

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM C. DUNCAN,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 188867

LC No. 95-007868-FH

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321; MSA 28.553, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to three to fifteen years' imprisonment for voluntary manslaughter, to be served consecutively to the mandatory two years' imprisonment for felony-firearm. He appeals as of right. We affirm.

I

Defendant first argues that there was insufficient evidence to convict him of voluntary manslaughter. Specifically, defendant contends that the evidence was insufficient to convince a reasonable trier of fact that he had the requisite intent to kill and that he did not act in self-defense. We disagree.

In reviewing the sufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements of the crime were proven beyond a reasonable doubt, and must not interfere with the jury's task of weighing the evidence or making determinations as to witnesses' credibility. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

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

Defendant argues that the jury could only reasonably have found an intent associated with involuntary, rather than voluntary, manslaughter. Although voluntary and involuntary manslaughter require different intent elements, *People v Richardson*, 409 Mich 126, 135-138; 293 NW2d 332 (1980), the record provides sufficient evidence to sustain a conviction of either crime.

Defendant's trial testimony differed from the earlier versions of the shooting he gave to the investigating officers. Because defendant was the only witness to the victim's death, the verdict in this case rested primarily on which of defendant's statements the jury believed to be more credible. It is not proper for this Court to interfere with the jury's duty of weighing the evidence or determining witnesses' credibility, and, when viewed in the light most favorable to the prosecution, there is sufficient evidence in this case to support the jury's finding that the elements of voluntary manslaughter were proven beyond a reasonable doubt.

Defendant also asserts the theory of self-defense. We conclude, after a careful review of the record, that there is sufficient evidence to justify the jury's rejection of defendant's claim of self-defense.

II

Next, defendant contends that the evidence was insufficient to prove that he possessed the firearm used in the homicide, a necessary element of the felony-firearm conviction. We disagree.

Defendant argues that he did not possess the gun until the struggle with the victim, and therefore asserts the defense of innocent possession. This Court has held that this defense applies in the limited circumstances where there is a "momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor," and that the defense is only valid where "the possessor had the intention of delivering the weapon to the police at the earliest possible time." *People v Coffey*, 153 Mich App 311, 315; 395 NW2d 250 (1986). The evidence in this case does not support the innocent possession defense. Accordingly, we affirm defendant's felony-firearm conviction.

III

Finally, defendant argues that he should be resentenced for his voluntary manslaughter conviction because the sentence imposed violates the principle of proportionality. Again, we disagree.

The trial court has broad discretion to tailor each sentence to the circumstances of the case and the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). Our review is limited to whether the sentencing court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). There is an abuse of discretion when the sentence violates the principle of proportionality: a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant received a mandatory two-year sentence for the felony-firearm conviction and three to fifteen years for the voluntary manslaughter conviction. Defendant has offered nothing to overcome the presumption that his three-year minimum sentence, well within the guidelines minimum sentence

range for defendant's voluntary manslaughter conviction, is neither excessively severe nor unfairly disparate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant also argues that the mandatory two-year sentence for the felony-firearm conviction should be considered in determining whether his overall sentence is proportionate to the circumstances. The general rule in Michigan is that as long as each sentence is proportionate, the cumulative nature of consecutive sentences does not affect this Court's proportionality analysis. *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991). However, defendant cites *People v Davis*, 196 Mich App 597; 493 NW2d 467 (1992), which was distinguished from *Warner*. In *Davis*, this Court held that it was not improper for the trial court to consider the effect of the mandatory two-year felony-firearm sentence when determining the proper proportional sentence for the underlying felony. *Id.* at 601. However, *Davis* is distinguishable from the present case in that defendant has been convicted of a more serious crime; moreover, defendant's aggregate sentence is within the guidelines range for voluntary manslaughter and the sentencing judge in the present case addressed appropriate considerations in determining defendant's sentence.

Because we conclude that defendant's sentence is proportionate to the seriousness of the crime and the surrounding circumstances, the sentence does not violate the principle of proportionality.

Affirmed.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Mary A. Chrzanowski