

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LARRY BERNARD MCGAHA,

Defendant-Appellant.

UNPUBLISHED

June 28, 2012

No. 301220

Wayne Circuit Court

LC No. 10-007430-FC

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with intent to commit 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 26 to 40 years' imprisonment for the assault with intent to commit murder convictions, 5 to 15 years' imprisonment for the felon in possession of a firearm conviction as a third habitual offender, MCL 769.11, and two years' imprisonment for the felony-firearm conviction. Defendant appeals his convictions and sentences as of right. We affirm.

On May 12, 2010, a fight occurred between neighbors and family members on Prest Street in Detroit. The police came, broke up the fight, and stayed on the street for about 30 or 40 minutes. After the police left, another altercation broke out. Three men — Willie Johnson, Lamario Fuller, and Ryan Rogers — were each shot twice by the same gunman, who had approached the altercation from behind a tree and pulled out a gun. A witness, Sharon Johnson, identified defendant as the shooter.

Defendant argues that the evidence was insufficient to support his convictions because Sharon Johnson was the only witness who identified defendant. We review a claim of insufficient evidence de novo. *People v Nowak*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, this Court does not interfere with the fact-finder's role of determining what inferences can be fairly drawn from the evidence and determining the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Identity is an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Positive identification by a witness may

be sufficient to support the identity of the defendant as the perpetrator and, as a result, a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Questions concerning the credibility of the identification testimony are for the trier of fact to resolve, and this Court will not interfere with that determination. *Id.*

Although Sharon Johnson was the only witness who saw defendant's face and was able to identify defendant as the shooter, the other witnesses' testimony corroborated her identification. Fuller, Willie Johnson, Rogers, and Sharon Johnson all testified that they did not see anyone carrying any weapons when the altercation began. Sharon testified that defendant approached after the fighting began, and he was wearing a blue jacket or hoodie and a black hat. Rogers, Willie Johnson, and witness Michelle Thomas described seeing an older man wearing a royal blue hoodie and a black hat approach after the fighting began. Rogers, Willie Johnson, and Thomas noticed that the man in the blue hoodie had a shiny or chrome gun.

After seeing the gun drop to the ground, Sharon Johnson saw Willie Johnson and defendant wrestle for the gun. She observed defendant eventually retrieve the gun and start shooting. Willie Johnson testified that, after the man in the blue hoodie dropped the gun, Johnson ran to pick it up. Johnson and the man wrestled for it, the gun went off, and Johnson was shot. When Johnson realized that he had been shot, he turned to run into his house and looked back at the man with the gun. Johnson saw the man point at him and shoot him again. Thomas also watched Johnson go for the gun and wrestle with the man in the blue hoodie. Thomas then saw the man point the gun at Johnson and shoot. In addition, Ebonique Dawson, defendant's witness, and defendant both testified that defendant was at the scene after the fighting started, just as the other witnesses had testified.

In sum, Sharon Johnson and the other witnesses all described the man in the hoodie as the shooter, and Sharon identified the man in the hoodie as defendant. Viewed in a light most favorable to the prosecution, this evidence was sufficient to establish defendant's identity beyond a reasonable doubt.

Defendant next argues that his sentences are cruel and unusual punishment because his convictions were based on insufficient evidence. However, if the evidence had not been legally sufficient, the remedy would have been to vacate his convictions, not his sentences. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). As discussed above, there was sufficient evidence to support defendant's convictions.

Defendant also argues that his sentences were cruel and unusual punishment because he was 45 years old and would have to spend the next 28 years in prison. Both the United States and Michigan Constitutions prohibit inflicting cruel and unusual punishment upon a defendant convicted of a charged offense. US Const, Am VIII; Const 1963, art 1, § 16. But a sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment. *Powell*, 278 Mich App at 323; *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). There is no dispute that defendant's sentences were within the guidelines range and, therefore, were presumptively proportionate.

There is also no requirement for the trial court to tailor a defendant's sentence in relationship to his age. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997).

Considering the severity of the convicted offenses and that defendant's sentences were within the guidelines range, defendant has not overcome the presumption that his sentences were proportionate. Accordingly, defendant's claim of cruel and unusual punishment must fail.

Affirmed.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder

/s/ Kirsten Frank Kelly