

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL LOFTIS,

Defendant-Appellant.

UNPUBLISHED
(AFTER REMAND)
June 28, 1996

No. 170570
LC No. 87-010136

Before: Hood, P.J., and Young and Brown,* JJ.

PER CURIAM.

Defendant appeals by right from his convictions for second-degree murder, MCL 750.317; 28.549, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to seventy years of imprisonment for the second-degree murder conviction consecutive to a two-year sentence for the felony-firearm conviction. We affirm.

I

Defendant was originally charged and convicted of first-degree murder. MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.424(2). On appeal, this Court reversed his conviction and remanded the case for a new trial. *People v Loftis*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 1993 (Docket No. 113673).

On remand, defendant was convicted for killing his wife, from whom he had been estranged and separated at the time of the homicide. Hoping to find missing social security checks she believed were in defendant's van, the decedent searched defendant's van which was parked outside his residence. When defendant arrived, an argument between the couple ensued. Defendant entered the van and drove away with the decedent. The decedent's son ran after the van and entered it. The son testified that defendant and the decedent continued their argument until defendant pulled a gun and shot the

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

decedent in her head. After seeing his mother fall towards the middle of the van, the son jumped out of the rear passenger side door, and heard more gunshots as he was running away.

Officers called to the scene discovered the decedent in the van with a bullet hole in her head and defendant suffering from multiple gunshot wounds.

II

Defendant first challenges the proportionality of his sentences and the scoring of the sentencing guidelines. Defendant's twenty-five year minimum sentence for the murder conviction fell within the range recommended by the guidelines, and his two-year sentence for the felony-firearm conviction is mandated by statute. Thus, his sentences are presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Defendant has failed to establish "unusual circumstances" which would overcome the presumption of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Moreover, defendant has waived consideration of this issue on appeal by failing to raise it at sentencing. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Defendant also claims that his maximum sentence of seventy years exceeds his life expectancy, and thus, violates the holding in *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). Defendant's claim is without merit because only his minimum sentence must satisfy the standard announced in *Moore*. *People v Weaver*, 192 Mich App 231, 234; 480 NW2d 607 (1991). Accordingly, since defendant can reasonably be expected to serve his minimum sentence, we find no error.

Defendant next argues that the trial court improperly scored Offense Variables (OV) 3, 6, and 13. Defendant did not object to the guidelines scoring at sentencing and thus, waives this issue on appeal. *People v Eaves*, 203 Mich App 356, 358; 512 NW2d 1 (1992). Nevertheless, the evidence at trial established that defendant shot his ex-wife in the head while she and her son were confined to the van he was driving. Accordingly, we find ample evidence in record to support the scoring of each variable. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). In addition, with respect to OV 13, we find the trial court properly found that the decedent's son suffered serious psychological injury necessitating professional treatment. See *People v Elliott*, 215 Mich App 259, 263; ___ NW2d ___ (1996) ("The guidelines reference the necessity of treatment, not the success of obtaining it.").

Since we affirm defendant's sentences and the trial court's scoring of the guidelines, it is unnecessary to address defendant's request to be resentenced before a different judge.

III

Defendant next argues that the evidence was insufficient to support a conviction for second-degree murder. Specifically, defendant claims that there was insufficient evidence of intent. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in light of the most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The crime of second-degree murder is established where the defendant caused the death of the victim and the killing was done with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 84 (1993); MCL 730.317; MSA 28.549. Malice is defined as the “intent to kill, the intent to do great bodily harm or the intent to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm will be the probable result.” *Kemp, supra* at 322. Malice may be inferred from the circumstances surrounding the killing. *Id.* The decedent’s son witnessed defendant shoot his mother in the head and heard two additional gunshots as he escaped from the van. The medical examiner confirmed that the decedent died from multiple close range gunshot wounds. Therefore, we find there was sufficient evidence for a reasonable juror to conclude that defendant acted with malice. Moreover, defendant’s claim that he acted in the “heat of passion” was a credibility question that was properly resolved by the jury. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

IV

Defendant claims that the trial judge erred in several respects. First, defendant claims that the trial judge should have been disqualified because she was biased against defendant. Although defendant moved to disqualify the trial judge, defendant did not seek de novo review by the Chief Judge of Recorder’s Court, and thus, has waived this issue on appeal. *People v Williams (After Remand)*, 198 Mich App 537, 544; 499 NW2d 404 (1993). Nonetheless, defendant failed to establish that the trial court’s comments during a pretrial conference indicated a preconceived belief in defendant’s guilt. The trial judge was apparently commenting on the prosecution’s strategy. Moreover, since defendant was convicted by a jury, any comment by the trial judge during a pretrial conference did not prejudice him at trial. Therefore, we find the court did not abuse her discretion when denying defendant’s motion for disqualification. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992).

Second, defendant claims that the court abused its discretion when denying defendant’s request for a waiver trial, and that the judge denied this request in order to evade the disqualification issue. A criminal defendant does not have an absolute right to waive a jury trial. *People v Kirby*, 440 Mich 485, 493; 487 NW2d 404 (1992). Also, defendant fails to show how the judge’s alleged bias deprived him of a fair trial. See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 111 (1988).

Therefore, we conclude that the trial court properly exercised her discretion when denying defendant's request for a waiver trial.

Finally, defendant claims that the trial court erred when refusing the jury's request to have witness testimony reread to them during deliberations. We disagree. A court has the discretion to refuse a jury's request to review certain testimony or evidence. MCR 6.414(H). Our review of the court's remarks indicate that the judge apprised the jury that preparing a copy of the testimony would be a time consuming endeavor. She encouraged the jurors to rely on their memories and remained open to another request if they were still having difficulty. The court's actions were proper. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990).

V

Defendant also maintains that a plethora of errors by the prosecution deprived him of a fair trial. Because defendant did not object to these errors at trial, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first claims that the prosecutor argued facts not in evidence, misstated the law, and invited sympathy for the victim's families. After reviewing these arguments in their entirety, we conclude that there was no miscarriage of justice. The prosecutor's argument was supported by the evidence presented at trial and properly raised issues in response to defendant's theory of manslaughter. *People v Bahoda*, 448 Mich 261, 282, 286-287; 531 NW2d 659 (1995). Also, we find any claimed errors in the prosecutor's statements could have been cured with a cautionary instruction if an objection had been raised and an instruction requested.

Defendant also contends that the prosecutor engaged in misconduct in her cross-examination of defendant. Again, no objections were made. Since the prosecutor's questions were relevant to the issues raised at trial, we conclude that the questioning did not result in a miscarriage of justice.

Finally, defendant claims that the prosecutor failed to produce two res gestae witnesses, entitling him to a new trial. Defendant did not raise this issue below. Under the present res gestae statute, MCL 767.40a; MSA 28.980(1), the prosecutor has no affirmative duty to endorse and produce *all* res gestae witnesses. The res gestae statute only imposes a duty on the prosecution, and the investigating law enforcement officers to exercise due diligence in discovering the identities of res gestae witnesses. *People v DeMeyers*, 183 Mich App 286, 291; 454 NW2d 202 (1990). Defendant has failed to establish that the prosecution did not exercise due diligence in obtaining and presenting res gestae witnesses. Also, based on our review of the record, we find defendant was not prejudiced by the absence of these witnesses since their testimony would have been cumulative. See *id.*, 293-294.

VI

Lastly, defendant argues that his trial counsel was ineffective for failing to address the errors that he has raised on appeal. In the absence of an evidentiary hearing, our review is limited to the alleged errors apparent on the current record. *People v Johnson*, 141 Mich App 125, 129-130; 373 NW2d 263 (1985).

In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Having reviewed defendant's claimed errors in the record, we do not find that his trial counsel's conduct during trial was other than that which might flow from tactical decisions which any trial lawyer is called upon to make. Accordingly, defendant has not established that he received ineffective assistance of counsel. *Pickens, supra*. Based upon the current record, we decline to remand this matter for further proceedings pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Harold Hood

/s/ Robert P. Young, Jr.

/s/ Thomas Leo Brown