

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD L. SHOEMAKER,

Defendant-Appellant.

UNPUBLISHED

September 29, 2000

No. 217957

Jackson Circuit Court

LC No. 98-089638-FC

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of voluntary manslaughter, MCL 750.321; MSA 28.553, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a term of ten to fifteen years' imprisonment for each manslaughter conviction, to be preceded by two-year terms for the associated felony-firearm convictions. Defendant appeals as of right. We affirm.

I

Defendant first argues the trial court erred in allowing the prosecutor to elicit testimony from the cousin of one victim, Michael Long, concerning her claim she had been sexually assaulted by defendant only a few days before the killings of which defendant was convicted. Defendant contends this evidence should have been excluded under MRE 404(b) because it was relevant only to his propensity or character and because any probative value was substantially outweighed by the prejudicial nature of the evidence. We disagree.

The admissibility of other-acts evidence is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Under MRE 404(b)(1), evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *Id.* at 385; *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Crawford, supra* at 390.

In this case, the disputed testimony was offered by the prosecutor not for the purpose of impugning defendant's character but rather to provide the jurors with facts necessary to explain the events that precipitated the killings. With respect to the relevancy of such evidence, our Supreme Court has noted that although there are substantial limits on the admissibility of evidence concerning other bad acts, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Here, it was this witness' allegations, whether believed to be true by the jury or not, that set in motion the events which led to the killings for which defendant was being tried. As noted by the prosecutor in arguing for admission of this testimony at trial, "[i]t's what [gave] rise to this entire scenario." The testimony was not admitted for the purpose of showing that defendant acted in conformity with a particular character trait, but rather for the purpose of providing a basis for the animosity which existed between the victims and defendant at the time of the shootings. That the prosecutor did not seek solely to malign defendant's character is supported by the fact that following elicitation of the disputed testimony, the prosecutor refrained from referencing the alleged sexual assault at any further point in the trial.

Given the necessity of the challenged evidence, we conclude the trial court did not abuse its discretion in finding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. As explained above, this testimony went directly to the genesis of the dispute which gave rise to these homicides and thus provided the jurors with the "complete story." *Sholl, supra*. Moreover, the witness' testimony may have in fact bolstered defendant's claim of self-defense by providing defendant with a significant reason to believe that victim Long, armed with a shotgun and angered by the witness' claims against defendant, intended defendant great harm. Therefore, in light of these facts and considering the jury received an appropriate limiting instruction, we find the trial court was within its discretion in admitting the challenged testimony.

II

Defendant next argues he was denied due process of law because the prosecutor failed to produce at trial the shotgun allegedly possessed by Long at the time he was shot by defendant. More specifically, defendant contends this failure was tantamount to a suppression or withholding of evidence because it prevented him from presenting exculpatory evidence in support of his claim of self-defense that might have been developed through testing of the weapon; i.e., evidence that the shotgun had in fact been fired by Long as inferred by defendant.

Because defendant failed to raise this argument below, our review is limited to determining whether defendant has demonstrated a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find no such error.

All of the cases cited by defendant to substantiate his position concern the prosecution either withholding evidence within its possession, or subsequently failing to preserve such evidence to the detriment of defendant and in violation of the duty to disclose set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

The rule of *Brady*, however, does not apply in the present case because unlike the situation presented in that case, there was no evidence “suppressed” or “withheld.” The crucial distinction between the situation found in *Brady, supra*, and that before us today is a failure to disclose or preserve evidence that has been developed, as opposed to a failure to develop evidence in the first instance. Although it is without question a criminal defendant has a due process right of access to favorable information possessed by the prosecution, *Brady, supra*, and the prosecution is duty bound to take measures to ensure such evidence is adequately preserved once it has been developed, see, e.g., *People v Wallace*, 102 Mich App 386; 301 NW2d 540 (1980), defendant does not allege that evidence possessed by the prosecution and favorable to his case was inappropriately withheld or preserved, but rather the prosecution failed to ensure this evidence was found and produced at trial. Neither the police nor the prosecution are required to seek and find such evidence in the first place. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Therefore, we find defendant’s reliance on *Brady, supra*, and its progeny to be misplaced as the disclosure and production requirements set forth in that line of cases are applicable only where the prosecutor possesses, or at least has knowledge of and access to such evidence. See, e.g., *People v Stanaway*, 446 Mich 643, 667; 521 NW2d 557 (1994). Accordingly, defendant has forfeited this unpreserved issue because no plain error exists.

III

Defendant next contends the prosecutor failed to prove beyond a reasonable doubt that the two homicides with which he was charged were not committed in self-defense. We disagree.

When reviewing claims of insufficiency of the evidence to sustain a verdict, this Court views the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). In doing so, however, this Court will not interfere with the jury’s role of determining the weight of evidence or the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), and will resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

“[T]he killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). When a defendant introduces evidence of self-defense, the prosecution bears the burden of disproving the defendant acted in self-defense beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). Here, viewing the evidence in a light most favorable to the prosecution, we believe the evidence introduced below was sufficient to allow the jury to find defendant’s claimed belief of imminent danger was neither honest nor reasonable.

Although defendant may have had, on the basis of prior threats and encounters with the decedents, reason to fear his victims as they approached his aunt’s home armed with a shotgun, the evidence did not indicate defendant was in imminent danger from these individuals at the time they were shot. At trial, defendant testified he emptied his fully loaded .357 Magnum while firing at his victims – a

total of six shots being fired from that weapon. Despite defendant's claim that this barrage was precipitated by a shotgun blast fired in his direction by one of these individuals, Anthony Riley, who was with the victims at the time they were shot, testified that Long never fired the shotgun and the weapon was pointed toward the ground at the time defendant began firing at them. Moreover, seven prosecution witnesses, including one of defendant's own companions that day, testified to having heard no more than five to six gunshots, which each agreed were consistent in sound. Two of these witnesses, Willis Pryor and Ronald Klee, were disinterested neighborhood residents at work in their yards at the time of the shootings. Both Pryor and Klee indicated that based on previous recreational experience with the use of shotguns, they were each familiar with the sound made when a shotgun is fired, but neither of them recognized any of the shots heard that day as the product of a shotgun. Rather, both of these witnesses indicated their belief that each of the shots heard were those of a handgun. Similarly, a police officer who was patrolling the area at the time of the shootings testified that from his experience, which included training in the use of both handguns and shotguns, all of the shots he heard sounded as if they were fired from a handgun. Moreover, each of the three officers who surveyed the scene of the shootings shortly after this incident took place testified they found no evidence to substantiate defendant's claim that a shotgun had been fired in that area.

In addition, testimony from the medical examiner demonstrated each of the decedents had been shot from behind – one in the back of the head, the other in the midsection of his back. When considered in conjunction with the testimony of defendant's cousin that defendant had earlier stated while holding the .357 in his lap that he had to "get them" before they "got" him, these facts were sufficient to allow a rational trier of fact to find defendant acted not in self-defense of an imminent threat, but rather in an unlawful attempt to preempt any such harm. See *People v Truong (After Remand)*, 218 Mich App 325, 338; 553 NW2d 692 (1996)(even in the face of previous threats, a "preemptive strike" is not any form of self-defense). This is especially true in light of the fact defendant purchased the ammunition only a short time before leaving the safety of his home and traveling back to the area where he had previously been confronted by the victims earlier that day. These facts constitute sufficient evidence to disprove defendant's claim of self-defense beyond a reasonable doubt.

IV

Defendant next argues that in scoring the sentencing guidelines the trial court erred in relying on information contained within the PSIR, claimed by defendant during sentencing to be inaccurate, without requiring the prosecutor to prove the accuracy of that information by a preponderance of the evidence. Defendant argues that because this error resulted in the calculation of an increased sentencing guidelines range, his sentence is disproportionate and therefore remand for resentencing is required. However, we conclude that defendant is not entitled to a remand for resentencing on the basis of this claimed error.

Initially, we note where a sentencing court fails to resolve such a challenge this Court will not remand for clarification if the failure constituted harmless error. See *Grant, supra* at 233-234; *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991). Here, the prosecution has provided this Court with a copy of the order of adjudication establishing that contrary to defendant's claim below, the disputed information was in fact correct and thus properly considered in the trial court's scoring of the sentencing guidelines. Although this Court's review is generally limited to the record of the trial court,

Amorello v Monsanto Corp, 186 Mich App 324, 330; 463 NW2d 487 (1990), if remand to supplement the record would be a waste of judicial time this Court may consider the enlarged record without remand. See *Hawker v Northern Michigan Hospital, Inc*, 164 Mich App 314, 318; 416 NW2d 428 (1987). In light of the documentation provided this Court by the prosecution, we find it is unnecessary to remand this matter for resentencing.

Moreover, defendant's sentence is not disproportionate. Here, inasmuch as the court's minimum sentence of ten years is within the guidelines' range, it is presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Although a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances, *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), defendant has failed to present any unusual circumstances to overcome this presumption. See *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). To the contrary, in light of defendant's prior record and the circumstances surrounding the instant offense, we believe defendant's sentence to be proportionate. At the time of sentence, defendant, at seventeen years of age, had already incurred six juvenile convictions which included such offenses as carrying a concealed weapon, resisting and obstructing, and criminal sexual conduct. Despite youth home incarceration resulting from disposition of these offenses, defendant continued as an adult to engage in unlawful conduct which culminated in the deaths of two individuals by gunshot on a residential street. As noted by the court during sentencing, this record raises "serious doubts" regarding defendant's potential for rehabilitation and requires a period of extensive incarceration for the protection of society. Accordingly, we find no abuse of discretion in the trial court's sentence of ten to fifteen years.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder