

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROBY,

Defendant-Appellant.

UNPUBLISHED
November 21, 2013

No. 311221
Wayne Circuit Court
LC No. 11-010972-FC

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317. He was sentenced as a third habitual offender, MCL 769.11, to 40 to 60 years' imprisonment. Defendant appeals by right, and we affirm.

Defendant's conviction arises from the shooting death of the victim, Hassan Green. The victim was confined to a wheelchair because of an earlier shooting. He was at the home of a friend, where the men engaged in the sale of marijuana. The friend left to do laundry. When the friend returned, at least three men were in the home with guns drawn. The friend tried to avoid making eye contact with the assailants, but identified defendant as the man standing in front of the victim. The victim told the men not to shoot his friends. The victim was shot, and the men fled the home. Cell phone mapping indicated that defendant was in the vicinity of the shooting at that time. The victim's friend identified defendant from a photographic line-up. Additionally, nearly a year later, a neighbor identified defendant as an individual who fled the home that evening. Defendant was acquitted of first-degree felony-murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, but convicted of second-degree murder, MCL 750.317.

Defendant first alleges that there was insufficient evidence to convict him of second-degree murder because the testimony of the witnesses was incredible and unreliable. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a

reasonable doubt. Appellate review of a challenge to the sufficiency of the evidence is deferential. The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. [*People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010) (citations omitted).]

All conflicts in the evidence are resolved in favor of the prosecution, and circumstantial evidence and reasonable inferences arising from that evidence may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). The prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. See *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). A positive identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The trier of fact determines the credibility of identification testimony, and on appeal the issue is not resolved anew. *Id.*

In the present case, the defense attacked the credibility of the testimony of the witnesses in light of the delay in coming forward, discrepancies in their statements, and the inconsistencies in the identification of the number of men and guns. Despite the defense attack, the jury nonetheless convicted defendant of second-degree murder. In light of the record evidence, despite any discrepancies, there was sufficient evidence for the jury to convict defendant of second-degree murder. The victim's friend identified defendant as standing in front of the victim and recognized his voice. We do not resolve identification and credibility issues anew on appeal. *Malone*, 287 Mich App at 654; *Davis*, 241 Mich App at 700.

Next, defendant asserts that the imposition of a 40 to 60 year sentence constituted cruel and unusual punishment in light of defendant's age and substantial health problems. We disagree. There is a presumption that a sentence given within the guidelines range is proportionate, and a proportionate sentence is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "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 defendant's age is insufficient to overcome the presumptive proportionality of his sentence, particularly where the defendant has a lengthy criminal history and commits violent offenses. *People v Bowling*, 299 Mich App 552, 558-559; 830 NW2d 800 (2013). Defendant failed to demonstrate that his sentence was cruel or unusual by comparing the penalty imposed for other crimes in this state as well as other states. *Brown*, 294 Mich App at 390. His age and health issues are similarly insufficient to overcome the presumption of proportionality particularly in light of his extensive criminal history. *Bowling*, 299 Mich App at 558-559. Accordingly, defendant is not entitled to appellate relief.

In his Standard 4 supplemental brief,¹ defendant contends that “[j]udicial fact finding on various offense variables, all of which increased the range of punishment” was improper because they were never proven beyond a reasonable doubt. However, a review of the sentencing transcript reveals that defendant did not raise any scoring challenges for the trial court to resolve. Although the prosecutor noted that an additional ten points should be scored for PRV 6 because defendant was on probation at the time of this offense, defense counsel did not object and the additional points did not alter the sentencing guidelines range. Contrary to defendant’s assertion, the trial court did not find facts that increased the mandatory minimum sentence. Moreover, defendant’s reliance on *Alleyne v United States*, 133 S Ct 2151, 2163; 186 L Ed 2d 314; ___ US ___ (2013), is misplaced because the Supreme Court expressly held that the ruling “does not mean that any fact that influences judicial discretion must be found by a jury.”

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello

¹ Administrative Order, No. 2004-6, Standard 4, allows a defendant to file a brief *in propria persona* to address issues that his counsel did not find meritorious.