

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN SEELEY,

Defendant-Appellant.

UNPUBLISHED

April 11, 1997

No. 188636

Recorder's Court

LC No. 95-000841

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317; MSA 28.549, one count of assault with a dangerous weapon, MCL 750.82; MSA 28.277, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1); MSA 28.788(5)(1). Defendant was sentenced to life imprisonment for the second-degree murder conviction, to be served consecutive to the mandatory prison term of two years for the felony-firearm conviction. Additionally, defendant was sentenced to thirty-two to forty-eight months' imprisonment for the felonious assault conviction, to be served consecutive to the mandatory prison term of two years for the felony-firearm conviction. Finally, defendant was sentenced to one to two years' imprisonment for the fourth-degree criminal sexual conduct conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion by not allowing defense counsel to discuss a witness' written statement in front of the jury during closing argument. Specifically, defendant argues that the trial court incorrectly stated that a line-up sheet, which contained a witness' prior inconsistent statement, was not evidence in the case. It does, indeed, appear that the document had been admitted into evidence. However, the court's instructions permitted the jury to consider the statements in the line-up sheet for impeachment purposes, which is proper. We conclude that although the court erroneously stated that the exhibit had not been admitted, defendant was permitted to present the evidence, and use and argue it for the proper purpose, and was not denied a fair trial.

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

Defendant next argues that the trial court abused its discretion by permitting the prosecutor to introduce numerous hearsay statements under the non-existent “res gestae exception” to hearsay. While we agree that there is no “res gestae exception,” we do not agree that the evidence should have been excluded. The statements were not hearsay because they were not offered for the truth of the matter asserted.

Defendant next argues that the trial court abused its discretion by admitting evidence of prior bad acts allegedly committed by defendant. In order to preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection asserted on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994); *People v Sardy*, 216 Mich App 111, 113; 349 NW2d 23 (1996); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, defendant alleges that the trial court improperly admitted evidence of three prior bad acts. First, a witness testified about a statement that defendant had made regarding an incident where he held a gun to a woman at a Burger King. While defendant objected to the witness’ testimony on relevancy grounds, defendant failed to object on the grounds that her testimony introduced impermissible prior bad acts evidence. Because defendant failed to object to the admission of the witness’ testimony on the same grounds that he asserts error on appeal, this issue is not properly preserved for appellate review. *Grant*, *supra*, 445 Mich 545-546, 553. Next, defendant alleges that the prosecutor improperly elicited testimony from defendant regarding his previous act of selling a gun. Again, because defendant failed to object below, this issue is not properly preserved for appellate review. *Id.* Finally, defendant argues that the prosecutor improperly elicited testimony from defendant that he had fired weapons in the past, including the gun which was used to kill the victim. Once again, because defendant failed to object below, this issue is not properly preserved for appellate review. *Id.* Further, we conclude that given defendant’s testimony at trial, the failure to review these claims of error will not result in manifest injustice.

Defendant next argues that he is entitled to resentencing because prior record variable (PRV) 7, offense variable (OV) 7, and OV 9 were incorrectly scored. We disagree.

Initially, we acknowledge our agreement with defendant that PRV 7 was incorrectly scored at twenty points. Because defendant had only one concurrent felony conviction, defendant should have been assessed ten points for PRV 7. However, a reduction in defendant’s PRV score would still allow for a life sentence within the guidelines.

Regarding the offense variables, 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).

It appears from the record that the victim was attacked by defendant and his friends, and was overcome by defendant and his friends’ combined strength and power, thus supporting the court’s scoring of OV 7.

There is also record evidence to support the trial court's assessing defendant ten points for OV 9. In determining whether a defendant is a "leader," the entire criminal episode or situation should be taken into account. Michigan Sentencing Guidelines (2d ed, 1988), p 78. There was evidence that defendant was the person who had a prior relationship with the victim and his step-daughter, and that defendant was the person who led his friends to the victim on the day of the shooting. Defendant testified that the gun which was used to shoot the victim was originally his weapon. Further, there was evidence that defendant gave orders at the scene. Accordingly, we conclude that there is adequate support for the trial court's scoring of OV 9. See *Johnson*, *supra*, 202 Mich App 290.

Lastly, defendant argues that his life sentence is disproportionate. We disagree. The sentence imposed 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*, 207 Mich App 73, 75; 523 NW2d 825 (1994). A defendant's lack of criminal history is not an usual circumstance that overcomes the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Moreover, although defendant is correct in his assertion that he had no prior adult criminal record, according to the Presentence Investigation Report, defendant was assigned to the status of youthful trainee under the Holmes Youthful Trainee Act, MCL 762.11; MSA 28.853(11), for receiving and concealing stolen property over \$100. In addition, defendant's remorse, depression, prior employment, lack of substance abuse problems, and family support also are not unusual circumstances warranting a lower sentence. Finally, we cannot say that the trial court abused its discretion in emphasizing the seriousness and the senselessness of defendant's actions in sentencing defendant to the highest end of the guidelines range. Therefore, defendant's request for resentencing is denied.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Alton T. Davis