

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DESHAWN JONES,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 194801

Kent Circuit Court

LC No. 95-002470-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant Michael Deshawn Jones was convicted of manslaughter, MCL 750.321; MSA 28.553, three counts of reckless discharge of a firearm, MCL 752.861; MSA 28.436(21), and felony-firearm, MCL 750.227b MSA 28.424(2). Defendant was sentenced to imprisonment for eight to fifteen years for manslaughter to be served consecutively to the two-year sentence for felony-firearm. Defendant was given time served for the three counts of reckless discharge of a firearm. Defendant appeals his convictions and sentences as of right. We affirm.

I

Defendant first claims on appeal that the trial court erred in denying his motion to quash the bindover on the manslaughter charge because the prosecutor failed to show at the preliminary examination that defendant did not act lawfully in shooting a fleeing felon. On the afternoon of June 19, 1995, the victim and alleged fellow gang members of the “Cherry Street Boys” pulled up in a truck near defendant’s house at 812 Kalamazoo. The victim got out of the truck, picked up a bicycle sitting on the sidewalk, walked up the stairs to the house, and threw the bicycle through the living room window. Shortly thereafter, defendant opened fire and shot the victim, who later died from the injury. There was evidence that the victim’s likely motive for throwing the bicycle was retaliation for the death of fellow gang member, Nate Jones, who was shot the night before. The Cherry Street Boys believed that defendant’s cousin, B. J. Whiteside, a member of the “Kalamazoo Boys” gang, was one of the individuals responsible for Jones’ death.

A private citizen may use deadly force to stop a fleeing felon under the following circumstances: (1) the evidence must show that the felony actually occurred, (2) the fleeing suspect against whom the force was used must be the person who committed the felony, and (3) the use of deadly force must have been “necessary” to ensure the apprehension of the felon. *People v Hampton*, 194 Mich App 593, 596-597; 487 NW2d 843 (1992). The parties agree that throwing the bicycle through the window constituted the felony of malicious destruction of personal property over \$100. The parties also agree that it was the victim who committed the felony. Therefore, the only element at issue is whether deadly force was necessary to apprehend the fleeing felon. The issue of necessity is one of fact that should be left for the jury to decide. *Hampton, supra* at 597.

Where an issue raised on appeal concerns the factual sufficiency of the evidence to bind over a defendant, this Court reviews the circuit court’s decision for an abuse of discretion. *People v Kieronski*, 214 Mich App 222, 228; 542 NW2d 339 (1995). The trial court did not abuse its discretion in denying defendant’s motion to quash because a question existed for the jury regarding whether defendant’s use of deadly force was necessary to apprehend the victim. Defendant admitted during his interview with police, which was submitted to the court at the preliminary examination, that he knew the identity of the victim as Tony Hargdes. Thus, defendant could have provided the victim’s name to the police, which would have permitted them to locate and arrest him for throwing the bicycle through the window. In *People v Smith*, 148 Mich App 16, 25; 384 NW2d 68 (1985), this Court agreed that the use of deadly force was not necessary when the defendant knew where the fleeing felon lived. In this case, defendant also possessed information about the victim (his name) that could have led to his arrest by police.

Furthermore, a magistrate’s erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). Because we conclude that there was sufficient evidence to sustain defendant’s conviction for manslaughter, the error alleged by defendant is rendered harmless.

II

Defendant also claims on appeal that there was insufficient evidence produced at trial to support a finding that defendant did not act in self-defense in shooting the victim. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

A person has the right to use force to defend himself under certain circumstances. Lawful self-defense will excuse a defendant from homicide. CJI2d 7.15(1). “[T]he killing of another in self-

defense is justifiable homicide if the defendant honestly and reasonably believed that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once a defendant introduces evidence of self-defense, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Defendant claims that the prosecution failed to meet its burden in this case.

The evidence presented by the prosecution demonstrated beyond a reasonable doubt that defendant did not act in self-defense. Defendant admitted during his interview with police that he did not begin to shoot at the victim until the victim was retreating from defendant’s house. There were two sets of steps leading up to defendant’s house, one set from the sidewalk and another set at the porch. Defendant stated that he began firing at the victim when he was running down the stairs that ended at the sidewalk. Defendant’s statement was corroborated by several other witnesses who testified that the victim was near the bottom of the stairs before the shooting began. Other witnesses testified that the victim had reached the sidewalk or the street before defendant opened fire. In addition, defendant was not aware that there were several other men outside in vehicles when he began shooting at the victim; therefore, the threat of their presence could not have contributed to his decision to open fire.

Furthermore, defendant admitted that he continued to shoot at the victim even after he crossed the street and was running away. Sebree Kyles, who had just arrived at his mother’s house at 819 Kalamazoo, testified that he saw the victim stumble as he was running through the yard, and he discovered blood in the area where the victim stumbled. Officers Lubbers and Lis also discovered a blood trail that began in the yard at 819 Kalamazoo and led to 850 Franklin where the victim was found. There was no blood found in the area of defendant’s house at 812 Kalamazoo. Given the nature of the victim’s wound, Dr. Cohl testified that the victim would have started to bleed immediately after being shot. Defendant told police that he was very afraid and believed that the victim was armed, although defendant did not see any weapons. However, during defendant’s interview with police, the victim also stated that, “[he] was trying’ to hit Tony for bustin’ the window,” and that he was “mad as hell.”

Based on these facts, a reasonable jury could have concluded that defendant did not honestly and reasonably believe that his life was in imminent danger when he shot the victim. The reasonableness of a defendant’s belief in danger must be measured by the circumstances as they appeared to the defendant. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). Given recent events and the escalating tension between the Cherry Street Boys and the Kalamazoo Boys, defendant may have reasonably feared for his life when the bicycle initially came through the window and he believed the victim to be armed (although defendant did not see a gun). However, the victim did not continue to attack; instead, he immediately turned and began walking down the stairs away from defendant’s house. There is no evidence that the victim was posing any threat to defendant at that time; nevertheless, defendant opened fire and shot the victim in the back after he fled across the street.

Finally, defendant claims on appeal that his sentence was disproportionate because defendant's conduct was a result, at most, of his mistaken belief in the need to defend himself. Provided permissible factors are considered, appellate review is limited to whether the sentencing court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires that a sentence must be proportionate to the seriousness of the crime and the defendant's prior record *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). A sentence imposed within the applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). In this case, the sentencing guideline range for the offense was three to eight years. Defendant was sentenced to eight to fifteen years for his manslaughter conviction; therefore, his sentence is presumptively proportionate.

Although a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances, *Milbourn*, *supra* at 661, defendant has failed to present any unusual circumstances that would rebut the presumption of proportionality. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). The record indicates that during the course of the incident, not only was the victim mortally wounded while fleeing defendant's house, but another person's elbow was grazed by gunfire and another received minor lacerations from flying glass. Furthermore, several neighbors were placed in great fear and jeopardy as defendant sprayed gunfire across the front of their homes. One home across the street was struck at least fifteen times by bullets while the resident was home with her daughter and infant foster daughter. In addition, the presentence report indicates that defendant has had seven prior misdemeanor convictions. Finally, the likelihood of reformation on the part of defendant is low because he is a high school dropout who has never held full-time employment. The imposed sentence was proportionate to both the offense and the offender.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski