

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LAMONT DENNIS,

Defendant-Appellant.

UNPUBLISHED

November 14, 1997

No. 196699

Recorder's Court

LC No. 95-005717

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Defendant was convicted by a jury 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). He was sentenced to consecutive terms of 22-1/2 to fifty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to a fair and impartial trial because of numerous alleged improprieties by the prosecution. Defendant's preserved allegations of impropriety assert that the prosecutor improperly argued facts not in evidence, expressed his personal opinion, speculated about what was in the minds of certain witnesses, and vouched for the veracity of evidence. We disagree.

In reviewing the alleged improprieties in context, and in light of defense arguments and the relationship they bear to the evidence admitted, we conclude that the prosecution's comments were proper. See *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The prosecutor was properly commenting on the evidence and making inferences from the evidence presented regarding the police department's diligence in pursuing the case and regarding why witness Brown may have changed his story, and properly responding to defendant's argument that the prosecution was on a power trip and did anything to convict defendant, including breaking the rules of evidence. See *McElhaney*, *supra*; *Lawton*, *supra*. Further, because we find that any prejudicial effect from the prosecutor's unobjected-to comments could have been cured by cautionary instructions from the court, we conclude that a

miscarriage of justice will not result from our failure to review those claims. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Therefore, we hold that defendant was not denied his right to a fair and impartial trial because of any alleged impropriety by the prosecutor. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Defendant next argues that there was insufficient evidence presented to convict him of second-degree murder beyond a reasonable doubt. We disagree. In viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence supported findings that (1) Ellis' death occurred, (2) that her death was caused by defendant's act of shooting at Ellis as well as several other people with whom she was seated, (3) that no circumstances existed to justify, excuse, or mitigate defendant's actions, but rather that defendant acted in retaliation for an altercation that had ensued the previous day, and (4) that defendant shot with an intent to kill, to inflict great bodily harm, or to create a high risk of death or great bodily harm.¹ *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). Therefore, under these facts, we conclude that sufficient evidence was produced for a rational trier of fact to find defendant guilty of second-degree murder beyond a reasonable doubt.

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 6 and that his sentence of 22-1/2 years' imprisonment was disproportionate. We disagree.

Sentencing guidelines do not have the force of law; therefore, a claim that a variable was miscalculated is not in itself a claim of legal error. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997). "[A]pplication 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." *Id.* at 177. Here, because the record indicates that Ellis as well as several other people were put in danger or injury of loss of life by defendant's actions, we conclude that the sentencing court properly assessed defendant with ten points for offense variable six. See Michigan Sentencing Guidelines (2d ed, 1988), p 77. Therefore, defendant's guidelines challenge fails under the *Mitchell* test. *Mitchell, supra*. Further, with respect to defendant's proportionality argument, defendant's sentence is within the minimum guidelines range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). We have reviewed defendant's arguments and conclude that because defendant has failed to present unusual circumstances to overcome the presumption of proportionality, his sentence is proportionate. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Accordingly, we conclude that defendant is not entitled to resentencing.

We affirm.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young

¹ The jury was given instructions on second-degree murder and aiding and abetting someone else in committing an offense. Although the evidence never clearly established who the shooter was, the

prosecutor theorized that defendant was guilty under the principle of aiding and abetting. *People v Dilling*, 222 Mich App 44, 50; 564 NW2d 56 (1997) (an aider and abettor may be convicted and punished as if he directly committed the offense).