

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH COGER,

Defendant-Appellant.

UNPUBLISHED

July 9, 2002

No. 228699

Wayne Circuit Court

LC No. 99-010260

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to consecutive prison terms of thirty-five to seventy years for the murder conviction and five years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant admitted shooting at the decedent but argued that he fired in self-defense after decedent shot at him. Defendant challenges the trial court's findings. The trial court's findings of fact are reviewed for clear error. *People v Williams*, 228 Mich App 546, 557; 580 NW2d 438 (1998). This Court will defer to the trial court's resolution of factual issues, especially when credibility of witnesses is involved. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Here, the trial court recognized that defendant had no burden of proof. Defendant testified in this case, however, and it is apparent that the trial court did not entirely believe defendant's version of the events leading up to the shooting. The trial court believed that there had been an "argument" between defendant and the decedent but emphasized that even if defendant's version was true, it did not excuse his conduct. Defendant acknowledged shooting at the decedent and the trial court found that defendant had a duty to retreat when he had an opportunity to do so because the shooting happened on a public street. It is apparent that the trial court was aware of the factual issue and resolved it. *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989).

Defendant also asserts that the trial judge improperly relied on his own experience, reached conclusions contrary to the physical evidence, relied on defendant's failure to prove his own innocence, misapplied the law, and failed to consider the requested lesser offense of manslaughter. The trial judge expressed his disbelief in defendant's claim that decedent had previously shot at him and that the police did not take a report of the matter, and the court was

not convinced that there was a crack house across the street. The trial court was entitled to make these credibility determinations. *Cartwright, supra*; *People v Hughes*, 217 Mich App 242, 248-249; 550 NW2d 871 (1996). Moreover, as defendant concedes, the trial court stated on the record that defendant “has no obligation to prove or disapprove [sic] anything.” The burden of proof was not shifted by the trial court’s disbelief of defendant’s theory.

Defendant also claims that the trial judge disregarded physical evidence that a bullet exited through decedent’s windshield when the judge stated in his findings that a hole in decedent’s windshield was an entry hole and disregarded evidence that shells from a caliber different from defendant’s weapon were found at the scene. Whether defendant was standing in front of decedent’s car or to the side when he fired the fatal shot, it is undisputed that defendant fired several bullets into decedent’s car and that decedent was killed as a result. No gun was found on decedent and the trial court found that defendant had a duty to retreat. On these facts, even if the trial judge was wrong about which of decedent’s windows defendant fired into, reversal is not required. Further, the trial judge was not required to accept defendant’s theory that the spent casings on the street were from decedent’s weapon when no gun was found on decedent.

Finally, defendant argues that the trial court erred in refusing to consider the lesser offense of voluntary manslaughter. We note that in this bench trial, the trial judge is presumed to know the law. *People v Sexton*, ___ Mich App ___; ___ NW2d ___ (Docket No. 224917, issued March 1, 2002), slip op at 9. The finder of fact must consider a cognate lesser offense if there is sufficient evidence to convict the defendant of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). This Court reviews the evidence to determine whether consideration of the lesser offense is consistent with the evidence and the defendant’s theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). To support a conviction of voluntary manslaughter, there must be evidence that defendant killed in the heat of passion, that there was adequate provocation, and that there was no lapse of time during which a reasonable person could control his passions. *Pouncey, supra*. Also, self-defense may properly be applied to a charge of manslaughter. *In re Gillis*, 203 Mich App 320, 322-323; 512 NW2d 79 (1994); *People v Young*, 120 Mich App 645, 650; 327 NW2d 329 (1982).

In the present case, no gun was found on decedent or in decedent’s car. In addition, the trial court found there had been ample opportunity for defendant to retreat and concluded that defendant did not fire the shots in self-defense. Finally, the trial court was not convinced that defendant’s ability to reason was blurred by passion. *Pouncey, supra*. Although the trial judge did not specifically discuss manslaughter in his findings, it is apparent from the record that the trial court concluded that the evidence did not support a finding of manslaughter in this case. Under these circumstances, we find no error requiring reversal.

Defendant also argues that he must be resentenced because the trial judge allegedly relied on improper considerations and improperly punished him for his failure to admit guilt and for his religious beliefs. Defendant suggests that the trial court sentenced him harshly because of these improper considerations, although we note that defendant’s minimum sentence is within the range recommended by the sentencing guidelines and, in fact, does not even fall at the high end of the guidelines range. We do not agree the trial court’s comments reflect that defendant was improperly punished because of his refusal to admit guilt or because of his religious beliefs. It is undisputed that defendant shot and killed the decedent, and it was not improper for the trial court

to suggest that he did not believe defendant's expression of remorse. Lack of remorse and lack of potential for rehabilitation are proper considerations at sentencing. *People v Houston*, 448 Mich 312, 326; 532 NW2d 508 (1995).

Because the crime in this case was committed after January 1, 1999, the statutory guidelines apply. MCL 769.34(1) and (2). Defendant acknowledged at sentencing that the guidelines were properly scored and that the presentence investigation report was correct. Absent an error in scoring or inaccurate information relied on by the trial court, this Court must affirm a sentence within the guidelines range. MCL 769.34(10); *People v Laversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Because we are not convinced that the trial court enhanced defendant's sentence on an improper basis, there is no challenge to the scoring or information relied on by the trial court, and defendant's thirty-five year minimum sentence is within the guidelines range, we affirm defendant's sentence. MCL 769.34(10).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot