

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY A. BUFORD,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 195501
Recorder's Court
LC No. 95-008403

Before: Corrigan, C.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions 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). The trial court sentenced defendant to consecutive terms of imprisonment of twenty to thirty years for the second-degree murder and two years for felony-firearm. We affirm.

Defendant shot and killed his sister Tarnisha's boyfriend. Defendant had become upset with the victim because he believed the victim had been seeing other women. Defendant quarreled with the victim upon the victim's arrival at Tarnisha's apartment. Defendant then left the apartment to retrieve a shotgun, returned, and shot the victim.

Defendant first argues that the trial court abused its discretion in admitting evidence of a statement Tarnisha allegedly made to police officer Michael Yaklin. Tarnisha accompanied the seriously injured victim to the hospital emergency room, where Yaklin was investigating an unrelated case. Tarnisha was distraught. A few minutes later, Yaklin attempted to calm Tarnisha after hospital workers moved the victim to an examination room. Yaklin asked Tarnisha about the circumstances of the crime and whether she knew the identity of the shooter. Tarnisha responded that defendant threatened to "slap the ****" out of the victim earlier in the evening. Over defendant's objection, the trial court allowed Yaklin to testify to Tarnisha's statement because it was an excited utterance.

Defendant contends that the prosecutor failed to establish the foundation requirements for the excited utterance exception to the general rule barring hearsay, MRE 803(2), because Tarnisha made the statement in response to Yaklin's question and had time to contrive or misrepresent before making

the statement. We disagree. The prosecutor satisfied the foundational requirements of the excited utterance exception by presenting evidence that Tarnisha made the statement within minutes of the shooting while still under the influence of the emotional trauma caused by the startling event. See *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996). That Tarnisha made the statement in response to Yaklin's question does not preclude the court from considering it an excited utterance because the prosecutor presented evidence that the statement was spontaneous. *People v Hungate*, 27 Mich App 496, 498-499; 183 NW2d 634 (1970). The trial court did not abuse its discretion in admitting the evidence. *Kowalak, supra* at 558.

Defendant argues that the prosecutor failed to present sufficient evidence of malice to support a conviction of second-degree murder. We disagree. Defendant argued with Tarnisha about the victim before the victim arrived at the apartment. Defendant confronted the victim when the victim arrived, and shortly thereafter, left the apartment to retrieve a shotgun. He returned and shot the victim in the chest. A rational trier of fact could find from this evidence that defendant acted with an intent to kill and with no justification or mitigating circumstances that would reduce the killing to a lesser crime. See *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended 453 Mich 1204 (1996); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Finally, defendant argues that his sentence is disproportionate. We disagree. Defendant identifies no unusual circumstances necessary to overcome the presumption that his sentence within the guidelines' range is proportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). The trial court did not abuse its discretion in sentencing defendant. *Id.*

Affirmed.

/s/ Maura D. Corrigan
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra