

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY E. POWERS,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 195244

Oakland Circuit Court

LC No. 95-142360 FC

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

MEMORANDUM.

Defendant appeals by right his jury conviction of the lesser included offense of felonious assault, MCL 750.82; MSA 28.277, reduced from assault with intent to commit murder, MCL 750.83; MSA 28.278, and felony firearm MCL 750.2276; MSA 28.424(2), and his guilty-plea based conviction of felon in possession of a firearm, MCL 750.224f; MSA 28.424(6), for which, other than the determinate two year sentence for felony firearm, he received enhanced indeterminate sentences of 6 to 15 years and 4 to 15 years, to be served concurrently but consecutively to the felony firearm sentence.

Defendant first contends that the trial court abused its discretion, *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982), in rejecting his request for instructions on two misdemeanors, reckless use or discharge of a firearm, MCL 752.a863; MSA 28.436(24), and discharge of a firearm, without injury, while aimed intentionally but without malice, MCL 750.234; MSA 28.431. With respect to the offense created by MCL 750.234; MSA 28.431, a principal aspect of the crime is that the firearm be intentionally aimed at another person. According to defendant's own testimony, when the firearm was discharged, it was pointed in the air, and defendant claimed to have shot four times through the roof of the car in which he was sitting. As the victim, Mitchell, was neither on the roof of the car nor otherwise above the vehicle, this statute by its terms was inapposite and thus defendant failed to meet the third condition of the *Stephens* test, that the requested misdemeanor be supported by a rational view of the evidence at trial. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987).

Similarly, if the jury had credited defendant's testimony, it could not have found him guilty of reckless use or discharge of a firearm "without due caution and circumspection for the rights, safety or

property of others.” MCL 752.a863; MSA 28.436(24). That statute lacks a hierarchical or other logical relationship to assault with intent to murder, MCL 750.83; MSA 28.278. See *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). It also fails to fit defendant’s actions as he described them, since his discharge of the firearm was intentional and careful, not reckless, heedless, willful or wanton, and defendant by his lights exercised due caution and circumspection for the rights, safety and property of others. The trial court, accordingly, did not abuse its discretion in rejecting the requested instructions. *Steele, supra*, 21-22.

Defendant further contends that his enhanced sentences are disproportionate to the offenses and the offender. Any reliance on the sentence guideline range for this argument is misplaced, as the guidelines are irrelevant, although the trial court’s decision to sentence defendant at double the guideline range for the underlying offense was beneficial to defendant, an error of which he may not complain. *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). That these enhanced sentences are consecutive to the two year sentence for felony firearm did not have to be taken into account by the trial court in any fashion. *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). These enhanced sentences are properly reviewed only for abuse of sentencing discretion, and no abuse of discretion is established on this record, where the conviction offenses involve firearms and violence by a fourth offender. *People v Hansford (After Remand)*, 454 Mich 320; 562 NW2d 460 (1997).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.