

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL ALAN KEIL,

Defendant-Appellant.

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UNPUBLISHED

November 1, 1996

No. 172916

LC No. 93-004136

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,\* 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). He was sentenced to twenty-five to forty years imprisonment for the second-degree murder conviction and two years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The evidence presented at the preliminary examination was sufficient to establish that a crime was committed and that there was probable cause to believe that defendant committed it. A rational trier of fact could have found the essential elements of second-degree murder were sufficiently established to bind defendant over on the charge. *People v Kieronski*, 214 Mich App 222, 228; 542 NW2d 339 (1995). Thus, the district court's decision to bind over defendant on the charge and the circuit court's affirmance of that decision were not abuses of discretion. *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993); *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991).

The trial court did not clearly err in denying defendant's motion to suppress evidence. *People v Lucas*, 188 Mich App 554, 571; 470 NW2d 460 (1991). Considering the totality of the circumstances surrounding the interrogation, the Court finds defendant's statement was the result of an uncoerced choice and the requisite level of comprehension. *People v Wright*, 441 Mich 140, 146-147; 490 NW2d 351 (1992).

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\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Defendant was not denied a fair trial by the references to gangs, gang activity and sawed-off shotguns during trial. Any prejudicial effect of these references was not so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977); *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

The trial court did not abuse its discretion in denying defendant's motion for a mistrial. The witness' statement was unresponsive, unsolicited and unexpected by the prosecutor. Any prejudice was cured by the trial court's statements. Defendant was not deprived of a fair trial. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

The trial court did not abuse its discretion in denying defendant's motion to impeach Koch with the evidence that he had been expelled from school. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995); *McAlister, supra*, 505; *People v Tait*, 136 Mich App 475, 477-478; 356 NW2d 33 (1984).

The trial court did not abuse its discretion in permitting Tina Onufrak to testify that the necklace had been "pulled apart." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995). That opinion did not require an expertise in jewelry, metallurgy, engineering or physics, but was one which could be given by a lay witness because it was rationally based on the witness' perception and was a reliable conclusion that could be made by people in general on the basis of the evidence before them. *Id.*, 455-456.

The prosecutor's arguments and statements did not deny defendant a fair trial. *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995); *Duncan, supra*; *Cross, supra*.

Defendant was not denied his right to a unanimous verdict. *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992); *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945).

Defendant was not denied the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

The trial court did not abuse its discretion when it denied defendant's motion to admit evidence that the victim's brother had written the words "Rachel killer" on her mirror prior to her death. *McAlister, supra*.

The comments and questions of the trial court did not deny defendant a fair trial. *People v Moore*, 161 Mich App 615, 616; 411 NW2d 797 (1987).

Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to prove the elements of second-degree murder beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996); *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). The evidence was sufficient to show that at the time of his assaultive activities, defendant created a very high risk of death or great bodily harm with the knowledge that such was the probable result. *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984).

There is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

The trial court did not abuse its discretion in sentencing defendant. *People v Cervantes*, 448 Mich 620, 626-627; 532 NW2d 831 (1995). Defendant's sentence for the second-degree murder conviction is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Further, because the sentence is proportionate, it does not constitute cruel or unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

/s/ Roman S. Gribbs

/s/ Jane E. Markey

/s/ Thomas Giles Kavanagh