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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY DARRELL KINCADE,

Defendant-Appellant.

UNPUBLISHED
October 19, 2023

No. 361670
Oakland Circuit Court
LC No. 2019-271257-FC

Before: MURRAY, P.J., and O’BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendant shot two victims in a bathroom, wounding one and killing the other. He was sentenced as a third-offense habitual offender for his second-degree murder conviction, assault with the intent to commit murder conviction, felon-in-possession of a firearm conviction, and three convictions for possession of a firearm during the commission of a felony. We affirm.

A witness testified that he heard gunshots coming from a bathroom, and he saw defendant putting a gun in his waistband while standing in the doorway of that bathroom. A different witness testified that he also saw defendant in the bathroom, putting an object into his waistband. The witnesses, plus another man, attempted to restrain defendant when he tried to flee after shooting the victims, and a gun fell from defendant’s waistband during the altercation. A third witness testified that she heard defendant exclaim, “I f**ked up,” after he was restrained.

The wounded victim testified that he was in the bathroom when he heard the bathroom door open, heard gunshots, felt a gunshot hit his arm, and saw defendant in the doorway. Defendant told the wounded victim, “turnaround before I kill [you],” and the wounded victim saw the deceased victim on the floor. It was later confirmed by the police that the deceased victim had died from multiple gunshots to his back, torso, and arms, and the bullet casings found in the bathroom matched the semiautomatic handgun that fell from defendant’s waistband. Additionally, the wounded victim’s blood was found on defendant’s clothes.

Defendant was convicted by a jury. The recommended minimum sentencing guidelines ranges were 365 to 900 months of imprisonment for defendant’s second-degree murder conviction, 270 to 675 months of imprisonment for his assault with the intent to commit murder conviction,

and 57 months to 10 years of imprisonment for his felon-in-possession conviction. The trial court did not depart from those recommendations and imposed minimum sentences of 540 months of imprisonment for the second-degree murder conviction, 420 months of imprisonment for the assault with intent to commit murder conviction, and 57 months of imprisonment for the felon-in-possession conviction. The trial court ordered those sentences to run concurrently with each other and consecutively with the three mandatory, and concurrent, five-year imprisonment sentences for defendant's three felony-firearm convictions.

Defendant now appeals whether his convictions were supported by sufficient evidence as well as the proportionality of his second-degree murder and assault with the intent to murder sentences.

We "review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196 (cleaned up). This includes defendant's identity because "identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "With regard to an actor's intent, because of the difficulties inherent in proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McKewen*, 326 Mich App 342, 347 n 1; 926 NW2d 888 (2018) (cleaned up).

Defendant argues that the evidence identifying him as the offender of each crime was insufficient to support his convictions beyond a reasonable doubt. Defendant ignores, however, that several witnesses testified that he was in the doorway of the bathroom, the gun that matched the shell casings from the bathroom was found after it fell from defendant's waistband, and the wounded victim testified that defendant told him that he was going to kill him. Further, the wounded victim's blood was found on defendant's clothes, and defendant was heard saying "I fucked up" after the shooting.

"Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Head*, 323 Mich App 526, 532; 917 NW2d 752 (2018). In this case, it was reasonable for the jury to infer that defendant committed the acts given the evidence that was presented at trial. Further, defendant's intention to commit the crimes was reasonably inferred from his attempt to flee after the shooting, and his admission that he had "f**ked up." The prosecutor established the elements of second-degree murder, assault in the intent to commit murder, felon-in-possession, and felony-firearm beyond a reasonable doubt when considering the several first-hand accounts of defendant's actions.

Next, defendant argues that his sentences for second-degree murder and assault with the intent to commit murder were unreasonable, disproportionate, and cruel or unusual. Our Supreme Court has recently held that "defendants may challenge the proportionality of any sentence on appeal and that the sentence is to be reviewed for reasonableness." *People v Posey*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 345491); slip op at 37. "Sentencing decisions are reviewed for an abuse of discretion." *Id.* at ___; slip op at 4 (cleaned up). A trial court abuses its discretion if the imposed sentence is not "proportionate to the seriousness of the circumstances

surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017) (cleaned up).

In reviewing a sentence for proportionality, this Court must ask "whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Posey*, ___ Mich at ___; slip op at 36. "When a trial court sentences a defendant within the guidelines' recommended range, it creates a presumption that the sentence is proportionate." *Id.* at ___; slip op at 37. To overcome that presumption, "the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate." *Id.* at ___; slip op at 36.

In this case, defendant argues that his second-degree murder and assault with the intent to murder sentences are disproportionate because he is 45-years-old and will spend the next 45 years of his life incarcerated. This Court has held, however, that a defendant's advanced age is not sufficient to overcome the presumption of a proportionate sentence. See *People v Bowling*, 299 Mich App 552, 558-559; 830 NW2d 800 (2013). Defendant did not present any other argument regarding the proportionality of his sentences and, thus, he has not overcome the presumption.

Lastly, defendant argues that his sentences were unconstitutional under the Eighth Amendment of the United States Constitution, and Article 1, § 16, of Michigan's 1963 Constitution. Defendant did not raise this claim in the trial court, however, and it is unpreserved. When an issue is not properly preserved for appellate review, we review the unpreserved issue for plain error affecting a defendant's substantial rights. See *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). "[T]he defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011).

Defendant argues that the disproportionality of his sentences renders them cruel and/or unusual. The Eighth Amendment of the United States Constitution, however, "contains no proportionality guarantee." *Harmelin v Michigan*, 501 US 957, 965; 111 S Ct 2680; 115 L Ed 2d 836 (1991). "[T]he drafters of the Declaration of Rights did not explicitly prohibit 'disproportionate' or 'excessive' punishments. Instead, they prohibited punishments that were 'cruell and unusuall [sic].' " *Id.* at 967.

The Michigan Constitution does provide a "prohibition against cruel or unusual punishment [that] includes a prohibition on grossly disproportionate sentences." *People v Burkett*, 337 Mich App 631, 636; 976 NW2d 864 (2021) (cleaned up). As stated, however, a sentence within the guidelines range is "presumptively proportionate, and a proportionate sentence is not cruel or unusual." *People v McFarlane*, 325 Mich App 507, 538; 926 NW2d 339 (2018) (cleaned up). Defendant has not overcome the presumption that his sentences are proportionate.

Affirmed.

/s/ Christopher M. Murray
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle