

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME E. MIDDLEBROOKS,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 187819

Oakland Circuit Court

LC No. 95-137224-FC

Before: Corrigan, C.J., Markey and Markman, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to a term of imprisonment of twenty to forty years for the assault with intent to commit murder conviction and to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201; 489 NW2d 748 (1992); *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996).

The elements of an assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). An “assault” is defined as an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Joeseype Johnson*, 407 Mich 196, 225; 284 NW2d 718 (1979) (Williams, J., concurring). The intentional discharge of a firearm at someone within range is an assault. *People v George Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Defendant contends that the prosecution failed to prove

beyond a reasonable doubt that defendant possessed the requisite intent element of the crime. We disagree.

Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of an offense. *Barclay, supra* at 674. This Court has held that the intent to kill could be proven by inference from any facts in evidence. *Id.* This Court has stated:

By saying however, that the specific intent to murder or . . . the intent to kill must be proved, we do not intend to say it must be proved by direct, positive, or independent evidence; but as very properly remarked by my brother Campbell in *People v Scott*, 6 Mich [287 (1859)], the jury ‘may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.’ And in considering the question they may, and should take into consideration the nature of the defendant’s acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988), citing *Roberts v People*, 19 Mich 401, 415 (1870).]

Moreover, the factfinder is permitted to infer an intent to kill from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993). Also, this Court previously has determined that aiming and firing a gun at a victim was sufficient to support a finding that the defendant had acted with the intent to kill. *People v Hollis*, 140 Mich App 589, 592-593; 366 NW2d 29 (1985).

In this case, defendant was a passenger in a motor vehicle. While traveling alongside the complainant’s vehicle, defendant fired a gunshot directly into the complainant’s window. The complainant was struck in the chest. Considering the evidence in the light most favorable to the prosecution, we determine that sufficient evidence supported the jury’s conclusion that defendant acted with the intent to kill.

Next, defendant contends that two acts of prosecutorial misconduct deprived him of a fair trial. We disagree. First, defendant asserts that the prosecutor improperly argued facts not in evidence when he argued in closing that an eyewitness testified consistent with the preliminary examination testimony. Defense counsel failed to object at trial to the prosecutor’s statement. Therefore, the issue is not preserved for review unless defendant can show that: (1) the prejudicial effect of the alleged misconduct was so great that even a cautionary jury instruction would not have overcome it or (2) failure to consider the issue would result in a miscarriage of justice. *People v Hedelsky*, 162 Mich App 382, 384; 412 NW2d 746 (1987). Defendant has failed to establish either. Therefore, we decline to address this issue.

Defendant also argues that the prosecutor improperly examined the eyewitness, complainant's passenger Harvey Black, regarding why Black waited over a week to reveal the identity of defendant as the individual who shot the complainant. We disagree. Black testified that he was afraid to identify defendant because he feared for his safety. Over defendant's objections, the prosecutor then asked Black if he had heard of people being injured because they went to the police. This evidence could have assisted the jury in determining whether Black's failure to come forward earlier was excusable; thus, it could have assisted the jury in deciding whether to believe Black's account of the events. The prosecutor did not engage in misconduct depriving defendant of a fair trial. See, e.g., *People v Phillips*, 217 Mich App 489, 492-498; 552 NW2d 487 (1996).

Defendant also takes issue with the sentence imposed by the trial court, arguing that it was based upon inaccurate information and disproportionate. In this case, the guidelines recommended a minimum sentence range of eight to fifteen years. The court sentenced defendant to a minimum term of twenty years, which exceeded the recommended sentence by five years.

Sentencing decisions are reviewed by this Court under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires a sentence to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636, 661. We hold that the trial court's sentencing of defendant was not an abuse of discretion.

Defendant argues that, because the record is devoid of facts that he was involved with drugs or that the shooting was drug-related, the court should not have exceeded the sentencing guidelines on those grounds. Defendant ignores his own juvenile record, which contains two drug-related convictions. Additionally, the PSIR reported that, according to an assessment prepared by the Department of Social Services, "defendant's goal in life was to become a member of the machos street gang." Finally, although defendant argues that the court should not have characterized the shooting as an assassination attempt, the facts of this case indicate otherwise. The record supports the court's departure from the guidelines.

Further, the sentence, although an upward departure from the guidelines' recommended range, was not disproportionate. The sentencing guidelines do not convey substantive rights, but are merely a tool to assist the trial court in its exercise of discretion. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). The trial court may exceed the guidelines when to do so would not violate the principle of proportionality. *Milbourn, supra*, at 659-660. Departures are appropriate where the guidelines inadequately account for factors that legitimately may be considered at sentencing. *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995).

In this case, defendant had an extensive juvenile record. At the time of the assault, he was a truant from his placement in a tether program. He had violated the terms of his placement and cut off his tether. With respect to the offense, defendant appeared to have waited for the complainant's vehicle in a residential neighborhood and then shot into the front seat of the car, which another passenger also occupied. The complainant sustained a serious gunshot wound to the chest. Also, the complainant was

shot by mistake; apparently, another individual was defendant's intended victim. Additionally, the trial court intended to send a message to the community. Deterrence is an appropriate factor to consider when sentencing a defendant. *Watkins, supra*. Defendant's actions evidenced his total indifference to human life. In light of the serious nature of the crime and defendant's background, the sentence imposed was proportionate.

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman