STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KHALIFAH S. BOYD,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 200545
Genesee Circuit Court
LC No. 95-053062-FH

Before: Sawyer, P.J., and Wahls and Reilly, 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). The trial court sentenced defendant to concurrent terms of ten to fifteen years' imprisonment for each voluntary manslaughter conviction, to be served consecutive to concurrent terms of two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant was tried for the shooting deaths of Rashameer McFarland and Perry Williams. McFarland was arguing with and choking defendant's sister, Tekera Boyd, before defendant shot and killed him. Williams was sitting in the passenger seat of a car parked in the street near the altercation. After defendant shot McFarland, defendant and Williams exchanged gunshots, killing Williams and wounding defendant.

On appeal, defendant first contends that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant's actions were not justified as self-defense or defense of another. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before reasonable time has passed for the blood to cool and reason to resume its habitual control. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763

(1993). In Michigan, the 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 Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). A defendant is not entitled to use any more force than is necessary to defend himself. *Id.* Furthermore, the defense is not available when the defendant is the initial aggressor unless the defendant withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.* at 323. The right to self-defense includes the right to defend another. See *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970), citing *People v Curtis*, 52 Mich 616; 18 NW 385 (1884). When evidence of self-defense is introduced, the prosecution bears the burden of excluding the possibility that the defendant acted in self-defense. *Fortson*, *supra* at 20.

Defendant argues that the testimony of several witnesses was not competent because these witnesses also gave contradictory accounts of the shootings. However, this Court will not attempt to resolve anew issues of credibility, which are properly left within the domain of the trier of fact. See *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). At trial, Deandre Clemonts testified that when defendant told McFarland to "get off" his sister, McFarland raised his hands and defendant started shooting. Clemonts further testified that McFarland did not have a gun in his hands. Lamika Stevens also testified that McFarland threw up his hands before defendant shot at him. Finally, Taneisha Bedenfield testified that McFarland let go of Tekera Boyd and exchanged words with defendant before being shot by defendant. On this evidence, a rational trier of fact could have found that defendant's act of shooting McFarland was not necessary to protect Tekera Boyd from any threat of serious bodily harm. *Kemp*, *supra* at 322. Moreover, there was also evidence that when defendant first saw McFarland arguing with and choking Tekera Boyd, he told McFarland to "leave her alone" and then went into his house for fifteen to thirty minutes before returning with a gun. Given the evidence that defendant did not react immediately to McFarland's assaultive behavior, a rational trier of fact could have found that defendant did not honestly and reasonably believe that Tekera Boyd was in peril. Accordingly, the prosecution presented sufficient evidence to disprove defendant's claim of self-defense as to the shooting of McFarland. *Truong (After Remand)*, *supra* at 337.

Clemonts also testified that after defendant shot McFarland, defendant moved closer to the car in which Williams was sitting and shot at Williams. According to Clemonts, "When [defendant] started shootin' at the guy that was in the car, he, the guy that was in the car started shooting back." Further, Mercaves Dixon testified that after defendant shot McFarland, defendant ran toward the car in which Williams was sitting. Finally, Lamika Stevens testified on cross examination that after defendant shot into the car, the man in the car (Williams) shot back at defendant. On this evidence, a rational trier of fact could have found that defendant was the initial aggressor in his conflict with Williams. *Kemp*, *supra* at 323. Accordingly, the prosecution presented sufficient evidence to disprove defendant's claim of self-defense as to the shooting of Williams. *Truong (After Remand)*, *supra* at 337.

Defendant next argues that the trial court abused its discretion when it admitted Officer Greg Hosmer's testimony regarding Clemonts' statement, "Khalifah gunned them down," under the excited utterance exception to the hearsay rule. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on

appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Hearsay is a statement, other than the one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Hearsay is not admissible unless it comes within one of the exceptions provided by the Michigan Rules of Evidence. MRE 802. An exception to the hearsay rule is made if the statement qualifies as an excited utterance. MRE 803(2); *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). To qualify as an excited utterance, a statement must (1) arise out of a startling event or condition, (2) be made before there has been time to contrive or misrepresent, and (3) relate to the circumstances of the startling event or condition. MRE 802(3); *Gee*, *supra* at 282. The second requirement addresses the issue of whether the statement was made while the declarant was still under the influence of an overwhelming emotional condition. Properly understood, it relates to capacity to fabricate rather than lack of time to fabricate. *People v Hackney*, 183 Mich App 516, 522; 455 NW2d 358 (1990). This requirement is governed by a two-part inquiry; that is, whether the interval between the event and the statement was long enough to make fabrication possible and whether the declarant's emotional state at the time permitted fabrication. *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994). Finally, the occurrence of the startling event or condition must be established by independent evidence apart from the hearsay statement itself. *People v Burton*, 433 Mich 268, 294-295; 445 NW2d 133 (1989).

In this case, the declarant was a nine-year-old boy. According to Hosmer's testimony, the declarant made a statement relating to the circumstances of the shootings within minutes after witnessing the shootings. The shooting of two persons certainly qualifies as a startling event. Hosmer described the declarant's demeanor at the time he made the statement as being "confused." Moreover, several witnesses, including Hosmer, testified in court to the occurrence of a shooting, thereby providing independent evidence of the startling event. Accordingly, we hold that the trial court's admission of the hearsay statement under the excited utterance exception was not an abuse of its discretion. *Lugo*, *supra* at 709.

Finally, defendant argues that his ten- to fifteen-year sentence for the voluntary manslaughter convictions was disproportionately severe. We disagree. Defendant's minimum sentence of ten years falls within the six- to ten-year range recommended by the sentencing guidelines and is, therefore, presumptively proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). At sentencing, defendant presented no evidence of "unusual circumstances" rendering this presumptively proportionate sentence disproportionate. See *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Accordingly, we find no abuse of discretion in the sentence imposed.

Affirmed.

/s/ David W. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly