

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES CHRISTOPHER POGUE,

Defendant-Appellant.

UNPUBLISHED

May 15, 1998

No. 195237

Recorder's Court

LC No. 93-010474

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-five to seventy-five years' imprisonment for the second-degree murder conviction, and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress his statements made to the police because of the deliberate delay of his arraignment, the lack of *Miranda*¹ warnings before each statement, inducement by threats and promises made by the officers, and defendant's lack of counsel. We disagree.

Whether a defendant's statement was voluntary is a question of law that the court must determine under the totality of the circumstances. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). When reviewing a trial court's determination of voluntariness, this Court examines the entire record and makes an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, in recognition of the trial court's superior ability to view the evidence, deference is given to the court's assessment of the weight of the evidence and credibility of the witnesses. The trial court's findings will not be reversed unless they are clearly erroneous. *Id.*

We are convinced that, considering the totality of all the surrounding circumstances, defendant's statements were the products of an essentially free and unconstrained choice by defendant. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). We acknowledge that defendant was not promptly arraigned. Moreover, the police held defendant for approximately three days, during which time he was questioned at least three times. On the other hand, the trial court found that defendant's claims of coercion and denial of requested counsel were not credible. In addition, before the second and third statements, the police advised defendant of his *Miranda* rights, which he waived, and there was no corroborating evidence that the police used or threatened physical force or that they made any promises to defendant in return for making a statement.² Although defendant gave three statements, the interviews were conducted in separate sessions that were hours apart, and the interview sessions were not prolonged. Finally, the record shows that defendant was twenty-one years old, had a twelfth grade education, appeared to be of normal intelligence, and, as the trial court noted, had previous experience with the police. The trial court did not clearly err in denying the motion to suppress.

II

Defendant next argues that, because he was illegally detained, his statements and evidence of the gun and ammunition that the police recovered as a result should have been suppressed. Although raised by defendant at his *Walker*³ hearing, the trial court declined to address this argument, stating that it was not the basis for the hearing. In any event, we find no error.

Defendant maintains that the police did not have probable cause to arrest him until after he had already given his first two statements. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *People v Mitchell*, 138 Mich App 163, 167; 360 NW2d 158 (1984). Where there is no probable cause to arrest, but the police take a defendant into custody for investigatory purposes, any evidence obtained as a result of that unlawful detention or any statement made while unlawfully detained must be suppressed. *People v Irby*, 129 Mich App 306, 314; 342 NW2d 303 (1983).

We agree with defendant that his initial approximately five-hour detention was illegal because the police lacked probable cause to arrest him. However, the police did have probable cause to arrest defendant by the time he gave his first statement. Testimony at the *Walker* hearing revealed that defendant initially approached Detroit Police Officers Steven Parker and Joseph Stevenson, who were making an unrelated traffic stop, and told them he had been the victim of an attempted carjacking and that his girlfriend had been shot by the assailant. Defendant apparently went voluntarily with the officers to the homicide section of the Detroit Police Department. After dropping defendant off, the officers recovered a .380-caliber shell casing in the backseat of their patrol car where defendant had been sitting. Meanwhile, another .380-caliber shell casing had been recovered from defendant's own car. At that point, the police clearly had probable cause to arrest defendant. Whether or not defendant was formally arrested or told that he was under arrest is irrelevant. See *Irby, supra* at 315. Consequently, the fact that defendant was lawfully in custody at the time he gave his first statement was a sufficient intervening circumstance such that any illegality in defendant's initial detention was attenuated. See

People v Washington, 99 Mich App 330, 335-336; 297 NW2d 915 (1980). Moreover, we are convinced that the record

demonstrates that defendant freely consented to the search of his bedroom. *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). Defendant's second and third statements and the gun and ammunition recovered by the police were thus properly admitted.

III

Defendant also argues that the prosecutor's misconduct denied him a fair trial. While we agree with defendant some of the prosecutor's comments were improper, defendant failed to object below to several of the challenged remarks. Appellate review of those comments is therefore precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

We have examined the allegedly improper comments and find that, in the instances in which defense counsel objected, the trial court properly cured any prejudicial effect. In fact, with respect to some of the prosecutor's remarks, the trial court sua sponte cured any potential prejudice. Regarding those instances where defense counsel failed to object, we conclude that an objection and curative instruction could have eliminated any prejudicial effect. Moreover, the court's instruction that the arguments of counsel were not evidence dispelled any potential prejudice with respect to all of the alleged instances of prosecutorial misconduct. *People v Ullah*, 216 Mich App 669, 682-683; 550 NW2d 568 (1996).

IV

Defendant also argues that the trial court abused its discretion when it admitted a firearms report and photographs of the interior of defendant's car. Whether evidence was properly admitted is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant first claims that he was denied a fair trial because the trial court allowed the prosecutor to use the firearms report, which was not introduced until after trial had begun. Defendant's specific argument as it relates to the report is that he did not have adequate time to prepare for it. However, the record reveals that the trial court granted defense counsel the exact amount of time that he requested to review the report. Defense counsel cannot now argue that the time was inadequate. We further note that defense counsel's cross-examination of the prosecution's firearms expert was pointed and effective.

Defendant also argues that the trial court abused its discretion in admitting several photographs of the interior of defendant's car, which photographs showed blood in the passenger compartment. Photographic evidence is admissible if competent, relevant, and substantially necessary or instructive to show material facts or conditions. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Photographic evidence is not inadmissible merely because it may be gruesome and shocking. The trial court, however, should exclude photos that could lead the jury to abdicate its truth-finding

function and convict on passion alone. *Id.* We conclude that the photographs were properly admitted because they were competent, material, and relevant to the prosecution's theory that the shooting was not accidental. Moreover, the photographs were not particularly gruesome or shocking. See *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). In sum, we find no abuse of discretion in either of the trial court's decisions.

V

Next, defendant claims that he was denied a fair trial when the jury, during its deliberations, asked two questions concerning the trial court's instructions; the court responded by rereading the pertinent portions of those instructions. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* After carefully reviewing the instructions at issue, we find no error.

VI

Defendant argues that the cumulative effect of multiple errors committed at trial warrants reversal. Defendant is not entitled to reversal on this basis. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

VII

Finally, defendant claims that his twenty-five-year minimum sentence is disproportionate. We disagree. Defendant's twenty-five-year minimum sentence is within the guidelines recommended range of three hundred to six hundred months, albeit at the high end of that range, and is therefore presumed to be proportionate. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). While a sentence within the guidelines can constitute an abuse of discretion upon a demonstration of unusual circumstances that make the sentence disproportionate, *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992), a defendant's lack of criminal history is not an unusual circumstance that overcomes the presumption of proportionality. *Daniel, supra* at 54. The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene M. White
/s/ Robert P. Young, Jr.

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

² While the police admittedly did not advise defendant of his *Miranda* rights before his first statement was made, during which time the prosecution concedes defendant was in custody, we conclude that any error in the admission of that statement was harmless in light of the fact that defendant's first statement was exculpatory and cumulative to other evidence properly admitted at trial. See *People v Howard*, ___ Mich App ___; ___ NW2d ___ (Docket No. 172633, issued 11/25/97), slip op pp 6-7.

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).