

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC HARRINGTON,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 181988

Recorder's Court

LC No. 93-006461

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of second-degree murder, MCL 750.317; MSA 28.549, and assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. Defendant was sentenced to concurrent terms of twenty-five to fifty years' imprisonment for the second-degree murder conviction and five to ten years' imprisonment for the assault conviction. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the first-degree murder and assault with intent to murder charges because there was insufficient evidence of: 1) premeditation and deliberation; and 2) specific intent to kill. We disagree.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). When reviewing a trial court's ruling on a motion for a directed verdict, this Court uses the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

Here, the trial court properly denied defendant's motion for directed verdict on the charge of first-degree murder. There was evidence presented that defendant came out from behind a counter with

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

a baseball bat and began to hit Nawab. When Profit told defendant to stop hitting her, defendant turned on Profit. Profit himself was not carrying a weapon and was still somewhat stunned after being hit on the head by the television defendant threw at him earlier. Defendant came at Profit swinging the bat. He hit Profit about the head and continued to beat Profit even after Profit had fallen to the floor. This was ample evidence of premeditation and deliberation. See *People v Anderson*, 209 Mich App 527, 537-538; 531 NW2d 780 (1995); *People v Haywood*, 209 Mich App 217, 229-230; 530 NW2d 497 (1995). Accordingly, the trial court did not err when it denied defendant's motion for directed verdict on the first-degree murder charge.

The trial court also properly denied defendant's motion for a directed verdict on the charge of assault with intent to commit murder because sufficient evidence was presented to support giving the charge to the jury. The intent to kill can be inferred from the circumstances found here, where there was evidence that defendant came out from behind the counter and hit Nawab over the head with a baseball bat as she was walking away from him. Defendant continued to beat Nawab even after she had fallen to the floor, and Nawab could have died just as Profit did. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995); *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). As such, the trial court did not err when it denied defendant's motion for directed verdict on the charge of assault with intent to commit murder.

Next, defendant contends that he was denied a fair trial through repeated instances of prosecutorial misconduct, including the prosecutor's denigration of the defense of insanity, defense counsel's ability, and defendant's experts, the prosecutor's vouching for his own credibility, and the prosecutor's numerous references to a "higher law" and the Ten Commandments. We disagree. Because defendant failed to object to most of the alleged errors below, our review is precluded unless an objection could not have cured the error or our failure to review will result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, with regard to defendant's unpreserved claims of error, we believe that the alleged errors, if in fact they were even errors, could have been cured by a timely instruction and that our failure to provide further review will not result in a miscarriage of justice. Moreover, review of the entire record evidences that the prosecutor and defense counsel had an extremely adversarial relationship. To single out the prosecutor as having denigrated defense counsel to the extent that defendant was denied a fair trial in this situation would be unfair. Defense counsel participated equally in the negative comments each attorney directed at the other. Defendant was not denied a fair and impartial trial as a result of the prosecutor's often heated repartée with defense counsel.

Turning now to defendant's preserved claims of error, we find nothing in the prosecutor's conduct that denied defendant a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). Contrary to defendant's characterization of the prosecutor's questioning of an expert as contributing to a denigration of the defense of insanity, we believe that the prosecutor's remarks taken in context did not denigrate a defense sanctioned by the legislature, but rather served to express the prosecutor's position regarding the quality of defendant's presentation of this defense. Cf. *People v Wallace*, 160 Mich App 1, 9; 408 NW2d 87 (1987).

Defendant also argues that he was denied both his due process right to present a defense, and his state and federal constitutional rights to confront witnesses, when the trial court excluded the relevant and material testimony of a defense witness, Jackson, who would have impeached the direct examination testimony of an important prosecution witness, Turner. We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991). Because Jackson's testimony would have been used to impeach Turner on a collateral matter, the trial court properly excluded the evidence. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995); *People v Ellerhorst*, 12 Mich App 661, 671; 163 NW2d 465 (1968). Furthermore, even if the evidence was improperly excluded, the error was harmless. *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Nawab's and Norwood's testimony corroborated that of Turner such that even if Turner's testimony would have been disregarded by the jury as untrustworthy, there was still ample evidence upon which to base a conviction. *Id.*

Next, defendant contends that his conviction of second-degree murder was against the great weight of the evidence. We disagree.

On appeal, this Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Id.* at 444. The test is whether the verdict is against the overwhelming weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant's conviction of second-degree murder for Profit's death was not against the great weight of the evidence. Nawab, Turner, Norwood, another eye-witness, and defendant himself, all testified that defendant grabbed a bat, came out from behind the registration desk and began to beat Nawab with the bat. Nawab, who was desperately trying to ward off defendant's attack, sustained numerous injuries as a result of the beating. When approached by Profit, who told defendant to stop hitting Nawab, defendant began to hit Profit with the bat. Defendant's first blow hit Profit in the head, causing Profit to fall to the floor. Defendant, however, continued to beat Profit about the head even after Profit had fallen over. This evidence was sufficient to show that defendant killed Profit with malice, and evidenced either an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the likely result. See *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a new trial because the verdict was not against the overwhelming weight of the evidence.

Finally, defendant argues that he is entitled to resentencing because his twenty-five- to fifty-year sentence for the second-degree murder conviction was disproportionate and was imposed as punishment for defendant having exercised his constitutional right to trial. We disagree.

Prior to the commencement of trial, a *Cobbs*¹ hearing was held. However, the trial court's comments during the *Cobbs* hearing indicating that it would consider sentencing defendant to a minimum of fifteen years and a maximum of thirty years did not prevent the court from later imposing a longer sentence after a plea was never offered and defendant was convicted following a jury trial. Following trial, the court had much more information on which to base its sentence, including, in this case, a higher guidelines range. *People v Cobbs*, 443 Mich 276, 282-283; 505 NW2d 208 (1993). Thus, if defendant's sentence is proportionate, the fact that defendant was subjected to a higher sentence following trial does not in and of itself indicate an improper motive on behalf of the sentencing court. *Id.*

Because defendant's sentence falls within the minimum guidelines' range, it is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant did not present any unusual circumstances which would take his sentence out of the applicable guidelines range. The fact that defendant was a first time offender is incorporated into the calculation of his guidelines range and is not an unusual circumstance sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Furthermore, defendant had a history of mental problems for which he had yet to receive any long-term, effective care. Defendant, as a result of his inability to control himself and in a fit of anger, beat Profit to death with a baseball bat and injured Nawab when he beat her with the same bat. Placing him in prison for a period of time would serve to protect society from any further incidents and perhaps afford defendant the opportunity to receive some type of counseling for his mental and emotional problems. Accordingly, defendant's sentence of twenty-five to fifty years' imprisonment is proportionate to both the offense and the offender.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Marilyn Kelly

/s/ Joseph B. Sullivan

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).