STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD HAWKINS,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 184530
Recorder's Court
LC No. 94-006953

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions 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). Defendant was sentenced to the mandatory term of two years' imprisonment for the felony-firearm conviction and a consecutive term of twenty-five to fifty years' imprisonment for the murder conviction. We affirm.

Defendant shot and killed an approximately thirteen-year-old boy. Thomas Young was present when this occurred. Young's version of the incident, as evidenced by the introduction of his preliminary examination testimony at trial after he became unavailable as a witness pursuant to his assertion of his Fifth Amendment privilege against self incrimination, indicated that he and defendant went to a house to buy drugs. After encountering the victim outside the house, defendant pulled a gun and forced the victim to walk to a field. Defendant asked the victim for money, and then told the victim to get on his knees after the victim stated that he did not have any money. Defendant shot the victim. Young denied discussing with defendant a plan to commit robbery or that he was involved in the killing.

Defendant's version of the incident, as evidenced by the introduction of his statement to the police at trial, indicated that he and Young went to a drug house intending to commit robbery. When the victim answered the door, defendant and Young both pulled guns and forced the victim to walk to a

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

field and get on his knees. As defendant and Young were discussing whether to go back into the house, the victim moved as if to get up. Defendant shot the victim.

Defendant first argues that the trial court failed to sufficiently ascertain the validity of Young's assertion of his Fifth Amendment privilege and that, since defendant was not afforded an opportunity to confront Young at trial, he was denied his right to a fair trial. We disagree. A witness is "unavailable" if he asserts his Fifth Amendment privilege against self-incrimination, MRE 804(a)(1), (b)(1); MCL 768.26; MSA 28.1049, and his preliminary examination testimony may be read at trial in lieu of his actual testimony. *People v Pickett*, 339 Mich 294, 306; 63 NW2d 681 (1954); *People v Castaneda*, 81 Mich App 453, 458; 265 NW2d 367 (1978).

The trial court properly determined, outside of the presence of the jury, that Young had a valid Fifth Amendment privilege, and that he understood the privilege. *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994); *People v Poma*, 96 Mich App 726, 732 294 NW2d 221 (1980). Moreover, the admission of Young's preliminary examination testimony did not interfere with defendant's right of confrontation because defendant had an opportunity and motive to develop the testimony by examining Young at the preliminary examination. *People v Morris*, 139 Mich App 550, 554-556; 362 NW2d 830 (1984). Thus, there being no abuse of discretion, we will not disturb the trial court's decision to declare Young "unavailable" and admit his preliminary examination testimony. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Next, defendant contends that he was denied effective assistance of counsel when defense counsel failed to present extrinsic evidence in order to impeach the key witness' preliminary examination testimony, and when she failed to object to the trial court's instructions on reasonable doubt and on inferences to be drawn from the use of a deadly weapon. We disagree. Upon reviewing the record, we conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard or reasonableness, or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant further maintains that the trial court committed error requiring reversal in finding that his statement to the police was voluntarily made. We disagree. Following a *Walker*[1] hearing, the trial court properly evaluated the totality of the circumstances in determining whether defendant's statement was voluntary. *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). Specifically, the court found that defendant was apprised of his *Miranda*[2] rights, and that he voluntarily and understandingly waived those rights. *Id*. The court found that defendant was intelligent and that he had had some college education. In finding that the defendant had not been mistreated by the police during the approximately thirty-nine hours defendant was detained before giving a statement, the court did not focus merely on the fact that defendant had been detained for a period of time, but rather properly focused on what occurred during the delay and its effect on defendant. *People v Cipriano*, 431 Mich 315, 335; 429 NW2d 781 (1988). After reviewing the record and giving deference to the trial court's

determination of the credibility of the witnesses, we conclude that the trial court's findings were not clearly erroneous. *Id*. In addition, we note that there is no indication that defendant was (1) ill; (2) injured; (3) intoxicated; (4) deprived of sleep, food or medical treatment, or; (5) threatened with or actually abused. Thus, our own independent review of the record leads us to conclude that defendant's statement was voluntarily made. *Id*.

Defendant also asserts that the trial court erroneously allowed the introduction hearsay, which denied defendant his right of confrontation. Specifically, defendant contends that error occurred when two witnesses testified that immediately after hearing a gunshot they heard Young ask defendant why had defendant shot the victim. We disagree. Once the prosecution laid the foundation for the statement, defendant did not object. Therefore, we must determine whether a substantial right of defendant's was affected. *Barclay, supra,* at 673. After reviewing the record, we conclude that the statement complained of was an excited utterance, which is an exception to the hearsay rule and admissible regardless of the declarant's availability. MRE 803(2); *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994). We find that no substantial right of defendant's was affected.

Defendant further argues that the trial court improperly instructed the jury regarding reasonable doubt and inferences that can be drawn from the use of a deadly weapon. However, since defendant failed to object to the court's instructions, our review is precluded unless relief is necessary to avoid manifest injustice to defendant. *Haywood, supra* at 230. After reviewing the record, we find that the court properly instructed the jury and that, accordingly, relief is not necessary to avoid manifest injustice. *People v Moldenhauer,* 210 Mich App 158, 159; 533 NW2d 9 (1995); *Haywood, supra*.

Finally, defendant asserts that the trial court abused its discretion in imposing a minimum sentence of twenty-five years' imprisonment for the murder conviction, the uppermost range of the sentencing guidelines' range of eight to twenty-five years. We disagree. Sentences within the guidelines' range are presumptively proportionate. *People v Cotton,* 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant has failed to raise any mitigating circumstances that would overcome the presumption of proportionality and demonstrate that the court abused its discretion in sentencing defendant. *People v Milbourn,* 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Piotrowski,* 211 Mich App 527, 533; 536 NW2d 293 (1995). The court relied upon appropriate factors in imposing defendant's sentence, which was proportionate to both the offense and the offender. *Milbourn, supra,* 435 Mich 635-636; *People v Hunter,* 176 Mich App 319, 320-321; 439 NW2d 334 (1989).

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] *People v Walker (On Rehearing),* 374 Mich 331, 338; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).