STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARICE BURTON, JR.,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 189320

Recorder's Court
LC No. 94-002579 FC

Before: Corrigan, P.J., and J.B. Sullivan* and T.G. Hicks,** J.J.

PER CURIAM.

Following a jury trial in Detroit Recorder's Court, defendant was convicted of second degree murder, MCL 750.317; MSA 28.549, two counts of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to twenty-five years imprisonment for murder, two to four years imprisonment for each count of felonious assault and two consecutive years imprisonment for felony firearm. He filed this appeal as of right, and we affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant did not act in self-defense. We disagree. A claim of lawful self-defense is established by showing that the defendant had a reasonable and honest belief that he was in danger of being killed or seriously injured and that the action taken was immediately necessary to avoid the danger posed. *See People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985); CJI2d 7.15. Additionally, the defendant must also show that he used only the amount of force necessary to defend himself. *Deason, supra*, at 31.

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* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.
** Circuit judge, sitting on the Court of Appeals by assignment.

The evidence presented at trial was sufficient to establish that defendant did not have a reasonable fear of imminent harm and that he acted with unreasonable force. On February 11, 1994, DeShawn Taylor and his brother, McKinley Taylor, were walking their five-year-old sister, Christina Finley, home from school. While waiting to cross Middlebelt, defendant approached them, walking slowly with his hands in his pocket. DeShawn Taylor, who was carrying his sister on his shoulders, put the girl down. He then removed his hat and put it in his pocket. Defendant told DeShawn that he heard that DeShawn had slashed his brother's tires. Defendant then pulled a gun out of his pocket and shot DeShawn Taylor in the chest. Defendant also fired a second shot at McKinley Taylor and Christina Finley. At the time defendant shot DeShawn Taylor, DeShawn had his hands at his sides. Moreover, the testimony of McKinley Taylor and Christina Finley indicated that at the time defendant shot DeShawn Taylor, DeShawn did not have a gun, he had not said anything to defendant, and other than taking off his hat, had made no threatening gestures toward defendant.[1] Viewing the evidence in a light most favorable to the prosecutor, we find that there sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt that defendant did not act in lawful self-defense. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Next, defendant argues that the trial court erred in excluding Officer Tubbs' testimony regarding decedent's prior criminal record. At trial, defendant claimed that he shot decedent in self-defense. In an effort to support this defense, defendant attempted to elicit testimony from Officer Tubbs regarding decedent's criminal history in order to establish decedent's reputation for violence. However, before the trial court could make any ruling on the prosecutor's objection to this evidence, defense counsel voluntarily withdrew the question. Because the question was withdrawn and trial court made no finding or ruling on this issue, the issue is not preserved for appeal; therefore, appellate consideration of this issue is inappropriate. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

Defendant also argues that he was denied a fair trial because the trial court failed to instruct the jury regarding imperfect self-defense. We disagree. Imperfect self-defense is a qualified defense which can mitigate second-degree murder to voluntary manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992); *see also People v Kemp,* 202 Mich App 318, 323; 508 NW2d 184 (1993); *Deason, supra,* at 31. Although the Michigan Supreme Court has not yet addressed the viability of the imperfect self-defense doctrine, this Court has applied the doctrine only where the defendant would have had a right to self-defense but for his actions as the initial aggressor. *See Kemp, supra,* at 323; *Butler, supra,* at 67; *People v Wytcherly*, 172 Mich App 213; 431 NW2d 463 (1988); *Deason, supra,* at 31. This Court has expressly declined to extend the doctrine of imperfect self-defense to situations, such as the one currently before this Court, where the defendant maintained an unreasonable belief or acted with an unreasonable amount of force. *Deason, supra,* at 32. Thus, even if recognized, the doctrine of imperfect self-defense does not apply to the circumstances of this case.

Lastly, defendant argues that the sentence imposed by the trial court was disproportionate in light of the fact that he had no prior criminal history, had a history of employment, and was provoked by decedent. We disagree. Defendant's sentence of ten to twenty-five years fell within the sentencing guidelines range and is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408

NW2d 789 (1987). Defendant's history of employment, his lack of a criminal record, and his minimum culpability are not unusual circumstances which can overcome the presumption of proportionality for a sentence within the sentencing guidelines range. *People v Daniels*, 207 Mich App 47, 54; 523 NW2d 830 (1995). Therefore, we find that trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan
/s/ Timothy G. Hicks

[1] Although there was conflicting evidence at trial, conflicting witness testimony essentially creates a credibility contest. Questions of credibility are left to the trier of fact and will not be reviewed anew by this Court on appeal. *People v Valesquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). In light of defendant's conviction in this case, it is clear that the jury did not find the testimony of the defense witnesses to be credible.