

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE SAMUEL FORD,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 174003
LC No. 93-66595-FC

Before: Corrigan, P.J. and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant subsequently pleaded guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to a fifteen to thirty year term of imprisonment. We affirm.

I

Defendant first argues that the court erred by admitting into evidence a gun that was unconnected to the crime. The trial court admitted the gun through the testimony of a police officer who recovered it from defendant's residence pursuant to a search warrant. Later, a ballistics expert testified that the gun had not discharged the ammunition casings recovered at the crime scene. While the bullet retrieved from the victim's body was consistent with having been discharged from the gun, the expert could not state positively that it had, in fact, been discharged from the gun.

Evidence of a defendant's possession of a weapon similar to that used in the charged offense is relevant. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989) (Boyle, J.); *People v Howard*, 391 Mich 597, 604-605; 218 NW2d 20 (1974). A weapon need not be tied ballistically to the crime to be admitted. *People v Prast (On Rehearing)*, 114 Mich App 469, 490-491; 319 NW2d 627 (1982). A court does not abuse its discretion in admitting a weapon that is similar to the one used

* Circuit judge, sitting on the Court of Appeals by assignment.

in the crime and that might have been the one used. *People v Kramer*, 103 Mich App 747, 758-759; 303 NW2d 880 (1981).

We also observe that this is not a case where the introduction of the weapon, bearing the defendant's fingerprints, is critical to place the defendant at the scene of the crime and to demonstrate his involvement. Rather, defendant admitted that he was present at the crime scene, that he had an automatic gun, that he pointed that gun at the victim and that the gun discharged twice while he held it. The evidence against defendant was overwhelming. *People v Burnett*, 166 Mich App 741, 752; 421 NW2d 278 (1988). Unlike the case relied on by defendant, *People v Philip Drake*, 142 Mich App 357, 359-360; 370 NW2d 355 (1985), here the admitted gun might have been the murder weapon.

II

Defendant's next allegation of error pertains to the trial court's failure to instruct the jury on qualified self-defense. Qualified self-defense, also known as "imperfect self-defense," has been applied in other jurisdictions to mitigate an act of second-degree murder, reducing it to manslaughter, "where a defense of self-defense fails because the defendant was the aggressor, or maintained an unreasonable belief of danger, or reacted with an unreasonable amount of force." *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

In *Deason*, we noted that Michigan courts have applied qualified self-defense only where a defendant would have had the right to self-defense but for his actions as the initial aggressor. *Id.* at 32. On appeal, defendant asks this Court to employ the doctrine to his circumstances, where he allegedly acted with the unreasonable belief that he was in imminent danger of death or serious bodily injury or acted with an unreasonable amount of force. We again decline to extend the doctrine because "[a]pplication of the defense to these facts would be a significant extension of prior case law and is more appropriately a matter for legislation, court rule, or appeal to the Supreme Court." *Id.*

III

Defendant next submits that the prosecutor committed misconduct in his closing argument. We reject this claim. The prosecutor did not vouch for the credibility of his witnesses. See, e.g., *People v Enos*, 168 Mich App 490, 492-495; 425 NW2d 104 (1988). Instead, the prosecutor merely argued how the evidence and reasonable inferences from the evidence related to his theory of the case. This was proper under *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Further, the prosecutor did not inject issues broader than defendant's guilt or innocence. In fact, the prosecutor's comments that defendant recites plainly show that the prosecutor was attempting to prompt the jury to focus on the relevant facts and to disregard certain events that transpired after the shooting.

IV

Turning next to defendant's assertion that he was denied effective assistance of counsel, we disagree. We review a claim of ineffective assistance of counsel de novo, limiting our review to the facts contained in the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). This

Court presumes that counsel was effective, and a defendant bears the heavy burden of demonstrating otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To prevail, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. A defendant must also show a reasonable probability that, but for counsel's deficient performance, the result would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *Id.*; *People v Poole*, 218 Mich App ___; ___ NW2d ___ (Docket Nos. 169867, 169987, issued September 17, 1996).

Defendant premises his ineffective assistance of counsel argument on his counsel's failure to object to the three previous claims of error. A claim of ineffective assistance of counsel cannot succeed on alleged errors which are, in fact, not errors. Counsel is not deficient for failing to assert meritless arguments. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Because no errors occurred, defendant was not denied effective assistance of counsel.

V

Finally, defendant claims that his sentence is disproportionate. This Court reviews sentences for abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it imposes a sentence that is not proportional to the severity of the crime and to the defendant's record. *Id.*

Because the court sentenced defendant as an habitual offender, the sentencing guidelines do not apply. *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995) (Riley, J.), and *Cervantes*, 448 Mich at 630 (Cavanagh, J). Appellate review of habitual offender sentences utilizing the sentencing guidelines is inappropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Moreover, the sentence still must be proportional. *Milbourn, supra* at 635-636.

Specifically, defendant contends that his sentence is disproportionate in view of the mitigating circumstances. The record reflects that the court considered all the mitigating circumstances, including defendant's rehabilitation potential, defendant's age of twenty-two, defendant's troubled childhood, and his high school education. Despite these factors, the court imposed a fifteen to thirty year term of imprisonment. This sentence is proportional considering defendant's second felony offender status and his eight prior misdemeanor convictions. Moreover, the justice system previously has dealt with defendant lightly. Nevertheless, defendant has persisted in a course of criminal behavior of escalating severity, which culminated in the victim's death. Defendant committed the instant offense within two months of his release from jail on an earlier conviction. Given his prior record, defendant should have been trying to avoid trouble, but the facts indicate instead that he was looking for it. We also gravely regard the fact that defendant shot the victim in the back. Defendant's sentence is not disproportional.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

