

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY MENDOZA, SR.,

Defendant-Appellant.

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UNPUBLISHED  
October 11, 1996

No. 185897  
LC No. 94-011525

Before: Reilly, P.J., White, and P.D. Schaefer,\* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of second-degree murder, MCL 750.317; MSA 28.549, one count of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), arising from the shooting death of defendant's son and the wounding of defendant's ex-wife. He was sentenced to concurrent terms of twenty-five to seventy years' imprisonment for the second-degree murder and assault convictions, to be served consecutive to the mandatory two year term for the felony-firearm conviction. We affirm.

Defendant first argues that he is entitled to resentencing because offense variable (OV) 3 was misscored at twenty-five points. Scoring decisions will be upheld if any evidence exists to support them. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993); *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). The evidence in this case supports the trial court's score of twenty-five points on the ground that defendant acted with intent to kill or to do great bodily harm and there was no combative situation or victimization of defendant by the decedent. See *People v Rodriguez*, 212 Mich App 351, 352-353; 538 NW2d 42 (1995). Consequently, we affirm the trial court's scoring of OV 3.

Next, defendant argues that his sentence is disproportionate. We disagree. The sentence falls within the sentencing guidelines range, and we find no unusual circumstances to render it disproportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Albert*,

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

207 Mich App 73, 75; 523 NW2d 825 (1994). A defendant's lack of criminal history is not an usual circumstance overcoming the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Neither are defendant's years of continued employment and his claim of self-defense unusual circumstances dictating a lower sentence. Therefore, defendant's request for resentencing is denied.

Finally, defendant argues that there was insufficient evidence to support his conviction of second-degree murder. We again disagree. In this case, there is no dispute that defendant purposefully shot at and killed the decedent with a dangerous weapon. Additionally, viewed in the light most favorable to the prosecution, defendant's asserted belief that he was in danger is unreasonable in light of the fact that the decedent was unarmed and was carrying a baby when he was shot. See *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Petrella*, 424 Mich 22, 268-270; 380 NW2d 11 (1985). Therefore, we conclude that there was sufficient evidence to find defendant guilty beyond a reasonable doubt of second-degree murder.

Affirmed.

/s/ Maureen Pulte Reilly  
/s/ Helene N. White  
/s/ Philip D. Schaefer