STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAYMOND PERRY MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED
July 26, 1996

No. 177972
LC No. 93-009471

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years for the felony-firearm conviction to be followed by twenty to thirty years for the second-degree murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his conviction was against the great weight of the evidence in light of the serious credibility problems of two of the prosecution witnesses. We disagree. The trial court could properly consider the inconsistent testimony and credibility of these witnesses in determining whether the verdict was against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). However, giving due deference to the trial court's credibility evaluation, *People v Canter*, 197 Mich App 550, 560; 486 NW2d 336 (1992), we cannot say that the trial court's finding that the verdict was not against the great weight of the evidence was an abuse of discretion, *Herbert*, *supra* at 477.

Defendant also argues that the prosecution presented insufficient evidence to show that his actions were a proximate cause of the decedent's death. Defendant argues that the decedent's companion delayed seeking medical treatment for the decedent and that this delay was an intervening factor which precluded a finding that defendant's actions were a proximate cause of the death. See

* Circuit judge, sitting on the Court of Appeals by assignment.

People v Tims, 449 Mich 83, 96; 534 NW2d 675 (1995). This argument fails for two reasons. First, the companion testified that, immediately after the shooting, he drove to a gas station and called for an ambulance. Second, if defendant inflicted a dangerous wound to the decedent, the decedent's failure to seek medical attention cannot be considered an intervening factor. *People v Townsend*, 214 Mich 267, 278-279; 183 NW 177 (1921). By the same reasoning, any delay by the companion in seeking medical attention for the decedent cannot be an intervening factor. Considering this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant's actions were a proximate cause of the decedent's death. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant next challenges the admission of certain expert testimony. The factual assumptions underlying the hypothetical question which defendant challenges were in substantial accord with the facts in evidence. See *Gardner v Van Buren Public Schools*, 197 Mich App 265, 273; 494 NW2d 845 (1992), rev'd on other grounds 445 Mich 23, 27-28; 517 NW2d 1 (1994). Further, the response which defendant challenges did not assume facts not in evidence. The witness was simply discussing the possible effects of the gunshot wound based on its exact location. The trial court did not abuse its discretion in admitting this expert testimony. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

Defendant finally challenges the scoring of Offense Variable (OV) 3, Intent to Kill or Injure, and the proportionality of his sentence for the second-degree murder conviction. We reject both challenges. Although a lower score is allowed for OV 3 if the killing occurred in a combative situation, such a score is inappropriate in this case because the record suggests that the decedent was acting in self-defense in the fight which preceded the shooting and that the fight ended before the shooting occurred. See *People v Rodriguez*, 212 Mich App 351, 354-355; 538 NW2d 42 (1995). We will not disturb the trial court's scoring decision, if there is evidence on the record to support it. *People v Hernandez*, 443 Mich 1, 16503 NW2d 629 (1993).

Defendant's twenty- to thirty-year sentence is presumptively proportional because it falls within the calculated minimum sentence guidelines range of ten to twenty-five years. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Because defendant did not raise any unusual circumstances at the sentencing hearing, this issue is not preserved for appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1991). Further, failure to review this issue will not result in manifest injustice, because there is no evidence to support defendant's characterization of the decedent as a willing participant in or instigator of the conflict which preceded the shooting.

Affirmed.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant