STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY BEAL,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 197891
Recorder's Court
LC No. 95-008926

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, 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). Defendant was sentenced to serve twenty to forty years' imprisonment for the second-degree murder conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. He now appeals and we affirm.

On appeal, defendant argues that the trial court improperly allowed the prosecution to introduce evidence that at least one month before the instant offense defendant pointed a handgun at the decedent's head. Defendant asserts that this evidence was inadmissible to prove character and conformity therewith, MRE 404(b). However, defendant objected at trial on relevancy and hearsay grounds. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Regardless, when read in context, the testimony was properly admitted to show opportunity and knowledge and was not admitted to show defendant's bad character. See *People v VanderVliet*, 444 Mich 62, 65; 508 NW2d 114 (1993), and *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

Next, defendant argues that the trial court erred in admitting several inculpatory statements made by him to Detroit Police Officers Pride Johnson and Felix Kirk. We disagree. Defendant's statements to Johnson were not made in response to "express questioning" by police or in response to "any words or actions on the part of police that the police should know are reasonably likely to elicit an

incriminating response." *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Rather, the record reveals that defendant blurted out the inculpatory statements without any prompting from the arresting officer. Because statements made voluntarily by persons in custody do not fall within the purview of *Miranda*,[1] *People v Hartford*, 117 Mich App 754, 759-760; 324 NW2d 31 (1983), we conclude that the trial court did not clearly err in admitting defendant's statements to Johnson.

With regard to the statements made by defendant to Kirk, defendant does not assert that the inculpatory statements were made in the absence of *Miranda* warnings. Rather, it is defendant's contention that Kirk's failure to inform defendant of the subject of the interrogation amounted to trickery and thereby rendered his waiver of *Miranda* rights invalid. "A suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Colorado v Spring*, 479 US 564, 577; 107 S Ct 851; 93 L Ed 2d 954 (1987). Because there is no allegation that defendant's decision to waive his Fifth Amendment privilege was otherwise rendered involuntary, the trial court did not clearly err in admitting defendant's signed confession to Kirk.

Defendant also raises two issues related to sentencing. First, defendant argues that the sentence for his second-degree murder conviction was disproportionate. We disagree. We review a claim that a sentence is disproportionate for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id.*, citing *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant contends that the sentence for his second-degree murder conviction was disproportionate because of defendant's lack of an adult criminal record, his strong familial relationships, and his showing of remorse at sentencing. Defendant's twenty-year minimum sentence for his second-degree murder conviction fell within the recommended guidelines' range of ten to twenty-five years and, therefore, is presumptively proportionate. *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996). Because the factors presented by defendant at sentencing were not sufficiently unusual to overcome the presumption of proportionality, we find no abuse of discretion. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Defendant also contends that he is entitled to resentencing because the sentencing judge erred in calculating OV 3 on the sentencing guidelines. However, our Supreme Court recently ruled that a claim of miscalculated variable is not in itself a claim of legal error as the guidelines do not have the force of law. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). The *Mitchell* Court stated:

> On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, *and* (3) the sentence is disproportionate. [*Mitchell*, *supra*, 454 Mich 177 (emphasis added).]

Because we have concluded that defendant's sentence is proportionate, this Court is precluded from appellate review on the issue of variable scoring. See *People v Bass*, 223 Mich App 241, 261; ___ NW2d ___ (1997).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).