

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME D. HAIRSTON,

Defendant-Appellant.

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UNPUBLISHED

December 19, 1997

No. 196378

Recorder's Court

LC No. 95-011429

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer\*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of seventeen to thirty years for the second-degree murder conviction and six to twenty years for the assault with intent to commit murder conviction, to be served consecutively to a two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court should have considered whether defendant was guilty of voluntary manslaughter on the basis of either adequate provocation or the doctrine of imperfect self-defense, and that defense counsel was ineffective because his requests that the trial court consider options other than second-degree murder were inadequate. We do not find either claim persuasive.

A trial court sitting without a jury must, in making its findings, address those theories argued by the defendant and which are supported by the facts. *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988). The defense theory in this case was self-defense, and defense counsel requested that the trial court also consider convicting defendant of manslaughter. However, defendant never raised the doctrine of imperfect self-defense and, moreover, the evidence did not support it. As defendant concedes, in Michigan, the doctrine of imperfect self-defense only applies where the defendant would have had a right to self-defense but for his actions as the initial aggressor. See *People v*

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

*Deason*, 148 Mich App 27, 32; 348 NW2d 72 (1985). It was defendant's position at trial, however, that he was *not* the initial aggressor.

In convicting defendant of second-degree murder, the trial court found that "the killing was not justified, excused or done under circumstances that reduce it to a lesser crime." This finding indicates that the court was aware of the relevant issues and correctly applied the law in making its findings. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). Therefore, the trial court's findings were sufficient under MCR 2.517(A). *Id.*

We also reject defendant's connected assertion that he was denied the effective assistance of counsel because counsel did not adequately request the trial court to consider either manslaughter based on provocation or the doctrine of imperfect self-defense. In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The defendant must also show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Since defendant failed to preserve this issue for appeal by moving for a new trial or an evidentiary hearing before the trial court, our review is limited to the record before us. *Barclay, supra* at 672.

In the case at bar, defense counsel informed the trial court at the beginning of trial that the defense theory was that defendant "acted in self-defense and the defense of others, and that he acted reasonably given the situation he saw." During trial, counsel elicited testimony consistent with that theory, and he requested during closing argument that the trial court consider self-defense and the lesser offense of manslaughter in making its findings. Finally, while defendant contends that counsel should also have requested the trial court to consider the doctrine of imperfect self-defense, as stated previously, it would have been inconsistent with defense claims that defendant was not the initial aggressor. See *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987). On this record, defendant has failed to establish that he did not receive the effective assistance of counsel.

Defendant next argues that the trial court erred in accepting defendant's waiver of his right to a jury trial because the waiver was not intelligently and understandingly made. We disagree. We review the trial court's finding that defendant's waiver was made knowingly and voluntarily for clear error. *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

Before accepting a defendant's waiver of his right to a jury trial, the trial court must advise the defendant in open court of his constitutional right to trial by jury. *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993); MCR 6.402(B). The court must also ascertain that the defendant understands his right to a jury trial and that he voluntarily chooses to give up that right. *Shields, supra*. We conclude, on review of the record made at defendant's waiver hearing, that the trial court properly ascertained that defendant understood his right to have a jury trial and that he voluntarily waived that right. See *id.* at 560-561.

Defendant's last claim on appeal is that his seventeen- to thirty-year prison sentence for the second-degree murder conviction is disproportionate. We review the trial court's sentencing decision for an abuse of discretion. *People v Oldendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because defendant's seventeen-year minimum sentence for the conviction of second-degree murder is within the sentencing guidelines range of 120 to 300 months, it is presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant has presented no unusual circumstances which would overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Consequently, the trial court did not abuse its discretion in sentencing defendant.<sup>1</sup>

Affirmed.

/s/ Donald E. Holbrook

/s/ Robert P. Young, Jr.

/s/ James M. Batzer

<sup>1</sup> To the extent defendant also argues that the total effect of his consecutive sentences (seventeen to thirty years for the second-degree murder conviction plus two years for the felony-firearm conviction) is disproportionate, we reject such a claim. "[W]e evaluate the proportionality of the individual sentences in the abstract and not the cumulative effect of the sentences." *Kennebrew, supra*.