STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASHAN D. HALL,

Defendant-Appellant.

UNPUBLISHED
January 15, 2002

No. 223010
Wayne Circuit Court
Criminal Division
LC No. 99-002424

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty-one to sixty-two years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction, the sentences to run consecutively. We affirm.

I

Defendant first argues that the trial court erred when it concluded that his statement to the police, wherein he acknowledged firing at the victim following a dispute over payment for illegal drugs, was voluntary. We disagree.

When reviewing a trial court's determination of voluntariness, this Court is required to examine the entire record and make an independent determination of the issue as a question of law. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). However, this Court affords great deference to the trial court, and will not reverse its findings unless they are clearly erroneous. *Id*. A trial court's findings are clearly erroneous where, after an examination of the record, this Court is left with a definite and firm conviction that the trial court made a mistake. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

In evaluating the voluntariness of a particular statement, a court must determine whether, considering the totality of all the surrounding circumstances, the statement is "'the product of an essentially free and unconstrained choice by its maker,'" or whether the accused's "'will has been overborne and his capacity for self-determination critically impaired . . . .'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). After examining the totality of the

circumstances surrounding the defendant's statement in the instant matter, we are not left with a definite and firm conviction that the trial court erred in finding that the statement was freely and voluntarily given.

Although defendant claims that the subject statement was taken without first honoring his request for an attorney, the interrogating officers testified at the evidentiary hearing that defendant did not ask to speak with an attorney before making his statement. The trial court chose to accept the testimony of the interrogating officer over that of defendant, and we defer to the trial court's superior ability to judge the credibility of the witnesses. See *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).[1] Further, even accepting defendant's claim that he was both fatigued and hungry at the time of questioning, defendant does not allege that these deficiencies were the result of police misconduct, nor does the evidence show that the police exploited these deficiencies so as to invalidate the voluntariness of his statements. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998); see also *Howard*, *supra* at 538 (whether a statement was voluntary is determined "solely by examining police conduct"). Moreover, although a promise of leniency is one factor to be considered in the evaluation of the voluntariness of a defendant's statements, *Givan*s, *supra* at 120, defendant acknowledged during his testimony below that despite the interrogating officers' informing him that if he did not make a statement he would likely be charged with a more serious offense, these officers further informed him that they could make no promises regarding the exact charges that would be levied against him. There was also nothing about the remainder of defendant's personal circumstances or the duration and condition of defendant's detention suggesting that defendant's statement was involuntary. The record shows that defendant was eighteen-years-old[2] at the time of his questioning and that this was not his first contact with police. Moreover, the interview was not prolonged; the officers' entire contact with defendant lasting approximately three hours, including the time for the interview and review of defendant's statement. Accordingly, we find no error in the trial court's conclusion that defendant's statement was voluntary. *Cipriano*, *supra* at 334.

II

Defendant next argues that there was insufficient evidence to sustain his second-degree murder and felony-firearm convictions. Again, we disagree.

We review claims of insufficient evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hutner*,

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[1] In so deferring, we note that defendant does not dispute that he was informed of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) prior to questioning, or that he voluntarily chose to waive those rights.

[2] Contrary to his assertion on appeal, defendant was not a minor for purposes of the criminal justice system. Although there is some confusion in the briefs and lower court record transcripts regarding defendant's age at the time of his questioning, both defendant and his father acknowledged during their testimony below that defendant was eighteen years of age when he made the challenged statement to police on February 22, 1999.

209 Mich App 280, 282; 530 NW2d 174 (1995). Circumstantial evidence and the reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The offense of second-degree murder consists of the following elements: "'(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The element of 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 wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. at 464; *Mayhew*, *supra* at 125. Malice may be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent; the defendant need not actually intend the harmful result. *Mayhew*, *supra* at 125. See also *Goecke*, *supra* at 466. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The evidence produced at trial showed that on the evening of January 18, 1999, the victim approached defendant in her car and asked for drugs. Defendant told her to wait while he went to retrieve the drugs. When he returned and presented the drugs to her, she grabbed them from him and attempted to drive off without paying. At that point, defendant, by his own admission, fired one shot at the woman before panicking and running away. The victim was later found by police slumped over the steering wheel of her car only a short distance from the intersection where the drug deal had gone awry. She was transported to a nearby hospital where she was pronounced dead. The cause of death later was determined to have been a single gunshot wound to neck.

When viewed in a light most favorable to the prosecution, these facts were sufficient to allow a rational trier of fact to infer that defendant acted with a wilful and wanton disregard that death or great bodily harm would result when he fired his gun in the direction of the victim's car, and that in doing so defendant caused the victim's death. These facts similarly constitute a sufficient basis to support defendant's felony-firearm conviction.

III

Defendant next argues that the sentence imposed for his second-degree murder conviction is disproportionate, and that he is, therefore, entitled to resentencing. We disagree.

Because the crimes of which defendant was convicted occurred after January 1, 1999, he was sentenced under the newly enacted statutory sentencing guidelines. See MCL 769.34. Defendant's minimum sentence of thirty-one years (372 months) falls within the guidelines' recommended range of 270 to 450 months. Where, as here, a sentence falls within the guidelines range delineated by the Legislature, this Court's review is specifically curtailed:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing

> absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. [MCL 769.34(10) (emphasis added).]

Therefore, inasmuch as defendant does not assert an inaccuracy in the information used to determine his sentence, or otherwise challenge the guidelines scoring, we must affirm his sentence on appeal.

IV

Defendant next argues that defense counsel was ineffective at trial because he failed to interview two witnesses. Defendant asserts that these witnesses were "the most damming [sic]" presented against him by the prosecutor, and that counsel's failure to speak with them because they lived in a "high crime area" severely prejudiced his defense of the charges. Again, we disagree.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). We find that defendant has failed to meet his burden on either of these required showings.

Absent an evidentiary hearing on the matter, this Court's review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). We find no evidence on the record to support defendant's assertion that defense counsel did not in fact interview these witnesses, let alone that any such failure was premised upon their residence in a high crime area. Moreover, the record indicates that both witnesses were defendant's friends and that, despite the damning nature of their testimony, these individuals did their best to absolve defendant of any guilt for the victim's death. Accordingly, we do not perceive any prejudice to defendant as a result of defense counsel's allegedly deficient performance in this regard.[3]

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[3] Although defendant further asserts that counsel was ineffective in advising him that he should not testify on his own behalf at trial, he does not argue the merits of this issue in his brief on appeal. We, therefore, consider the issue to be abandoned. See *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).