STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2015
v	No. 320219 Wayne Circuit Court
MICHAEL CURTIS LEWIS, Defendant-Appellant.	LC No. 13-001351-FC

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 43 to 80 years' imprisonment for his second-degree murder conviction, 20 to 40 years' imprisonment for his assault with intent to murder conviction, one to five years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. Because the evidence was sufficient to support defendant's convictions and his sentence was not cruel and unusual, we affirm.

The present case arises from the shooting of Vincent Green and Anthony Brooks in connection with the operation of a drug organization. In particular, defendant's cousin, Tyreese Thornton,[1] was the leader of a drug organization involving the sale of heroin from three homes in Detroit. The victims, Green and Brooks, along with a third man, Charlton Hunt, had been selling drugs from a vacant house on Minden Street in Detroit. Defendant and codefendant Charles Howard[2] were also involved with the drug organization. Defendant in particular was in charge of collecting money from the house, paying the "workers," and dropping off drugs.

On December 22, 2012, defendant and Howard went to the Minden Street house to collect drug money from heroin sales at the house. When they arrived at the house, they

[1] Thornton was deceased at the time of defendant's trial.

[2] At trial Howard testified that, for his role the in the present case, he pled guilty to one count of second-degree murder.

remained outside in their vehicle and spoke with Green, who told them that Hunt had the money. Defendant called Hunt, who then came to the house and retrieved $2,060 from a hiding place in the attic. Defendant expected to receive $2,400, and Brooks was called on the telephone about the missing money. When Brooks did not answer the call, defendant and Howard, who was armed with a baseball bat, went into the home with Green and left Hunt outside. Inside the house, Howard hit Green with a baseball bat and searched Green for the money. Defendant then told Hunt to bring Brooks to the house. Patrice Carter, Green's girlfriend who had been in a back room of the house, was allowed to leave the home before Brooks arrived.

When Hunt returned to the house with Brooks, Brooks went inside while Hunt again stayed outside. Inside the house, Howard beat Brooks with the baseball bat. Defendant then shot Green three times, and then he shot Brooks twice with a .40 caliber gun. After shooting Brooks, defendant shot Green four more times, and then before leaving the house, defendant shot Brooks again. Green died as a result his gunshot wounds. Brooks survived and was taken to the hospital after he called his grandmother for help.

Before trial, Brooks identified defendant in a live line-up, and Howard named defendant as the shooter in a statement to police. At trial, both Brooks and Howard identified defendant as the shooter. Howard also testified that, one day when he and defendant were both in court at the same time, he received a letter from defendant offering to pay him to testify that Hunt shot the victims. Howard read this letter to the jury. Further, although Carter did not witness the shooting, she identified defendant at trial as one of the men in the home that night and she testified that she saw defendant with a gun before she left the home. Hunt, who could hear gunshots and sounds of a beating from inside the house, also identified defendant as one of the men who came to the home that evening, and Hunt testified that defendant and Howard came out of the home after shots were fired.

In contrast, defendant testified on his own behalf at trial. Defendant admitted to dealing drugs for Thornton, but he denied shooting anyone. He claimed that, on the night in question, Thornton came to the house with two friends and Thornton shot the victims because he had discovered that Brooks was working for someone else. In his testimony, defendant admitted to offering to pay Howard to name someone else as the shooter. A jury convicted defendant as noted above. He now appeals as of right.

On appeal, defendant first asserts that there was insufficient evidence to support his convictions because the prosecution failed to establish his identity as the shooter beyond a reasonable doubt. In particular, defendant maintains that Howard's statements were tainted by self-interest relating to his plea agreement, that Brooks made statements before trial which were inconsistent with his trial testimony, that Carter was not in the house during the shooting and she failed to identify defendant in a photo array before trial, and that Hunt was outside when the shootings occurred. According to defendant, his convictions must be reversed because the prosecution failed to present "credible and reliable evidence" to establish his identity as the shooter.

A defendant's challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court views the evidence "in the light most favorable to the prosecutor to

determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Additionally, this Court will not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Rather, we resolve all conflicts in the evidence in favor of the prosecution. *Kanaan*, 278 Mich App at 619.

Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Like any element, identity may be proved by either direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Positive identification of the defendant by witnesses may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Id.*

In this case, viewed in a light most favorable to the prosecution, the evidence was clearly sufficient to establish defendant's identity as the shooter. Four eyewitnesses placed defendant at the scene of the shooting, Carter specifically saw defendant with a gun shortly before the shooting, and two of the witnesses expressly identified defendant as the shooter.

To begin with, Howard, who had a long acquaintance with defendant, went into the home with defendant. Howard admitted to using a baseball bat to beat the victims. He was present for the shootings, and he identified defendant as the shooter. Likewise, Brooks also identified defendant as the shooter. Brooks knew defendant and he had seen defendant every day between Thanksgiving and the shooting on December 22. Brooks made what police described as an "instant" identification of defendant in a pre-trial line-up, he named defendant as the shooter in a statement to police in the hospital, and, at trial, Brooks described lying on the ground facing defendant while defendant stood over him. Brooks testified that he had did not have any doubt that it was defendant who shot him. Direct eyewitness testimony from Brooks and Howard positively identifying defendant as the shooter was sufficient to support his convictions. *Davis*, 241 Mich App at 700,

In addition to testimony from Brooks and Howard, defendant conceded in his own testimony that he was at the house at the time of the shootings. Further, although Hunt was not inside the house at the time of the shooting, he testified that defendant was present that evening, that defendant emerged from the home with Howard after shots were fired, and that, in contrast to defendant's theory of the case, Thornton was *not* at the house. Furthermore, Carter was inside the house before the shooting. She testified at trial that defendant came to get her out of the back room of the house and that, when he did so, "he had a gun on him." Carter identified defendant at trial, and she specifically recalled a tattoo on his neck which the jury was able to view when defendant was instructed to show the jury his neck. Taken together, evidence from Carter and Hunt clearly places defendant at the scene of the shooting in possession of a gun, while Howard, for example, was consistently described—even by defendant—as carrying a baseball bat and no one but defendant named Thornton as the shooter. On the whole, given Brooks's and Howard's eyewitness testimony naming defendant as the shooter, particularly when coupled with evidence

from Carter and Hunt, the evidence was sufficient to establish defendant's identity as the shooter in this case.[3]

In contesting the sufficiency of this evidence on appeal, defendant fundamentally asks this Court to reassess the credibility of these witnesses and the weight the jury should have given their respective testimony, which we will not do. See *Eisen*, 296 Mich App at 331. The jury was apprised of Howard's plea bargain, Carter's inability to identify defendant pre-trial in the photo array, and Brooks's prior inconsistent statements. The credibility of their identification testimony at trial in light of these circumstances was a question for the jury which we will not resolve anew on appeal. See *Davis*, 241 Mich App at 700. Given the identification testimony presented at trial, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions.

Defendant next contends that his sentence amounted to cruel or unusual punishment. In his brief, defendant provides a list of personal facts, including details about his criminal history, his family life, and his educational background. According to defendant, his sentence is disproportionately severe given that he was only 27 years old when convicted and that his convictions rest on what defendant considers to be unreliable evidence.

Defendant did not advance a claim that his sentences were unconstitutionally cruel or unusual in the trial court, meaning that this issue is unpreserved. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). This Court reviews unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order for defendant to establish plain error, he must show that (1) an error occurred, (2) the error was plain, clear or obvious, (3) and the plain error affected substantial rights. *Id*. The third prong requires a showing of prejudice, which occurs when the error affected the outcome of the lower court proceedings. *Id*.

The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1. § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment. US Const, Am VIII. See *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). If a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550

[3] Aside from eyewitness testimony, following the shooting, defendant acted in a manner which evidenced his consciousness of guilt. See *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008) ("A jury may infer consciousness of guilt from evidence of lying or deception."). For example, although defendant testified at trial that he witnessed Thornton commit the shootings, before trial, defendant lied to police when he told them he was not even at the scene of the shooting. In a written letter, he also tried to bribe Howard to procure Howard's perjured testimony to the effect that Hunt was the shooter. Defendant's efforts at deception, including his efforts to dissuade Howard from identifying him and to instead name Hunt as the shooter could be considered by the jury as evidence demonstrating defendant's consciousness of guilt. See *id.*; *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *People v Casper*, 25 Mich App 1, 7; 180 NW2d 906 (1970).

(2000). "In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). "[A] sentence must be proportionate to the seriousness of the crime and the defendant's prior record." *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002) (citation omitted). "A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment." *Bowling*, 299 Mich App at 558.

"In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Id.*, quoting *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Although a sentencing court may consider any factor not prohibited by law, "unusual circumstances" for purposes of overcoming the presumption of proportionality do not include employment, a minimal criminal history, or an adult defendant's age. See *Benton*, 294 Mich App at 205; *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, a defendant is not entitled to a lesser sentence based on assertions that the evidence of his guilt was insufficient or unreliable. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Rather, if the evidence is legally insufficient to support a conviction, the remedy is to vacate that conviction, not mitigate the sentence imposed for that conviction. *Id.*

In this case, it is uncontested that defendant's sentence falls within the recommended minimum sentencing range under the legislative guidelines. Because his sentence is within the recommended guideline range, it is presumptively proportionate and valid. *Brown*, 294 Mich App at 390. In an effort to overcome this presumption, defendant notes that at the time of his convictions he was 27 years old, his adult criminal history consisted of only two prior convictions that were drug related, he had no prior juvenile record, he had completed the ninth grade, he had three children, and he was a caretaker for his disabled brother. Defendant also asserts that his sentence is cruel or unusual because of the "quality of the evidence" presented at trial, suggesting that his convictions were based on insufficient evidence. Contrary to defendant's arguments, his claim of insufficient evidence is without merit as discussed above and, in any event, a claim of insufficient or unreliable evidence does not render defendant's sentence cruel or unusual. See *Powell*, 278 Mich App at 323. Likewise, neither defendant's age nor his personal characteristics with respect to his education, family, and criminal history constitute "unusual circumstances" rendering defendant's sentence disproportionate or invalid. Cf. *Benton*, 294 Mich App at 204-206; *Daniel*, 207 Mich App at 54. Quite simply, none of the factors cited by defendant demonstrate that he should be considered less culpable than others convicted of the same crimes. See *Benton*, 294 Mich App at 205. Indeed, defendant's cursory assertion of purportedly mitigating factors wholly fails to acknowledge the gravity of his crimes which included the brutal shooting of two men and which resulted in the death of one of his victims. See *Lee*, 243 Mich App at 188. Defendant also makes no effort to demonstrate that his sentences are cruel or unusual in comparison to the penalties imposed for crimes in this state or for the same crime in other states; and, given the gravity of the offenses in this case, we see nothing abnormally harsh or excessive in defendant's sentence. See *Bowling*, 299 Mich App at 559. In short, defendant has not overcome the presumption that his sentence within the guideline

range was proportionate. Therefore, defendant's sentence does not constitute cruel or unusual punishment, and no error occurred.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Stephen L. Borrello