

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UNPUBLISHED

January 28, 1997

No. 189323

MARIA ANGELA STEWART,

Defendant-Appellant.

Recorder's Court

LC No. 94-009761

Before: Doctoroff, P.J., and Hood and Paul J. Sullivan,* JJ.

PER CURIAM.

Defendant appeals by right her bench trial convictions for involuntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission or attempted commission of a felony, MCL 750.227b; MSA 28.424. Pursuant to MCL 750.329; MSA 28.561, the trial court found defendant guilty of causing death from a firearm pointed intentionally but without malice. Under the statute, this crime is deemed manslaughter. Defendant was sentenced to serve three to fifteen years in prison for the involuntary manslaughter conviction consecutive to a two-year term for possessing a firearm during the commission of the felony. We affirm.

Defendant argues that the prosecution presented insufficient evidence to find her guilty of manslaughter beyond a reasonable doubt. To support a manslaughter conviction based upon a charge that the defendant intentionally pointed a firearm at another without malice, the prosecutor must prove beyond a reasonable doubt that there was a death, that the death was caused by an action of the defendant, that the defendant caused the death without lawful justification or excuse, that the death resulted from the discharge of a firearm, that at the time of the discharge, the defendant was aiming the firearm at the decedent, and that at the time of the discharge, the defendant intended to point or aim the firearm at the decedent. *People v Duggan*, 115 Mich App 269, 271; 320 NW2d 241 (1982).

In assessing whether the evidence was sufficient to convict, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found

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

that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). This Court is not permitted to assess the credibility of the witnesses in making its determination. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Defendant first argues that the prosecution failed to prove beyond a reasonable doubt that she intentionally fired the shotgun which killed her boyfriend. This argument lacks merit because intentionally firing a gun is not an element of the crime charged. See *Duggan, supra*.

Defendant next argues that the prosecution failed to prove beyond a reasonable doubt that she intentionally pointed the shotgun at her boyfriend before the gun went off and he was killed. We disagree.

The prosecution presented and the trial court accepted evidence which, when viewed in a light most favorable to the prosecution, could have led a rational trier of fact to find that defendant intentionally pointed the shotgun at the deceased. Defendant and her boyfriend were arguing before the shooting. One witness testified that several minutes before the shooting, defendant pointed the shotgun up the stairs at her boyfriend and told him to get downstairs or she would shoot him. Further, one of the police officers who arrived at the scene following the shooting testified that defendant admitted that she pointed the gun at her boyfriend to scare him. The trial court chose to believe this testimony, and determinations of credibility are within the province of the trier of fact, *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990), and are not reviewable by this Court. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Based on the above testimony, there was sufficient evidence for a rational trier of fact to find that defendant intentionally pointed the gun at her boyfriend. Accordingly, reversal is not warranted.

Defendant next argues that she must be resentenced because her sentence of three to fifteen years in prison violated the rule that a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the defendant. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. Defendant's sentence was within the guidelines range and was thus presumptively proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). To overcome the presumption of proportionality, a defendant has the burden of bringing to the trial court's attention any unusual circumstances that would render a sentence within the guidelines range disproportionate. *Id.* In addressing what types of circumstances might overcome the presumption of proportionality, this Court has referred to mitigating circumstances. *People v Mooney*, 216 Mich App 367, 379; 549 NW2d 65 (1996).

Defendant cites several circumstances which she argues render her sentence disproportionate. First, defendant points to several of her personal characteristics. Defendant claims she is intelligent, articulate, and talented. She further notes that she was pregnant at the time of the shooting, and that she suffers from both physical and mental disabilities. Although these claims may be true, none of these characteristics mitigate the seriousness of defendant's offense. Thus, these circumstances do not render defendant's sentence disproportionate.

Next, defendant argues that the sentence was disproportionate because this conviction was her first, because she did not intend to shoot her boyfriend, and because she was distressed by the shooting. The fact that this was defendant's first offense was taken into account when computing the guidelines range. Although defendant may not have intended to shoot her boyfriend and she may regret what transpired, these do not constitute unusual mitigating circumstances. Accordingly, we find that defendant has presented no unusual circumstances which overcome the presumption of proportionality, and thus we affirm the sentence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan