

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J B BLACK,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 194108

Recorder's Court

LC No. 95-008599

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and felony firearm-second, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, second-offense, MCL 769.10; MSA 28.1082, to consecutive terms of thirty to sixty years, and five years. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying defendant's motion for directed verdict on the basis of insufficient evidence. We disagree. When ruling on a motion for a directed verdict, the court must consider the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant argues that, at the most, the prosecution's case established that the homicide was either committed in self-defense or was sufficiently provoked by the victim to constitute voluntary manslaughter. In order to prove the intent necessary to support a conviction of second-degree murder, the prosecutor must establish that the defendant possessed the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993). In Michigan, a killing in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is an immediate threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Defendant's belief must be measured by the circumstances as they appeared to the defendant rather than as they actually existed;

however, those circumstances must result in a

reasonable belief that the defendant is in danger of death or serious bodily harm. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982); *People v Garfield*, 166 Mich App 66, 79-80; 420 NW2d 124 (1988)..

When viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find defendant guilty of second-degree murder. Eyewitnesses testified that defendant had been the aggressor during the altercation and that defendant had indicated to the victim that he was not afraid of the victim. No witness, except defendant, heard the victim threaten defendant with any physical harm. Evidence was presented that the victim asked defendant to leave him alone and to quit bothering him. A witness heard defendant indicate that he knew the victim did not have a weapon. Defendant pulled his shotgun out of his trunk, aimed it at the victim's head, and pulled the trigger. Eyewitness and police testimony established that no weapon was seen on the victim at any time, and no weapon was found on the victim, at the crime scene or during an inventory search of the victim's vehicle.

Defendant was the only person who testified that the victim was the aggressor and that defendant had pleaded with the victim for his life. Whether defendant had an honest and reasonable belief that his life was in imminent danger came down to a question of credibility. When confronted with a conflict in the testimony, it is the trier of fact's duty to determine credibility of the witnesses and arrive at a decision of whom to believe. *People v Carigon*, 128 Mich App 802, 810; 341 NW2d 803 (1983). Here, the trial judge who had an opportunity to observe the demeanor of the witnesses, resolved the testimonial conflicts in favor of the prosecution. Viewed in a light most favorable to the prosecution, a rational trier of fact could have found that this evidence disproved defendant's self-defense claim beyond a reasonable doubt.

We also reject defendant's contention that there was sufficient mitigating evidence in this case to reduce defendant's conviction to manslaughter. The trial evidence established that defendant and the victim had an argument prior to the shooting and that defendant was angry with the victim. Defendant appeared to be the aggressor during the entire incident according to eyewitness testimony. Viewed most favorably to the prosecution, a rational trier of fact could find that the shooting was not an act done out of passion induced by adequate and reasonable provocation but rather was a homicide sufficient to support a conviction of second-degree murder.

Defendant's also argues that his sentence was excessive and disproportionate. Review of habitual offender sentences is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996). This principle is violated when the sentence is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn*, *supra* at 635-636. While the proportionality of an habitual offender's sentence is reviewed under the abuse of discretion standard, the sentencing guidelines do not apply to habitual offenders and as a result, have no bearing as to whether an abuse of discretion has occurred. *People v Gatewood*, 450 Mich 1025 (1996); *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996).

In light of the circumstances surrounding the offense and the offender, we find defendant's sentence is proportionate and, thus, the trial judge did not abuse her discretion in sentencing defendant. Defendant was convicted of second-degree murder for shooting an unarmed man with a shotgun in the face from two feet away. No credible evidence was introduced at trial to support mitigating circumstances or justification for the shooting. On the contrary, according to eyewitness testimony, defendant appeared to be the aggressor during the entire incident. Defendant committed this murder while he was on parole for the second-degree murder of his brother. We find defendant's sentence proportionate to the offender and the offense.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gibbs