidence of guilt). This was despite the fact that the prosecutor bore the ultimate burden of proving beyond a reasonable doubt that Anderson did not act in self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). For these reasons, we agree that the prosecutor engaged in repeated misconduct by interjecting Cromer into the evidence against Anderson and by making improper arguments concerning the inferences to be drawn from Anderson's failure to produce the gun after he turned himself in to the police.

D. Conclusion in Docket No. 284953

Although we agree with Anderson's contention that the prosecutor engaged in misconduct, we nevertheless decline to consider whether this misconduct affected Anderson's substantial rights. As noted above under docket no. 290688, we concluded that the trial court did

not abuse its discretion when it ordered a new trial. For that reason, even if we were to conclude that the prosecutor's misconduct was harmless, we could not affirm Anderson's convictions. Likewise, if we were to conclude that the misconduct was not harmless, any relief that we might grant would merely be cumulative. Therefore, although we admonish the prosecutor to refrain from repeating this misconduct on retrial, we conclude that the appeal in docket no. 284953 should be dismissed as moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

We affirm in docket no. 290688. We dismiss as moot the appeal in docket no. 284953.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly