

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGELIO MILBURN,

Defendant-Appellant.

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UNPUBLISHED

February 27, 2001

No. 221711

Wayne Circuit Court

Criminal Division

LC No. 97-003389

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree, premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The charges arose from an incident wherein shots were fired at a residence in Detroit, killing a young woman and wounding two others.

Originally, the prosecutor tried defendant jointly with two codefendants, before separate juries. The trial court discharged defendant's original jury and declared a mistrial because of juror misconduct. Defendant was tried a second time and convicted of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to cause great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm. He was sentenced to a term of 25 to 75 years' imprisonment for the second-degree murder conviction, 5 to 10 years' imprisonment for each of the assault convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, raising issues related only to his sentence for second-degree murder. We affirm.

Defendant first argues that the trial court improperly scored offense variables during sentencing. We find it unnecessary and inappropriate to review these scoring challenges because the scoring of the sentencing guidelines is not an end in itself but rather a means to achieve a proportionate sentence. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). Instead, we review defendant's sentence to determine whether it constitutes an abuse of discretion. *Id.*; *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

In this case, both the prosecutor and defendant agree that the sentencing guidelines recommended a maximum minimum sentence of 300 months, or twenty-five years. Thus, defendant's minimum sentence of twenty-five years is within the guidelines range, albeit at the highest end. A sentence that falls within the sentencing guidelines range is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Moseler*, 202 Mich App 296, 300; 508 NW2d 192 (1993). In order to overcome the presumption that a sentence is proportionate, a defendant must present unusual circumstances that would render the sentence disproportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Because defendant offers no unusual circumstances that would render his sentence disproportionate, he is not entitled to resentencing.

Moreover, we find that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. The record reveals that defendant previously taunted and threatened witness Antonio Nelson, including another occasion when defendant threatened Nelson with a gun. On the day of the shooting, defendant and his codefendants initiated a confrontation with Nelson and followed him to the home where his brother, cousins, and others lived. A verbal and physical confrontation occurred in front of the two-family flat. During that confrontation, defendant learned that children and women were present at the house. Defendant and his codefendants eventually ran from the home. However, as he was leaving, defendant vowed to return with a gun. A short time later, defendant and his codefendants returned. Codefendant Davis was seen with a shotgun. While it was unclear whether codefendant Anguan Milburn had a weapon, defendant was seen holding a handgun and pointing it directly at the occupied flat. Three bullets from a nine-millimeter handgun penetrated the flat, killing Chiequita Sullivan and injuring two others. Shortly after the shooting, police discovered gunpowder residue on defendant's hands.

Defendant has only one, nonviolent juvenile conviction on his record. However, he has other arrests and outstanding warrants and, as previously noted, had a history of aggressive behavior toward Nelson. Moreover, defendant evidenced a lack of remorse for his crime and the record reveals that he consistently lied about the crime, making statements in direct conflict with the undisputed evidence. His crime left a nine-month old child without a mother. Under the circumstances, we find that the 25 to 75 year sentence is proportionate.

Finally, we disagree with defendant that the trial court considered improper criteria when sentencing defendant. The trial court discussed the facts of the case and indicated that it believed that the facts showed premeditation and deliberation. The trial court, however, did not sentence defendant for first-degree murder. It sentenced him for second-degree murder and, in doing so, it was entitled to consider the facts underlying the pending charge, *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992), and the seriousness and boldness of the assault, *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Affirmed.

/s/ Michael R Smolenski  
/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald