

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARRION JOHNSON,

Defendant-Appellant.

UNPUBLISHED
February 27, 2001

No. 215210
Wayne Circuit Court
Criminal Division
LC No. 98-004094

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COZINE WELCH,

Defendant-Appellant.

No. 215211
Wayne Circuit Court
Criminal Division
LC No. 98-004094

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In Docket No. 215210, defendant Johnson was convicted of second-degree murder, MCL 750.317; MSA 28.549, following a joint bench trial, and sentenced to a term of twenty to forty years' imprisonment. In Docket No. 215211, defendant Welch was convicted of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Welch was sentenced to concurrent prison terms of twenty to forty years for the second-degree murder conviction, and five to ten years for each of the assault convictions, and a consecutive two-year term for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

Docket No. 215210 - Defendant Johnson

Defendant Johnson first argues that the trial court erred in denying his motion for a directed verdict of the original first-degree felony murder charge because there was insufficient evidence of malice to support that charge. He also argues that there was insufficient evidence of malice to support his conviction for second-degree murder. We disagree.

In considering a claim of insufficient evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *Id.*

Malice is “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 Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Malice can be inferred from the facts and circumstances of the killing, from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm, or from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

Viewed most favorably to the prosecution, the evidence in this case was sufficient to support a finding beyond a reasonable doubt that Johnson acted with malice. The prosecution introduced evidence at trial that Johnson acted in concert with codefendant Welch in an attempt to steal a truck behind a retail shop during business hours and engaged three men in a physical altercation. The evidence also showed that Johnson knew that Welch was armed with a handgun. This conduct reflected a wanton and willful disregard of the likelihood that Johnson’s actions would cause death or great bodily harm. Although Johnson testified that he did not know that Welch had a handgun, the trial court expressly found that his testimony was not credible. We will not interfere with the factfinder’s role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Next, Johnson argues that the trial court abused its discretion in admitting evidence of ammunition and a .45 caliber weapon seized from his house where these items were not associated with the charged offense. We disagree. The decision whether to admit or exclude evidence is within the trial court’s discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). The evidence of ammunition and weapons seized from Johnson’s house was properly admitted because it was relevant to his credibility, considering his claims that he had no knowledge that Welch was armed and that he had little contact with guns in general. *People v Mills*, 450 Mich 61, 66-67, 72; 537 NW2d 909 (1995). The trial court did not abuse its discretion.

Finally, we agree with Johnson that the trial court failed to articulate on the record its reasons for imposing his sentence. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). However, we do not agree that this error requires reversal or remand. We have held that, even where a trial court departs from the guidelines, the failure to articulate the reasons for the departure is harmless error. *People v Kreger*, 214 Mich App 549, 554; 543 NW2d 55 (1995). In

this case, where the court sentenced Johnson within the guidelines and there is no argument that the sentence is disproportionate, it would be a waste of judicial resources to remand the case for articulation. *Id.* at 555.

Docket No. 215211 - Defendant Welch

Defendant Welch argues that insufficient evidence was presented to prove beyond a reasonable doubt that he caused the victim's death. We disagree. There was testimony that, following an altercation, Welch pulled out a gun and began shooting at the people in the parking lot. The victim was shot in the head and killed. The fact that no one actually saw Welch shoot the victim does not defeat the causation element of second-degree murder. Circumstantial evidence and reasonable inferences arising from that evidence can be sufficient to prove the elements of the crime. *Truong, supra* at 337. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Welch caused the victim's death. *Id.*

We also reject Welch's argument that the prosecution failed to disprove his claim of self-defense beyond a reasonable doubt. 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 there is a threat of serious bodily harm. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Id.* at 20.

While there was evidence that a second weapon may have been involved, no witness saw anyone other than Welch with a weapon, and no other weapons were found at the crime scene. Viewed most favorably to the prosecution, the evidence was sufficient to disprove Welch's claim of self-defense beyond a reasonable doubt.

Next, Welch argues that defense counsel was ineffective because counsel did not call Welch as a witness to testify in support of his self-defense claim. Because Welch did not raise this issue in a motion for a new trial or request for an evidentiary hearing in the trial court, our review is limited to mistakes that are apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced defendant that he was denied the right to a fair trial. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). The defendant must overcome the presumption that counsel's actions constituted sound trial strategy. *Id.* The fact that a certain strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Here, there was evidence supporting a possible self-defense claim apart from any testimony from Welch. Under the circumstances, the decision whether to call Welch to testify was a matter of trial strategy. Further, the record indicates that Welch affirmatively waived his right to testify on the record after indicating that he had consulted defense counsel on the decision. It is not apparent from the record that any advice provided by defense counsel with

respect to that decision was deficient. Accordingly, Welch failed to show that defense counsel's performance was objectively unreasonable. *Ho, supra* at 191.

Welch also argues that his constitutional right against self-incrimination was violated when the police persisted in questioning him after he indicated his preference to remain silent. *Michigan v Mosley*, 423 US 96, 103-104; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Slocum (On Remand)*, 219 Mich App 695, 700; 558 NW2d 4 (1996). Welch gave a statement to Officer Anthony Woodford the day after the shooting, while he was at the hospital being treated for a gunshot wound. A review of the record reveals that there was only one interrogation. The record also indicates that, upon being advised of his *Miranda*¹ rights, Welch voluntarily waived his rights and gave the statement. The record does not indicate that Welch asserted his "right to cut off questioning" after he was given, and indicated his understanding of, his *Miranda* rights. *Slocum (On Remand)*, *supra* at 700. Thus, Welch's claim lacks factual support and is without merit.

Finally, the trial court did not abuse its discretion in sentencing Welch to a minimum term of twenty years for the second-degree murder conviction. The sentence 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). Welch failed to present any unusual circumstances to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).