

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK D. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 221854
Wayne Circuit Court
LC No. 98-010536

Before: Bandstra, C.J. and Doctoroff and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty to forty years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

First, defendant claims that his second-degree murder conviction should be vacated because the prosecutor presented insufficient evidence to support the conviction. We disagree.

The elements of second-degree murder are: (1) a death; (2) caused by an act of the defendant; (3) with malice; and (4) without justification or excuse.

Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. [*People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998) (Citations omitted).]

Malice may be inferred from all the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), including the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

Viewed most favorably to the prosecution, *Goecke*, *supra* at 488, the evidence in this case was sufficient to support defendant's second-degree murder conviction. At trial, the prosecutor presented the testimony of Davon Burns, who testified that defendant pointed a gun at the victim and shot him in the chest, thereby causing the victim's death. Moreover, defendant admitted in his statement to the police that he shot at the victim. The evidence, therefore, clearly

indicated that defendant caused the death of the victim by shooting him. Malice may be inferred from the circumstances, including the fact that defendant pointed a gun at the victim and shot him in the chest. *Kemp, supra* at 322; *Carines, supra* at 759.

The question then becomes whether the killing was justifiable. Defendant claimed in his statement to the police that he was acting in self-defense. He claimed that he only shot at the victim after the victim and his friends, Davon Burns and Damon Corbit, shot at him. A homicide is justifiable under a self-defense theory “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). The trial court found, however, that there was no evidence to indicate that the killing was justified, and the evidence supports the trial court’s conclusion. First, Davon Burns testified that defendant and the victim were arguing about “a few problems that occurred in the past.” According to Burns, defendant then said “[w]e can’t beef, we’ve known each other too long,” then turned and started walking away. After taking a few steps, defendant “turned around and started shooting.” Defendant pointed his black handgun at the victim and fired. Burns testified that the victim (and his friends) were unarmed and defendant was the only person who fired any shots during the incident. Burns’ account of the incident was corroborated by the other witnesses and the physical evidence presented at trial. The witnesses all testified that they only heard a few shots, contradicting defendant’s claim that he fired all six of his bullets after being fired upon by the victim, Burns, and Corbit. Moreover, evidence was presented to indicate that the victim was not armed at the time of the shooting. Lastly, the police only found three bullet casings, and Semaja Tomlin testified that she only saw one man shooting during the incident, further belying defendant’s claim that he shot at the victim in self-defense. In conclusion, viewed most favorably to the prosecution, the evidence was sufficient to support defendant’s second-degree murder conviction.

We also reject defendant’s claim that he was denied his right to the effective assistance of counsel. As to his claim that defense counsel should have filed a motion to suppress defendant’s statement to the police, defendant has not articulated the grounds upon which suppression would have been justified. He does not, for example, claim that the statement was not voluntarily or knowingly made. Nor does he claim that the statement was the product of threats or coercion. In any event, there is nothing in the record to indicate that defendant’s statement should have been suppressed. The uncontradicted evidence presented below indicated that, prior to the statement, defendant was advised of his constitutional rights, understood those rights, and freely and voluntarily waived those rights and agreed to make a statement to the police. Because the record reveals no basis for suppression, and defendant has articulated no grounds for suppression on appeal, defendant’s claim that defense counsel should have moved for suppression of the statement must fail. “Defense counsel is not required to make frivolous or meritless motions.” *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Moreover, defendant has not indicated how he was prejudiced by defense counsel’s failure to move for suppression. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant’s statement to the police, that he shot the victim in self-defense, was exculpatory in nature. Therefore, it does not appear that defense counsel’s failure to move for suppression prejudiced defendant. Accordingly, defendant has failed to show that there was a reasonable probability that, but for counsel’s “error,” the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant also claims that his trial counsel was ineffective for failing to produce witnesses requested by defendant at trial. “Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* Here, there is no indication in the record, and defendant does not indicate on appeal, what specific witnesses defendant wanted defense counsel to call at trial, what their testimony would have been, or how their testimony would have been helpful to the defense. Therefore, there is no deficiency apparent on the record.

Lastly, defendant argues that the trial court abused its discretion in sentencing him. This issue is not preserved for review. A defendant must provide this Court with a copy of the presentence report to preserve a claim of disproportionality. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). In any event, there is no basis for concluding that defendant’s sentence was disproportionate. Defendant’s twenty-year minimum sentence for second-degree murder is within the range recommended by the sentencing guidelines and, therefore, is presumptively proportionate, *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993), defendant has not articulated any unusual circumstances to overcome the presumption of proportionality. See *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Nevertheless, considering the serious nature of the offense we conclude that defendant’s sentence is proportionate. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

We affirm.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White