

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH R. ERVIN,

Defendant-Appellant.

UNPUBLISHED

August 27, 1999

No. 207870

Detroit Recorder's Court

LC No. 97-003198

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of murder in the second-degree, MCL 750.317; MSA 28.549, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the second-degree murder and assault with intent to murder convictions, which are to be served concurrently to each other and consecutively to the two-year sentence for the felony firearm conviction. These sentences are also consecutive to the sentence defendant was serving for a parole violation in a prior case at the time he was sentenced in this case. Defendant now appeals his convictions and sentences as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

In this case, the trial court found the trial testimony of the two eyewitnesses to be credible, despite their previous inconsistent statements. Both eyewitnesses testified that they were certain they saw defendant on the night of the shooting. Moreover, the testimony of defendant and his sister established that defendant was with the co-perpetrator around the time of the shooting and that

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

defendant owned a rifle similar to the one used in the shooting. Viewing the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence presented at trial from which the trier of fact could find beyond a reasonable doubt that defendant was guilty of second-degree murder, two counts of assault with intent to murder and felony-firearm. Further, to the extent that defendant's argument merely challenges the witnesses' credibility, questions of credibility are left to the trier of fact and should not be resolved anew by a reviewing court. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

Defendant next argues that the trial court's findings of fact and conclusions of law were clearly erroneous. Specifically, defendant complains that the trial court erroneously labeled a witness' out-of-court identification of defendant, which happened to be inconsistent with her in-court identification of defendant, as impeachment rather than substantive evidence. Although we agree with defendant that the trial court improperly labeled the evidence, we find the error to be harmless.

At the outset of its findings of fact, the trial court stated that out-of-court testimony and eyewitness statements were not substantive evidence, but would only be considered as impeachment evidence. Defendant correctly argues that the trial court's blanket statement, when applied to one of the eyewitnesses who testified at trial and was subject to cross-examination, violated MRE 801(d)(1), because the trial court failed to consider the evidence as substantive evidence.¹ This witness failed to identify defendant as the perpetrator, both to police investigators and during her preliminary examination testimony. This inconsistent identification evidence falls under the non-hearsay provisions of MCR 801(d)(1)(A) and is substantive proof of the truth of the matter asserted. See *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994).

Nonetheless, we find that the error was harmless. Appellate courts should not reverse a conviction unless the error was prejudicial. MCR 2.613(a), MCL 769.26; MSA 28.1096. See also *People v Mateo*, 453 Mich 203, 210; 551 NW2d 891 (1996); *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972). While we agree that the trial court improperly labeled the evidence, our concern focuses on how that mis-labeling impacted the trial court's assessment of the witness' credibility. Here, the trial court recognized the significance of the evidence, weighed it properly, and, in the context of all the evidence, concluded that the witness' in-court identification was believable. Consequently, defendant has not shown prejudice.

Next, defendant's challenge to the scoring of the Prior Record Variable 2 is not a cognizable appellate issue. *People v. Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997), habeas corpus conditionally granted by ___ F Supp ___ (ED Mich July 19, 1999); *People v Schmitz*, 231 Mich App 521, 535; 586 NW2d 766 (1998). Therefore, we decline to review this issue.

Defendant also argues that his sentences were disproportionate based on defendant's age, upbringing, background, and the non-assaultive character of his previous convictions. We disagree. 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). However, a sentence that falls within the sentencing guidelines range is presumptively proportional. *People v Broden*, 428 Mich

343, 354-355; 408 NW2d 789 (1987); *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998).

Defendant has not overcome that presumption. His life sentences fell within the sentencing guidelines' range of twenty- to forty-years' or life imprisonment. Further, given the circumstances surrounding the offense and the offender, we find that defendant's sentences were proportionate.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

/s/ Robert J. Danhof

¹ MRE 801(d)(1), provides in pertinent part:

(d) A statement is not hearsay if:

(1) Prior Statement of Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at trial, hearing or other proceeding, or in a deposition. . . .