

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMAN LOVELY,

Defendant-Appellant.

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UNPUBLISHED

August 9, 1996

No. 181186

LC No. 93-012804

Before: Cavanagh, P.J., and Hood and J.J. McDonald,\* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; 28.549. The trial court sentenced defendant to eighteen to twenty-seven years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in denying defendant's motion to suppress his statement. When reviewing a trial court's determination of the voluntariness of a confession, this Court must examine the entire record and make an independent determination. However, great deference is given to the trial court's assessment of the credibility of the witnesses, and its findings of fact will not be reversed unless clearly erroneous. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992).

We conclude that defendant voluntarily waived his *Miranda*<sup>1</sup> rights. After reviewing the evidence presented at the hearing, we cannot find that the trial court clearly erred in finding that defendant was alert and conscious when he waived his *Miranda* rights, and he was not coerced into giving his statement. The trial court considered the following factors in rendering its decision: defendant is not retarded, he understands English, and he was not suffering from psychosis, hallucinations, or delusions. Although defendant claims that a police officer harassed him and threw chairs, no evidence exists besides defendant's own testimony to support this assertion. We defer to the trial court's superior ability to view the evidence and evaluate the credibility of the witnesses. See *Brannon, supra*.

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

Defendant next alleges that he was denied a fair trial because the trial court, in its findings of fact, improperly referred to facts not in evidence. Specifically, defendant claims that the trial court incorrectly referred to evidence of sexual activity between defendant's wife, Tomika Stokes, and the decedent, Thurman Harris. We find no error requiring reversal. An evidence technician testified that Harris' body was found without any pants. The trial court merely inferred from the technician's testimony that sexual activity may have occurred between Stokes and Harris, thereby providing defendant with a motive for killing Harris. The trial court may draw reasonable inferences from the facts to assist in its determination that defendant had an intent to kill. *People v Guy Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985). However, even if the trial court did err in referencing sexual activity between Stokes and Harris, any error was harmless beyond a reasonable doubt due to the overwhelming evidence supporting defendant's guilt.

Defendant also argues that he is entitled to resentencing because offense variable (OV) 3 was misscored at twenty-five points, as opposed to ten points. Appellate review of scoring decisions is very limited. This Court will affirm a scoring decision if evidence exists to support the score. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

Twenty-five points should be assessed for OV 3 when there is an "[u]npremeditated intent to kill; or intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." Michigan Sentencing Guidelines (2d ed, 1988), p 77. In the present case, the trial court specifically found that there was not adequate provocation as there would be in a case of manslaughter. Moreover, the trial court properly concluded that adultery does not constitute victimization. Consequently, we find that the trial court did not err in scoring OV 3.

Finally, defendant argues that his sentence is disproportionate. Defendant's sentences are within the guidelines and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the principle of proportionality. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant's lack of criminal history is factored into the guidelines and is not an usual circumstance which could overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).