

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIZONDO PETER GONZALES,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 209417

Oakland Circuit Court

LC No. 95-141986 FC

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty-two to fifty years' imprisonment. We affirm.

At trial, several eyewitnesses testified that defendant and others were involved in an altercation in the parking lot of a bar. Defendant struck the victim, George Knight, knocking him to the ground. As Knight lay supine and motionless on the ground, defendant delivered several hard kicks to Knight's head. The medical examiner testified that Knight's death was the result of blunt force head trauma. Knight's neck was twisted so violently that his arachnoid artery stretched, then tore, causing internal bleeding, brain herniation and, ultimately, Knight's death.

I

On appeal, defendant contends that the trial court's instructions to the jury were flawed and thus argues for reversal of his conviction. First, defendant contends that the trial court erred by instructing the jury that it could end its deliberations if jurors decided that he was guilty of open murder. Defendant argues that this instruction was erroneous because it left the impression that the jury could convict defendant of second-degree murder even if he possessed a mitigating state of mind that would reduce his crime to voluntary manslaughter. Second, defendant contends that the trial court erred in instructing the jury on the elements of first-degree murder, because the evidence could not support a guilty verdict for this crime. Thus, defendant argues that his conviction for second-degree murder may have been the result of an improper jury compromise.

Defendant did not object to the jury instructions. Without an objection, review of jury instructions is foreclosed absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). We have carefully reviewed these two allegations of instructional error and conclude that the trial court's instructions to the jury were correct and fairly presented the issues to be decided. Because defendant has failed to show that our refusal to review these unpreserved issues will result in manifest injustice, we decline to consider these matters further.

II

Next, defendant argues that the prosecutor failed to present sufficient evidence from which a rational trier of fact could find that he was guilty of second-degree murder beyond a reasonable doubt. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). When addressing an issue concerning the sufficiency of evidence, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. The elements of this crime are (1) a death, (2) caused by defendant's act; (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464. Intent may be inferred from all the facts and circumstances. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). In light of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Defendant focuses a great deal of his argument on the asserted failure of the prosecutor to prove the second element of second-degree murder, i.e., that his alleged acts caused Knight's death. Defendant argues that the witnesses' testimony established that several people, including himself, attacked Knight and any one of Knight's attackers could have delivered the fatal blows that caused his arachnoid artery to tear and his inter-cranial bleeding. Also, defendant argues that the evidence showed that Knight most likely died from a blow delivered while he was still standing, thus belying the prosecutor's theory that defendant's forceful, repeated kicks to Knight's head caused his death.

Defendant's arguments are without merit. Dr. Virani, chief deputy medical examiner for Oakland County, testified that Knight died of internal, subarachnoid bleeding caused by blunt force head trauma, which could have been inflicted by a hand or a foot. Although Dr. Virani admitted that it

was at least possible someone could have delivered a fatal blow to Knight while the victim was still standing, Dr. Virani opined that it was much more likely that the death blow was delivered after Knight fell to the ground. Contrary to defendant's position that the evidence showed overwhelmingly that George Knight was set upon by a number of violent attackers, most of the witnesses to the attack testified that defendant was the only person delivering repeated, hard kicks to Knight's head while Knight lay motionless on the ground. While some witnesses reported seeing more than one person attack Knight, conflicts must be resolved in the prosecution's favor when determining the sufficiency of evidence. *Terry, supra*. The prosecutor presented sufficient evidence to prove beyond a reasonable doubt that defendant's acts caused Knight's death.

Next, the prosecutor was required to show that defendant acted with the requisite malice. The evidence showed that defendant repeatedly kicked Knight hard in the head while Knight was laying on the ground. One witness related that defendant kicked Knight's head "like a kicker would kick a football." The extreme and violent quality of defendant's attack more than amply demonstrated his intent to cause great bodily harm to Knight. From the evidence, a rational trier of fact could find beyond a reasonable doubt that defendant acted with the malice required for a conviction of second-degree murder.

Finally, the prosecutor succeeded in proving beyond a reasonable doubt that defendant acted without justification or excuse. Second-degree murder may be reduced to voluntary manslaughter if a defendant acted in the heat of passion, caused by adequate provocation, with no lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation must be sufficient to excite passion in a "reasonable man." *Id.* at 519. Here, there is some indication that before defendant attacked Knight, the car in which defendant was riding purposefully swerved toward Knight and almost hit him, which caused Knight to yell something, possibly an obscenity, at the car. However, viewed in a light most favorable to the prosecutor, this evidence could not lead a rational trier of fact to believe that Knight's act would ignite homicidal passion in a reasonable man. There is no further evidence that Knight instigated the altercation that caused his death. In fact, all of the witnesses to this crime testified that Knight lay motionless during the attack. Physical evidence found on Knight's and defendant's bodies corroborated testimony that the victim did not make the slightest attempt to defend himself during the assault. The evidence was sufficient to support the jury's conclusion that defendant acted without justification or excuse.

III

Next, defendant argues that numerous instances of alleged prosecutorial misconduct denied him a fair and impartial trial. We disagree.

Defendant objected to some instances of alleged prosecutorial misconduct, and failed to object to others. Appellate review of alleged prosecutorial misconduct is precluded where defendant failed to timely and specifically object at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Review of an unpreserved allegation of prosecutorial misconduct is precluded unless the

prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court decides issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portions of the record and evaluating the prosecutor's comments in context. *Id.* Whether the prosecutor's remarks and actions were proper depends on all of the facts. This Court must read prosecutorial remarks as a whole and evaluate them in light of the arguments of the defense and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Defendant first argues that the prosecutor improperly sought to convict him on the basis of the jury's sympathy for the victim, and contends that the following statements were improper:

All of us; the big, the strong, the old, the young, the weak, the powerful, every single one of us has a constant fear. It is the fear of being helpless, of being powerless; of being unable to control what happens to you

Although defense counsel objected at this point, arguing that the prosecutor's statements were intended to elicit sympathy for the victim, the trial court responded that it was "waiting to see whether [the prosecutor was] tying this into what has been proven." Defense counsel then abandoned his objection. The prosecutor continued:

[Knight] was unable to avoid the on-slaughter [sic], to avoid the brutality of the Defendant's foot over and over again against the side of his head repeatedly. He lay helpless, powerless and defenseless and until you can picture that, until you feel his foot on the side of George Knight's head, you can't feel the gravity of this offense. You have got to actually feel it, picture it and recoil from it in horror at the idea of someone laying on the ground, kicked in the head repeatedly while he's unable to stop it, unable to avoid it. Trapped was George Knight in that parking lot. That is what I want you to feel. That is what you should feel. It is what you must feel.

We do not agree that the prosecutor's comments denied defendant a fair trial. It is true that arguments that are little more than an appeal to the sympathy of the jury are improper. *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). However, it is not improper for a prosecutor to urge the jury to examine all of the evidence and to tell the jury that "if the evidence indicated defendant's guilt beyond a reasonable doubt, a guilty verdict would provide a sense of justice for the tragic death of an innocent bystander." *Id.* at 386. Here, the prosecutor, in all, argued that the jury should consider the total evidence and convict defendant of the death of Knight, who, as most all of the witnesses testified, was an innocent bystander. Moreover, the prosecutor's closing remarks concerning the manner of Knight's death, while a bit dramatic, anticipated defendant's argument that

Knight somehow shared in the responsibility for the attack because he swore at defendant or “solicit[ed] help to attack whoever he planned on fighting,” as there was evidence that Knight was aware that he would get in a fight. The prosecutor merely was highlighting evidence that Knight actually remained helpless during the course of the attack and was not, as defendant contended, the initial aggressor. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Simon, supra* at 655. Lastly, to the extent that the prosecutor’s remarks may be taken as a plea to the jury that it convict defendant out of a sense of its civic duty to avenge Knight’s horrible, senseless death, such an argument may be cured by an instruction to the jury that “arguments of counsel are not evidence,” *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993), an instruction that the trial court eventually gave.

Defendant also alleges that the prosecutor committed misconduct by questioning Lee Webber, the victim’s stepbrother and a witness to the crime, about how it felt for him to witness Knight’s murder. However, the trial court expressly allowed this line of questioning, as the prosecutor was using these questions to explore the issues of the witness’ potential bias and whether the emotional impact of the event had affected his ability to recall accurately the circumstances of Knight’s death. “It [is] certainly not misconduct on the part of the prosecutor to introduce evidence expressly permitted by the trial judge.” *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989).

Next, defendant argues that the prosecutor committed misconduct by using his opening statement to argue his case to the jury rather than simply outlining the facts he intended to prove during trial. We do not agree that the prosecutor’s use of florid language in his opening statement constituted misconduct that denied defendant a fair trial. A prosecutor may not use his opening statements to present the jury with prosecutorial allegations that are not subsequently proven at trial. *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997). Here, the prosecutor went on to prove everything that he alleged in his opening statement; defendant does not really argue otherwise. Defendant’s main concern seems to be that the prosecutor used strong language in his opening statement. However, the prosecutor is not constrained to using the blandest possible terms. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Once the prosecutor “crossed the line,” the trial court cautioned him to move on, and he did. Any further prejudice resulting from his use of “hard language” in his opening statement was cured by the trial court’s admonition to the jury that the statements of counsel did not constitute evidence. See *Stimage, supra*.

Next, defendant contends that the prosecutor committed misconduct by objecting twice during defense counsel’s opening statement. Defendant does not otherwise explain why these objections were improper or support his underlying position that the prosecutor made these objections in bad faith. Failure to argue the merits of an issue results in abandonment of that issue on appeal. *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992). In any event, it appears that the prosecutor objected to defense counsel’s statements because he believed that defense counsel was attempting to misstate the substance of the evidence that would be presented at trial. These objections were not improper.

Next, defendant argues that the prosecutor committed misconduct by “improperly us[ing] his objections and his questions to inform the jury of his view of the case.” Defendant directs this Court’s attention to an occasion when defense counsel attempted to question defense witness Pam Fisher about whether she had a conversation with witness Tonya Mihay in the hallway outside the courtroom and whether Fisher “kind of turned [her] back to [defense counsel and] started . . . speaking again.” At this point, the prosecutor objected and said “I was right there. If he wants to put me on the stand, that’s fine. . . . That’s not what happened.” The judge overruled the prosecutor’s objection.

In *Lawton, supra* at 354, the prosecutor made a similar remark when he formed the perception that the defense counsel was misleading the jury. This Court recognized that “[i]n the haste and heat of a trial, it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial.” We believe those observations apply in the present case. Here, the prosecutor was responding to defense counsel’s unfair implication that Mihay and Fisher combined to coordinate their testimony. If Fisher denied that she and Mihay agreed on their testimony, defense counsel still basically testified that, in his view, the two were acting mysteriously in the hall. In our opinion, the prosecutor was merely responding to defense counsel’s implication. In any event, the trial court overruled the prosecutor’s objection and later informed the jury that statements of counsel were not evidence. Defendant was not prejudiced by the prosecutor’s statement. *Id.*

Defendant claims that on yet another occasion the prosecutor used an objection to inform the jury about his view of the case. Defense counsel asked Tina Snitchler whether “anyone else of your friends, Houston, Neil [Rockind, the prosecutor], Terajai talk[ed] about how long [the assault] occurred.” The prosecutor objected, stating “first of all, I asked for a little courtesy to be called Mr. Rockind by Counsel. It’s one thing if she called me by Neil and that’s fine. Second, we are not friends and as much as she is a nice lady” The trial court sustained the prosecutor’s objection.

There was nothing prejudicial about the prosecutor’s objection. He was justified in replying to defense counsel’s insinuation that he was friends with Snitchler and somehow influenced her testimony. The jury was later instructed that statements of counsel did not constitute evidence, thus, defendant’s right to a fair trial was not compromised.

Next, defendant argues that the prosecutor committed additional misconduct, when after asking Detective Charles Jehle several questions regarding the nature of the detective’s investigation, the prosecutor, arguably not in the form of a question, characterized the investigation as “[a] long investigation as opposed to just jumping to conclusions at the scene.” At that point, defense counsel asked the prosecutor, “Are you testifying now?,” and the prosecutor agreed to rephrase the question. Because the prosecutor properly rephrased his question and the jury was instructed that arguments and comments of counsel are not evidence, we conclude that the prosecutor’s remark did not deprive defendant of a fair trial.

Next, defendant argues that the prosecutor “injected inflammatory rhetoric into the trial or distracted the jury with childish antics” when he muttered something under his breath when defense counsel requested a discussion at the bench and used words like “savagery” and “brutal” and “on-

slaught” when questioning witnesses about the attack on Knight. These comments are not a basis for reversal. First, although the judge stated that the jury could hear the comments of counsel better than he could, there is no indication that the jury did hear the prosecutor’s muttered comment. Defendant did not motion for a mistrial, did not request the trial court to address the prosecutor’s comment when the jury was readmitted to the courtroom, and did not attempt to include the substance of the prosecutor’s comment on the record. This Court is left with little tangible evidence of misconduct. Second, in relation to the prosecutor’s use of “hard language” to describe the crime, the prosecutor is not limited to using the blandest terms possible. See *Ullah, supra*. The fact of the matter is that this crime was brutal and savage. Any prejudice resulting from use of these words was cured by the trial court’s admonition to the jury that the statements of counsel did not constitute evidence. See *Stimage, supra*.

Next, defendant argues that the prosecutor committed misconduct when he asked a prospective juror during voir dire whether he would kill someone merely because they gave him “a dirty look” or said something bad to him. Defendant also alleges that the prosecutor committed misconduct by stated during his opening that he would look the jurors “in the face one by one” and ask them to convict defendant. Defendant has merely cataloged these allegations of misconduct. He does not attempt to support his allegation that they were improper or otherwise explain how they prejudiced him. He has failed to present properly these allegations of misconduct on appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). We will not make his arguments for him.

Next, defendant argues that the prosecutor committed misconduct during an exchange concerning witness Susan Knight, the victim’s mother. After the witness testified, the prosecutor asked the trial court to allow Knight to remain in the courtroom. Defense countered that he might recall her, if necessary. The prosecutor replied, “She’s the mother of the victim!” Defense counsel retorted, “This is not a sympathy showing.” The trial court agreed with defense counsel that Knight should remain outside the courtroom during testimony, admonished the prosecutor by saying that “[y]ou know it’s not proper for her to be in here,” and excused the witness. On appeal, defendant argues that the prosecutor forced him to “take an unpopular position against the mother of the victim” and otherwise used this exchange to elicit improper sympathy for the victim’s mother.

This is not a basis for reversal. A prosecutor may not seek a conviction on the basis of the jury’s sympathy. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). Within the context of this trial, the prosecutor did not force defendant to take an unpopular position against the victim’s mother. By the time the above exchange took place, defendant had already thoroughly cross-examined the victim’s mother, which was his own trial tactic. Moreover, the prosecutor did not force defense counsel to make further comments which might be interpreted by the jury as callousness toward the victim’s mother. In any event, defendant failed to seek a curative instruction on the sympathy issue. The trial court eventually instructed the jury that it was not to allow sympathy or prejudice to influence its verdict. Generally, a jury is presumed to follow instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). We find no error.

Defendant further argues that the prosecutor committed misconduct because he was “unrestrained and intemperate” when the trial court conducted discussions at the bench. Because these comments were outside the jury’s presence, the jury could not have been influenced by this conduct.

Next, defendant argues that the prosecutor committed misconduct because he stated during his opening that the prosecution “wouldn’t hide” from the fact that the victim was intoxicated at the time of the attack. Defendant argues that this constituted improper prosecutorial vouching for the strength of the state’s case. While it is improper for a prosecutor to vouch for the credibility of a witness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), it was entirely permissible for the prosecutor to state that he would present a strong case against defendant, regardless of evidence of the victim’s intoxication, see *id.* at 286-287. Likewise, the prosecutor was permitted to assure the jury that the evidence would “yell” for defendant’s conviction.

Next, defendant alleges that the prosecutor committed misconduct by asking Detective Jehle what witnesses to the crime told him during interviews. Defense counsel objected repeatedly to these questions, arguing that they called for hearsay. However, the trial court overruled defendant’s objections. Defendant argues that the prosecutor used these questions to elicit inadmissible hearsay from Jehle and therefore denied defendant a fair and impartial trial.

We do not agree that the prosecutor’s questions to Jehle constitute a basis for reversal of defendant’s conviction. First, the prosecutor did not commit misconduct by doing what the trial court expressly allowed him to do. *Curry, supra*. Second, the trial court was correct in overruling defendant’s objections to this line of questioning, because the prosecutor was not attempting to elicit inadmissible hearsay. During his questioning of Jehle, defense counsel insinuated repeatedly that the police did not conduct an adequate investigation of the crime because they immediately centered on defendant as a suspect, and some witnesses reported that others may have been involved in the affray that led to Knight’s death. The prosecutor did not use his questions to prove the truth of the matters contained in the witnesses’ statements to Jehle, i.e., that defendant attacked Knight, but rather to show that the police did not investigate other suspects because they did not have information that would lead them to believe that others were directly involved in the attack on Knight. Moreover, even if Jehle’s testimony as to the witnesses’ statements was inadmissible hearsay, numerous witnesses had already testified that defendant was the sole attacker. Thus, admission of Jehle’s testimony was harmless.

Next, defendant argues that the prosecutor denied him his right to confrontation by improperly objecting to his attempts to cross-examine witness Reginald Howard. During defendant’s cross-examination of the witness, defense counsel questioned Howard about statements that he made in his interview with police. The prosecutor made repeated objections on the basis of MRE 106, which states, “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at the time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Essentially, the prosecutor argued that defense counsel was taking quotations from Howard’s statement out of context. Despite the prosecutor’s objections, the trial court permitted defense counsel to continue his examination and relegated any challenges the prosecutor might have to defense counsel’s manner of cross-examination, to the prosecutor’s eventual redirect. Because defendant’s right of confrontation was neither denied nor impaired, we find no misconduct requiring reversal.

Next, defendant argues that the prosecutor committed misconduct by offering to stipulate to certain facts during defendant’s cross-examination of Tina Snitchler. Defendant does not support his

allegation that an offer to stipulate can constitute prosecutorial misconduct, and therefore has failed to present this issue properly for appellate consideration. *Jones, supra*. In any event, the prosecutor's offer to stipulate did not prevent defense counsel from going on to develop Snitchler's testimony as he saw fit. Defendant has not proven a basis for reversal of his valid conviction.

Finally, defendant argues that the prosecutor sought to introduce evidence through the testimony of Lee Webber "through improper means." When defense counsel objected to the prosecutor's questioning, the trial court sustained the objection, stating to the prosecutor, "You know that's improper sir." On appeal, defendant leaves it to this Court to determine the basis of the asserted impropriety, as well as the prejudice that befell defendant. Defendant has failed to properly present this allegation of prosecutorial misconduct for appellate consideration. *Jones, supra*. Moreover, the trial court sustained defense counsel's objection and admonished the prosecutor in front of the jury. Later, the jury was told to disregard evidence that the trial court ordered stricken or excluded. The jury is presumed to have followed this instruction. *Torres, supra*. In sum, defendant has failed to show that his conviction should be reversed because of prosecutorial misconduct.

IV

Finally, defendant argues that his sentence of twenty-two to fifty years' imprisonment for second-degree murder is disproportionate. We disagree. A trial court's imposition of a sentence is reviewed for an abuse of discretion, which exists where the sentence does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). We find no such abuse by the trial court when sentencing defendant.

Defendant argues that his sentence for second-degree murder is disproportionate because he did not intend to kill Knight, but instead created a very high risk of great bodily harm by kicking him in the head. In his brief, defendant states, "The testimony of even the prosecutor's witnesses, including the medical examiner, supports a conclusion that the victim's death in this case was more a tragic mischance than a foregone result of the offender's conduct."

Defendant's argument that his sentence is disproportionate largely disregards the facts of this case. The trial court cited the violent nature of defendant's act in support of its decision to impose a lengthy sentence. Although defendant contends that Knight's death was a "tragic mischance," testimony established that defendant kicked Knight extremely hard in the head repeatedly. It simply belies common sense to argue that this horrid attack was not intended to severely injure, if not kill, Knight. Moreover, defendant's position that the severity of his behavior was somehow lessened because the assault occurred as part of "an ordinary bar fight" is equally facile. There was little evidence to indicate that Knight threatened or verbally accosted defendant before or during the altercation. Further, there is no sound basis to excuse defendant or others from complying with the standards of civilized society merely because they choose to act on their aggressions in bars.

The trial court also cited defendant's lengthy criminal record in support of his sentence. Defendant was under sentence for delivery of less than fifty grams of cocaine when he murdered Knight.

Contrary to his argument that his prior convictions were non-violent, defendant was convicted in 1995 for domestic assault and battery. Moreover, defendant, who was twenty-two at the time of his sentencing, committed approximately five violent assaults as a juvenile and had an extensive history of resisting and obstructing the police as an adult. Defendant clearly demonstrated himself to be an unruly, violent individual. The trial court did not abuse its discretion by deciding that the protection of society was of primary importance in sentencing defendant. In sum, defendant's twenty-two to fifty year sentence of imprisonment is proportionate to defendant and his offense.

Affirmed.

/s/ Hilda R. Gage

/s/ Michael R. Smolenski

/s/ Brian K. Zahra