

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENO MCFADDEN,

Defendant-Appellant.

UNPUBLISHED

May 7, 1996

No. 173916

LC No. 93-007649

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

A jury convicted defendant of one count of second-degree murder, MCL 750.317; MSA 28.549, and one count of felony firearm, MCL 750.227b; MSA 28.424(2). Defendant received a sentence of fifteen to twenty-five years of imprisonment for the second-degree murder conviction and two years of imprisonment for his felony firearm conviction. Defendant appeals as of right. We affirm.

The deceased, Ronald Hoyette, was at a party with several other people on the night of June 24, 1993. Hoyette was sitting on the porch, in an intoxicated state, when a car arrived at the house next door. Hoyette went over to the car and began to argue with its occupants. Another man at the party, Joe Thomas, tried to pull Hoyette away from the car. Thomas informed Hoyette that defendant, an occupant in the car, had a gun. Although witnesses dispute the course of events during the argument, there is no dispute that defendant got out of the car, placed the gun inches from Hoyette's head, and shot him. At trial, defendant admitted to killing Hoyette. Defendant maintained that he only shot Hoyette in self-defense. Defendant claimed that Hoyette said that he had a gun and defendant thought that Hoyette was about to pull a gun out of his pants when defendant shot him.

First, defendant argues that the trial court erred when it refused to grant his motion for a directed verdict. Defendant claims that there was insufficient evidence of malice to sustain his conviction. When reviewing a denial of a motion for a directed verdict, this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to permit a

rational factfinder to find the essential elements of the crime proven beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). Second-degree murder is the unjustified and unexcused killing of a human being with malice. The prosecution must establish that defendant created and disregarded a very high risk of death at the time of his assaultive activities. *People v Bailey*, 207 Mich App 8, 9; 523 NW2d 798 (1994).

Defendant admits that he shot Hoyette at point-blank range in the head. Although defendant claims that he acted in self-defense, no witnesses testified that Hoyette possessed a gun. Some of the defense witnesses testified that they heard Hoyette say he had a gun. Defendant claimed that Hoyette stated that he had a gun and was reaching behind his back when defendant shot him. However, several other witnesses testified that Hoyette never reached behind his back and that he never said he had a gun. Weighing the credibility of the witnesses is the role of the factfinder. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Viewing the evidence in the light most favorable to the prosecution, the trial court properly denied defendant's motion for a directed verdict.

Next, defendant claims that he was denied effective assistance of counsel. To establish that the right to effective assistance of counsel was so undermined to justify reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was deprived of a fair trial. *People v Northrop*, 213 Mich App 494, 497; ___ NW2d ___ (1995).

Defendant maintains that defense counsel failed to properly prepare a defense witness when the prosecution elicited testimony damaging to defendant from this defense witness. The witness only testified that defendant moved toward Hoyette, pointed his gun at Hoyette's head, and shot him. Because several other witnesses provided similar testimony, this cumulative evidence did not prejudice defendant. Defendant also alleges that defense counsel was ineffective for failing to call a court reporter as a witness to impeach the testimony of a prosecution witness. Defense counsel properly impeached this witness by reading the transcript of the preliminary examination after this witness gave contradictory testimony at trial. Defense counsel was not ineffective.

Third, defendant argues that prosecutorial misconduct occurred when the prosecutor misinformed the jury about "adequate provocation." Because defendant failed to object to the prosecutor's comments to the jury during trial, this issue is not preserved for review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Even if defendant had preserved this issue for review, the prosecutor's statements to the jury did not constitute misconduct.

Fourth, defendant claims that the trial court erred when it failed to hold a due diligence hearing on a missing res gestae witness. Because defendant did not properly preserve this issue by moving for a new trial due to the prosecution's failure to call all endorsed witnesses, this issue is not preserved for review. *People v Simpson*, 207 Mich App 560, 561-562; 526 NW2d 33 (1994). Even if defendant had properly preserved this issue for review, defense counsel agreed to waive a due diligence hearing in exchange for an adverse inference jury instruction. Defendant may not claim error on appeal regarding

an act that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Finally, defendant argues that the sentence imposed by the trial court was disproportionate to the offense and the offender pursuant to *People v Milbourn*, 435 Mich 630461 NW2d 1 (1990). Defendant received a sentence within the recommended range of the sentencing guidelines. Sentences within the guidelines are presumptively proportionate. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). We do not find that any of the evidence presented by defendant overcomes this presumption of proportionality. Defendant's sentence was proportionate to the offense and the offender.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gribbs