

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LAMAR JONES,

Defendant-Appellant.

UNPUBLISHED

January 9, 1998

No. 193406

Recorder's Court

LC No. 95-001446

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I

Defendant argues that his convictions are not supported by sufficient evidence. When reviewing a claim that there is insufficient evidence to support a conviction, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v McCoy*, 223 Mich App 500, 501; 566 NW2d 667 (1997). The elements of second-degree murder are (1) the killing of a human being (2) with the intent to kill, or to do great bodily harm, or with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Johnson (On Remand)*, 208 Mich App 137, 140; 526 NW2d 617 (1994).

Here, the medical examiner testified that Moore died as a result of a single gunshot wound to the head. One witness testified that she saw defendant with a gun in his hand after the victim was shot. Another witness saw defendant approach the victim and saw defendant raise his arm in the victim's face. Viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of second-degree murder had been proven beyond a reasonable doubt.

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). As stated above, defendant's felony conviction for second-degree murder was supported by sufficient evidence. A witness testified that she saw defendant with a gun immediately after the victim was shot. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of felony-firearm had been established beyond a reasonable doubt.

II

Defendant next argues that the jury's verdict was against the great weight of the evidence and that the trial court abused its discretion when it denied his motion for a new trial on this basis. We disagree. This Court reviews the trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

When the trial court ruled on the motion, it stated that it weighed the credibility of the witnesses who testified at trial. A trial court is permitted to weigh witness credibility because it is acting as a thirteenth juror when it decides this motion. *Id.* at 476. When the trial court denied the motion, it stated that it weighed the credibility of the witness and determined that the verdicts were not against the great weight of the evidence. Upon review of entire record, we reach the same conclusion. Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis that the verdict was not against the great weight of the evidence.

III

Defendant also argues that he was denied the effective assistance of counsel at trial. We disagree. To establish a denial of effective assistance of counsel, the defendant must prove that counsel made errors that are so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that this deficient performance prejudiced the defendant's trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997) (citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). There is a strong presumption that defense counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 156. The defendant must overcome the presumptions that defense counsel's conduct was sound trial strategy. *Id.*

Defendant has presented a laundry list of allegations of counsel's deficient performance. They include ineffective cross-examination of prosecution witnesses, failure to present evidence, failure to object to jury instructions, and failure to investigate the facts of his case. However, defendant has failed to overcome the presumption that trial counsel's actions were trial strategy. *LaVearn, supra*, 448 Mich 216. Defendant claims that counsel failed to point out inconsistencies and failed to request a modified jury instruction on self-defense. However, after a careful review of the record, we note that trial counsel did exactly what defendant argues that counsel did not do. Therefore, there is no error. Regarding defendant's questioning of the medical examiner, there is no evidence in the record to suggest that counsel failed to ask about the victim's medical treatment for any other reason than trial strategy. *Id.* Therefore, defendant was not denied the effective assistance of counsel.

IV

Defendant claims that he was denied his Sixth Amendment right to counsel at sentencing. Because the trial court record is insufficient to make a reasoned and informed review of this sentencing issue as it relates to defendant's right to counsel, we remand with instructions to the trial court to make a full record as to why defendant's second counsel, Daryl Carson, was removed, and how defendant's third counsel, Susan Reed, protected defendant's rights at sentencing.

Defendant's convictions are affirmed and the case is remanded with instructions. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Henry William Saad

/s/ Michael R. Smolenski