

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO DEANGELO WILSON,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 191851

Wayne Circuit Court

LC No. 95-002068

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to life imprisonment. We affirm.

Defendant argues that there was insufficient evidence to convict him of second-degree murder. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). To establish second-degree murder, the prosecution must show that defendant caused the death of another and that the killing was done with malice and without legal justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is defined as the intent to kill, intent to do great bodily harm, or intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be a probable result. *Kemp, supra*. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Malice can be inferred from the acts of a defendant where the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Mackey*, 168 Mich App 154, 157; 423 NW2d 604 (1988).

At trial, the evidence established that the victim died from an impact to the head which resulted in severe brain injuries. Moreover, a witness testified that defendant and codefendant, Joseph Thomas Lewis, told her that one of the defendants choked the victim and the other kicked the victim in the head.

Since the natural tendency of choking or kicking someone in the head is to cause great bodily harm, there was sufficient evidence from which a rational juror could infer that defendant acted with malice. Therefore, there was sufficient evidence to support defendant's conviction for second degree murder.

Defendant next argues that the trial court abused its discretion in denying his motion for new trial on the ground that the verdict was against the great weight of the evidence. We disagree. We review the trial court's denial of the motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In reviewing a motion for a new trial, a trial court may give due consideration regarding whether the prosecution witnesses were credible. *Id.* This Court gives deference to the trial court's superior ability to judge the weight and credibility of the testimony. *People v Eggleston*, 149 Mich App 665, 671; 386 NW2d 637 (1986).

Defendant contends that the trial judge failed to pass on the credibility of the prosecution's key witness, and improperly concluded that the jury was entitled to believe her testimony. As stated above, the injuries to victim, including defendant's and his codefendant's statements admitting to kicking and choking the victim, indicate the jury's verdict was consistent with the evidence presented. The record also indicates that before falling unconscious, the victim told the police that five black males slammed his head against the door. As such, the trial court properly gave due consideration to the question of whether the witness was credible and ruled that the trier of fact could find the witness believable. *Herbert, supra.*¹ Accordingly, after reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that he was denied his right of confrontation because hearsay was admitted regarding a supposed dispute between him and the deceased. Defendant did not object to the admission of this statement, and hence has waived appellate review absent manifest injustice. MRE 103(a)(1); *People v Yarger*, 193 Mich App 532, 536; 485 NW2d 119 (1992). We conclude that no injustice resulted from the admission of the statement, as the only testimony regarding an argument with the victim concerned codefendant and not defendant.

Defendant next argues that the judge's instructions violated his right to be presumed innocent. The trial judge instructed the jury as to the order in which the jury would deliberate regarding first-degree murder and its lesser included offenses. By failing to object to the challenged instruction, defendant has waived appellate review absent manifest injustice. *People v Marji*, 180 Mich App 525, 534; 447 NW2d 835 (1989). We conclude that no injustice resulted. A jury must be instructed to consider the principal offense first, before considering the lesser included offenses. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Such an order of deliberation does not violate a defendant's right to be presumed innocent, but rather merely suggests an order of consideration. *People v Cavanaugh*, 127 Mich App 632, 643; 339 NW2d 509 (1983).²

Defendant also argues that his life sentence violated the principle of proportionality. We disagree. Defendant's sentence was within the sentencing guidelines range, and is therefore presumed to be neither excessively severe nor unfairly disparate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Defendant has not presented any unusual circumstances which persuade this Court

to believe that his sentence was not proportionate to the offender and offense. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992); *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Lastly, acting in pro per, defendant argues that he was denied the right to effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant primarily argues that his trial counsel, having been substituted only two weeks before trial, failed to request a continuance, did not properly prepare for trial, improperly agreed to a joint trial with codefendant, and allowed damaging evidence to be introduced against him. After reviewing defendant's allegations of error, we conclude that defendant was not deprived of the effective assistance of counsel. Our review of the record indicates that defense counsel appeared prepared and fastidiously represented defendant. She aggressively cross-examined the prosecution's key witness, and also moved for a directed verdict.

Finally, we reject defendant's argument that his counsel was ineffective because his codefendant's statement to the police severely prejudiced him at sentencing. As defendant admits, this statement was not presented to the jury. Further, defense counsel could not have precluded the trial court's consideration of the statement at sentencing because a codefendant's inculpatory statement, although inadmissible at trial, can be considered by the sentencing judge. *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.

¹ Defendant's argument that the trial court improperly relied on codefendant's admission in denying defendant's motion for new trial is without merit. The trial judge explained in her written denial of defendant's motion for a new trial that the circumstantial evidence *along with* admissions made by defendants supported the jury verdict.

² We also note that the trial court instructed the jury on the presumption of innocence.