

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME T. BROWN,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 207864
Recorder's Court
LC No. 96-007148

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to eighteen to thirty years' imprisonment on the second-degree murder conviction, to be served consecutively to the mandatory two-year sentence for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that because the prosecution presented insufficient evidence of premeditation and deliberation at his preliminary examination, the trial court abused its discretion in denying his motion to quash the information for first-degree murder. We need not decide whether there was evidence sufficient to bind over defendant on the charge of first-degree murder, because even assuming that the evidence was not sufficient, it does not necessarily follow that defendant's convictions must be reversed. A deficiency in the evidence at the preliminary examination does not require reversal of a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error. *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990); *People v Brownridge*, 225 Mich App 291, 306; 570 NW2d 672 (1997), mod on other grounds 459 Mich 456 (1999). See, also, MCL 769.296; MSA 28.1096.

Defendant also argues, however, that he was denied a fair trial because the trial court's submission of the charge of first-degree murder to the jury, when there was insufficient evidence to sustain that charge, permitted the jury to compromise its verdict. He contends that under such circumstances, prejudice is presumed and reversal of his convictions is required. However, our Supreme Court recently rejected the automatic reversal rule of *People v Vail*, 393 Mich 460; 227

NW2d 535 (1975). *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). While the *Vail* Court found that a defendant is always prejudiced when a jury is permitted to consider a charge unwarranted by the proofs, *Vail*, *supra* at 464, the *Graves* Court concluded that such a rule is inconsistent with the Court's harmless error jurisprudence, as well as MCL 769.26; MSA 28.1096, and the presumption that jurors follow the instructions they are given. *Graves*, *supra* at 483-484, 486. Thus, the Court found, "a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to the jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *Id.* at 486-487. Accordingly, we consider whether the prosecutor presented sufficient evidence to sustain the charge, and defendant's conviction, of second-degree murder.

In reviewing the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Circumstantial evidence and reasonable inferences that arise therefrom may be sufficient to prove the elements of an offense. *Id.* The elements of second-degree murder are:

(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. [*People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), quoting *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984).]

Here, the prosecution presented testimony that a number of young men were involved in an altercation in Chandler Park. Testimony established that defendant left the immediate area of the altercation, retrieved a gun from his car, and fired at least five shots – first two, then a pause, and then three more – toward the area where several people, including the victim, were located, and that he then fled the scene. The victim died as a result of a single gunshot wound to his abdomen. A witness also testified that defendant admitted to her the following day that he shot the victim. From this evidence, a jury could conclude that the prosecution had proven the elements of second-degree murder beyond a reasonable doubt. While defendant denied having or shooting a gun, issues of witness credibility are properly resolved by the fact finder. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Although the *Graves* Court indicated that reversal *may* be warranted on the basis of juror compromise "where a defendant is convicted of the next-lesser offense after [an] improperly submitted greater offense," there is no basis in this record to find that the verdict in this case was the product of juror compromise. *Graves*, *supra* at 487-488. Given the strength of the evidence supporting defendant's conviction of second-degree murder, we find that it is more probable than not that any error in instructing the jury on first-degree murder did not affect the verdict. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Therefore, defendant was not denied a fair trial or prejudiced by the trial court's denial of the motion to quash the information or its denial of the motion for a directed verdict on the first-degree murder charge. *Graves*, *supra* at 486-487; *Hall*, *supra* at 601.

Defendant also argues that he was denied a fair trial because the prosecutor improperly vouched for the credibility of the state's witnesses and improperly appealed to the jurors' sense of civic duty during closing argument. In reviewing claims of prosecutorial misconduct, this Court examines the remarks in context to determine whether they denied defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). "A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *Id.* at 276. A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

We find that the prosecutor's comments do not constitute impermissible vouching. Rather, the prosecutor was commenting on the evidence and stating that the facts, as presented through the testimony of witnesses, were believable. The prosecutor did not indicate that the witnesses were credible simply because he believed them to be telling the truth, but argued that their testimony indicated that they were believable. Such commentary is permissible.

Defendant also argues that the prosecutor impermissibly appealed to the jurors' sense of civic duty by asking them to "show us justice," and asking them to find defendant guilty of first-degree murder because "it's the right thing to do." Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Here, the prosecutor's comments arguably could be understood as an appeal to the jurors' civic duty. Nonetheless, we find that, viewed in their entirety and in context, these comments did not deny defendant a fair and impartial trial. A portion of the prosecutor's comment was a paraphrase of a statement purportedly made by defendant, and similar comments have been characterized as "relatively innocuous for a civic-duty argument." *Id.* Moreover, as discussed above, the evidence supporting defendant's conviction of second-degree murder was strong. Accordingly, we find no grounds for reversal of defendant's convictions. *Id.*

Affirmed.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh