

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARKESE TRAUAN BELL,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 192381
Recorder's Court
LC No. 95-001888

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARC MEALING,

Defendant-Appellant.

No. 192383
Recorder's Court
LC No. 95-001888

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

PER CURIAM.

In docket no. 192381, defendant Markese Bell appeals as of right his bench trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2). Defendant Bell was sentenced to 80 to 120 months in prison for the assault with intent to do great bodily harm conviction, and to a concurrent prison term of 270 days for the discharge of a firearm at a dwelling conviction. We affirm defendant Bell's convictions and sentences.

In docket no. 192383, defendant Demarc Mealing appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder and discharge of a firearm at a dwelling.

Defendant Mealing was sentenced to 80 to 120 months in prison for the assault with intent to do great bodily harm conviction, and to a concurrent two to four year prison term for the discharge of a firearm at a building conviction. We affirm defendant Mealing's convictions and sentences.

Docket No. 192383

We first address defendant Mealing's claims of error in docket no. 192383. Defendant Mealing first argues that the prosecution presented insufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder and discharge of a firearm at a dwelling. We disagree.

To determine whether the prosecution presented sufficient evidence to sustain a conviction, this Court views the evidence in the 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of assault with intent to do great bodily harm less than murder are (1) an assault, which is defined as an attempt or offer with force and violence to do corporal harm to another, coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996).

The prosecution's evidence indicated that defendant Mealing fired approximately twenty shots from a deadly weapon into a house. Testimony that Paula Armstrong entered the house after defendant Bell asked her if Dana Herron lived there indicates that defendant Mealing knew the house was occupied. One person inside the house was in fact struck by one of the bullets. The intent to do great bodily harm may be inferred from the act itself, the means employed, and the manner employed. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). We find the foregoing evidence sufficient to support a finding that defendant Mealing was guilty of assault with intent to do great bodily harm less than murder.

Defendant Mealing was also convicted of discharge of a firearm at a dwelling. MCL 750.234(b)(1); MSA 28.431(2)(1) provides, in relevant part:

[A]n individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than \$2,000.00, or both.

We conclude that the evidence noted above was sufficient to justify a rational trier of fact in finding defendant guilty of discharge of a firearm at a dwelling.

Defendant Mealing next argues that the trial court erred in admitting the gun into evidence where the prosecution failed to properly authenticate the gun by presenting evidence that the gun admitted at trial was the same gun used in the shooting. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Whether a proper foundation has been laid to admit evidence must be determined in light of MRE 901, which provides that the requirement of authentication “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(a). An adequate foundation for the admission of real evidence should include testimony that the object offered is the same object that was involved in the incident, and that the condition of the object is substantially unchanged. *People v Kemp*, 99 Mich App 485, 489; 298 NW2d 1 (1980). The factors to be considered include “the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it.” *Id.*, 490.

Naykia Graham testified that, after the shooting, defendant Mealing returned to the car with the gun, which she described as an “AK rifle,” and that either defendant Mealing or defendant Bell put the gun in the trunk of the car. When they drove to defendant Bell’s residence at 1658 Burlingame, defendant Mealing took the gun from the trunk, wrapped it in a blanket, took it upstairs, and put it under a bed. When the police later arrived at the house, “Donna” took the gun from under the bed and put it in the attic. Highland Park Police Officer Hubert Yopp testified that he found the gun, an AK-47, hidden in the attic of the house under a pile of dirty clothes. Officer Yopp explained that the gun was preserved as evidence and taken to the police station, and that he put an evidence tag on it. Sergeant Charles Hackney testified that, after the gun was tagged as evidence, the ammunition clip was taken out of the gun for safety reasons, and both the gun and the clip were sent to the Michigan State Police Laboratory. The gun was admitted at trial without the clip, although no explanation was given for why the clip was missing.

We find that the above-mentioned testimony was sufficient to establish a chain of custody linking the gun admitted at trial to the gun used in the shooting for the purposes of MRE 901. Although defendant Mealing also argues that the trial court erred in admitting the gun because it was in an altered state due to the fact that the clip was missing at trial, defendant did not object to the admission of the gun on that basis at trial. Therefore, the issue was not preserved for review. MRE 103(a)(1). Nevertheless, we find no error in the admission of the gun due to the missing clip because the gun’s overall condition was not changed in any important respects. See *Kemp*, *supra*, 99 Mich App 490.

Defendant Mealing next argues that the trial court abused its discretion in admitting the spent bullet casings recovered from the scene of the shooting because there was no evidence linking the casings with the gun admitted into evidence. We disagree.

Highland Park Police Officer Abdullah Nelson, an evidence technician, testified that on May 19, 1994, he found approximately twenty spent casings in several parts of the alley where the shooting occurred. He testified that he placed each casing in its own envelope, and placed a separate evidence tag on each envelope. He further testified that he recorded the location of each casing in the alley. Sergeant Hackney testified that the casings were sent to the Michigan State Police Laboratory with the gun for tests to determine whether the casings found in the alley matched the gun recovered from the house on Burlingame. The foregoing testimony was sufficient to establish that the casings admitted into evidence were what the prosecution claimed them to be – spent casings found in the alley after the shooting. As noted by the trial court, the fact that the prosecution presented no evidence that the spent casings matched the gun admitted into evidence went to the weight of the testimony, but not its

admissibility, and defense counsel was free to emphasize the lack of such evidence to the jury. Therefore, we find that the trial court did not abuse its discretion in admitting the spent bullet casings into evidence.

Defendant Mealing next argues that the trial court abused its discretion by admitting into evidence photographs depicting bullet holes in the house where the prosecution failed to lay a proper foundation for the photographs. We disagree. A proper foundation for the admission of photographs is established if someone who is familiar from his or her own observation of the scene photographed testifies that the photograph is an accurate representation of the scene. *People v Lobaito*, 133 Mich App 547, 560; 351 NW2d 233 (1984). Officer Nelson testified that he took the photographs in question on May 19, 1994, and that they accurately represented the scene. Therefore, we conclude that the prosecution laid a sufficient foundation for their admission.

In a related claim, defendant Mealing also argues that the trial court abused its discretion in admitting the photographs because the photographs were misleading to the jury due to the fact that there was no testimony that the bullet holes “were the result of this particular incident.” This argument is meritless because two witnesses testified that there were no bullet holes in the house prior to the instant shooting.

Docket Nos. 192381 and 192383

Finally, both defendants argue that the sentencing court abused its discretion because the sentences imposed violate the principle of proportionality. We disagree.

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence within the guidelines range is presumed to be proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Nevertheless, a sentence within a guidelines range can violate the principle of proportionality in unusual circumstances. *Milbourn, supra*, 435 Mich 661. However, a defendant’s employment, lack of criminal history, and minimal culpability are not unusual circumstances which overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

With respect to defendant Bell’s sentencing challenge in docket no. 192381, the recommended minimum sentence range for assault with intent to commit great bodily harm less than murder was 48 to 80 months. Defendant Bell was sentenced to 80 to 120 months in prison for that conviction. Defendant Bell asserts that his sentence was disproportionate because his guilt was based on accessory liability, he did not possess the gun, and he should not be held accountable for codefendant Mealing’s discharge of multiple bullets at the house. However, under Michigan law, an aider and abettor “shall be punished as if he had directly committed such offense.” MCL 767.39; MSA 28.979. Furthermore, defendant has presented no special circumstances to overcome the presumption of proportionality. We do not believe that the sentence imposed, even though it was the maximum minimum sentence recommended by the guidelines, constituted an abuse of discretion.

With respect to defendant Mealing's sentencing challenge in docket no. 192383, we likewise find no abuse of discretion in the 80 to 120 month sentence imposed for the assault with intent to commit great bodily harm conviction. The recommended minimum sentence range was 36 to 80 months. Therefore, defendant's sentence is presumed to be proportionate. *Dukes, supra*, 189 Mich App 266. Defendant argues that his sentence violates the principle of proportionality because he had only one prior felony conviction, he was employed at the time of the instant offense, he was working toward his GED, and he "has the capacity and willingness to lead a productive life." However, such considerations do not constitute unusual circumstances sufficient to overcome the presumption of proportionality. *Daniel, supra*, 207 Mich App 54. Finally, we find no abuse of discretion in the trial court's decision to sentence defendant Mealing to the maximum minimum sentence recommended by the guidelines.

Defendant Mealing also argues in docket no. 192383 that the judgment of sentence erroneously indicates that his 80 to 120 month prison term for assault with intent to commit great bodily harm less than murder was to run consecutive to the term of imprisonment imposed for the discharge of a firearm at a dwelling conviction. However, an amended judgment of sentence was issued on June 26, 1996, which properly indicates that defendant's sentences were to run concurrently. Finally, although the trial judge stated at the sentencing hearing that defendant Mealing was entitled to 390 days credit for time served, defendant's presentence investigation report (PSIR) indicated that he was arrested on December 19, 1994, and remained in jail until he was sentenced in the instant case on October 26, 1995. Therefore, defendant Mealing's judgment of sentence properly reflects a sentence credit of 309 days for time served.

Affirmed.

/s/ Richard A. Bandstra

/s/ William B. Murphy

/s/ Robert P. Young, Jr.