

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN DANDRE ELLIOTT,

Defendant-Appellant.

UNPUBLISHED

June 4, 2013

No. 305215

Wayne Circuit Court

LC No. 11-001611-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LETEZ WILLIAM THREATT,

Defendant-Appellant.

No. 305350

Wayne Circuit Court

LC No. 11-001611-FC

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals,¹ codefendants, Deshawn Dandre Elliott and Letez William Threatt, appeal their jury trial convictions. A jury found Elliott guilty of second-degree murder, MCL 750.317, assault with intent to do great bodily harm, MCL 750.84, discharge of a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Threatt was convicted of assault with intent to do great bodily harm, MCL 750.84, discharge of a firearm at a dwelling, MCL 750.234b, and felony-firearm, MCL 750.227b. The trial court sentenced Elliott to 20 to 40 years in prison for the second-degree murder conviction, 29 months to 10 years for the assault with intent to do great bodily harm conviction, five months to four years for the discharge of a firearm at a dwelling conviction, and two years for the felony-firearm conviction. The trial court sentenced Threatt to

¹ *People v Elliott*, unpublished order of the Court of Appeals, entered August 3, 2011 (Docket Nos. 305215 & 305350).

23 months to 10 years in prison for the assault with intent to do great bodily harm conviction, two months to four years for the discharge of a firearm at a dwelling conviction, and two years for the felony-firearm conviction. For the reasons set forth below, we affirm.

DOCKET NO. 305215

Elliott argues that the prosecution presented insufficient evidence to support his conviction in light of his claim of self-defense. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, to determine whether a rational trier-of-fact could have found that the prosecutor proved the essential elements of the crime beyond a reasonable doubt. *Id.* at 196.

Elliott specifically claims that Anthony Simpson was the initial aggressor because evidence showed that Simpson retrieved an assault rifle and took it to an ongoing fight between rival groups of residents and visitors at the Freedom Place apartment complex in Detroit. Elliott points to evidence that Simpson fired toward the crowd through an open door and claims that he returned fire in order to defend himself and others. However, this argument essentially asks this Court to reweigh evidence and witness credibility, something this Court will not do. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 440 Mich 508 (1992).

Although some evidence arguably supports Elliott's theory of the case, ample evidence also supports the prosecution's theory and the jury's verdict. Simpson testified that someone fired at him first and that he reflexively pulled the trigger when he was hit by a bullet. This was supported by the testimony of Stanley Larry, Mary Robinson, Officer Amy Metalic, and Officer Edward Lawson, all of whom said that they heard handgun shots first. Evidence also established that Brandon Halthon died from a gunshot wound to the head, and that the round came from Elliott's handgun. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In light of evidence that Elliott and others brandished firearms during the fight and that someone fired at Simpson before he returned fire, a rational jury could find that Elliott was the initial aggressor and his actions that night were not reasonable. The evidence was sufficient for the jury to find that Elliott did not have an honest and reasonable belief that he was in imminent danger or that it was necessary to use deadly force. Therefore, Elliott is not entitled to relief on this issue.

Elliott also argues that his 20 to 40 year prison sentence for his second-degree murder conviction constitutes cruel or unusual punishment. Because he failed to raise this issue below, our review of his claim is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Article 1, Section 16 of Michigan's Constitution provides, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted;

nor shall witnesses be unreasonably detained.” Const 1963, art 1, § 16.² The state constitution’s prohibition against cruel or unusual punishment includes a prohibition on grossly disproportionate sentences. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). A sentence within the guidelines is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because Elliott’s sentence for second-degree murder is within the sentencing guidelines range, and, in fact, is at the low end of the range, to sustain this claim, Elliott “must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

To support his argument, Elliott emphasizes his young age, his clean record, and the evidence presented at trial. These factors are either already considered in the sentencing guidelines or are irrelevant in considering the proportionality of defendant’s sentence. Elliott is not entitled to relief on this issue. *Powell*, 278 Mich App at 324.

DOCKET NO. 305350

Threatt argues that the trial court erred in giving a self-defense jury instruction that included a reference to the duty to retreat. Because trial counsel failed to object to the instruction at issue, this claim is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). The instructions must include all elements of the charged offenses and cannot exclude material issues, defenses, and theories, if there is evidence to support them. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). “Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Cain*, 238 Mich App at 127, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Threatt takes issue with the following portion of the trial court’s jury instructions:

A person can use deadly force in self defense or defense of others only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly or reasonably believed he needed to use deadly force and self-defense or defense of others.

However, a person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.

² Elliott also challenges his sentence under the United States Constitution’s prohibition on cruel and unusual punishment. However, the state provision affords greater protection than the federal provision. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). If a defendant’s punishment “passes muster under the state constitution, then it necessarily passes muster under the federal constitution.” *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011).

Further, *a person is not required to retreat if the person has not, or is not engaged in the commission of a crime at the time the deadly force is used, and has a legal right to be where the person is at the time, and has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent death or great bodily harm. . . .*

Threatt claims that including the reference to “retreat” in the jury instructions confused the jury because there is no duty to retreat when the person is not engaged in the commission of a crime and has a legal right to be there. However, the trial court never instructed the jury that defendant had a duty to retreat, and merely stated that, in assessing whether deadly force was reasonably necessary, the jury may consider whether defendant could have safely retreated. Further, as set forth above, the court went on to specifically articulate the rule argued by defendant.

Our Supreme Court approved the same instruction under similar facts in *People v Richardson*, 490 Mich 115; 803 NW2d 302 (2011). In *Richardson*, the defendant claimed he was denied due process when the trial court instructed the jury that there is a general duty to retreat, and then qualified the general rule with a statement that there is never a duty to retreat when attacked in one’s home. *Id.* at 119-120. In rejecting the defendant’s argument, our Supreme Court stated:

An instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat might have been clearer. However, defense counsel did not ask the court to give such an instruction. And defendant was not prejudiced by this omission because the jury was, in fact, informed that a person attacked in his or her home has no duty to retreat. [*Id.* at 120-121.]

As in *Richardson*, Threatt cannot show he was prejudiced by the trial court’s instruction.

Threatt alternatively argues that his trial counsel provided ineffective assistance of counsel for failing to object to the instruction. Because Threatt failed to raise this issue in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973), this claim is unpreserved. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). This Court’s review of an unpreserved ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Generally, to establish ineffective assistance of counsel, a defendant must show “that his counsel’s performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different. *Id.* at 57-58. There is a strong presumption that defense counsel rendered effective assistance. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Decisions regarding whether to raise objections to procedures or arguments are presumed to be matters of trial strategy. *Id.* at 253. Further, counsel is not required to advocate a meritless position. *Ericksen*, 288 Mich App at 201.

As discussed, the trial court’s instruction did not constitute error. Defense counsel is not ineffective for failing to raise a futile objection. See *id.* Defendant also cannot show that, but for the failure to object, the result of the trial would have been different. See *Matuszak*, 263 Mich

App at 57-58. The jury listened to the testimony and arguments, was instructed on all applicable rules of law, and found defendant Threatt guilty of the charges. Other than noting that the jury acquitted him of second-degree murder, Threatt fails to explain how a different outcome would have resulted if the trial court omitted its reference to a general duty to retreat in its jury instructions. See *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998) (stating that the defendant must overcome presumption that counsel was effective). Therefore, Threatt is not entitled to relief on this claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan