STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 1998
v	No. 202908 Recorder's Court
SHARON RATLIFF HUNTER, Defendant-Appellant.	LC No. 95-001147

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317; MSA 28.549, and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279.[1] Defendant was sentenced to 60 to 100 years' imprisonment for the second-degree murder conviction and six to ten years' imprisonment for each of the assault convictions. Defendant appeals by right. We affirm.

I

Defendant first argues that the trial court erred in refusing to instruct the jury on involuntary manslaughter as a lesser included offense of first- and second-degree murder. According to defendant, the court erroneously decided that if the jury could only conclude from the evidence that the principals acted with murderous intent, then defendant's intent must also be murderous. According to defendant, the evidence was sufficient to convict the principals Dennis Gover and/or Robert Ketchings, and defendant of involuntary manslaughter. We disagree.

Involuntary manslaughter is a cognate lesser included offense of first- and second-degree murder. *People v Cheeks* 216 Mich App 470, 479; 549 NW2d 584 (1996), citing *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), and *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). A trial court must give a requested instruction for a cognate lesser included offense if: (1) the principal and lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. *People v Flowers*, 222 Mich App 732, 734; 565 NW2d 12 (1997), citing *People v Hendricks*, 446 Mich 435, 444-446; 521 NW2d

546 (1994); *Cheeks, supra* at 479. "There must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense." *Cheeks, supra* at 479-480, citing *Pouncey, supra* at 387.

Involuntary manslaughter is the unintentional killing of another without malice and unintentionally, but (1) in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923); *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988). The negligence required to establish involuntary manslaughter under all three theories is gross negligence. *People v Clark*, 453 Mich 572, 578 (Mallet, J.); 556 NW2d 820 (1996); *Datema supra* at 597-598; *People v Townes*, 391 Mich 578, 590-591, n 4; 218 NW2d 136 (1974). Gross negligence requires (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997), citing *People v Orr*, 243 Mich 300, 307; 220 NW 777 (1928).

Defendant was charged with first-degree murder and convicted of second-degree murder, as an aider and abettor. One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Aiding and abetting requires proof that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or encouraged or assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Id*.

Because defendant does not contest her conviction as an aider and abettor and does not challenge the sufficiency of the evidence, the trial court correctly concluded that the instruction was inappropriate because there was no evidence to suggest that the principals acted in a grossly negligent manner. Rather, their actions could only be construed as intentional and, thereby, could not constitute involuntary manslaughter The evidence established that after defendant's sister, Wanda Ratliff, had been robbed, several individuals, including Gover, brought guns to the house and discussed the suspected perpetrators of the robbery. Ratliff stated that she wanted to kill the perpetrators and their children. Before leaving to confront one of the perpetrators identified as "Ricky," Gover told an individual, "tell your local boys, when we come, we coming shooting." Defendant drove several armed individuals to Ricky's house. Upon arriving, either Gover and/or Ketchings positioned himself on the ledge of the car window and fired fifteen to twenty shots toward the people on the porch and continued to shoot as defendant slowly drove away. As a result, two individuals were injured and a nine-year-old girl a few houses away was killed. Defendant cites no authority for the unlikely proposition that the premeditated or intentional act of shooting multiple bullets at a group of individuals can be construed as

gross negligence. Because defendant's culpability is identical to that of the principals, the trial court correctly refused to give the requested instruction.

II

Next, defendant argues that the trial court abused its discretion in allowing Officer Michael Jamison to opine that the car defendant was driving during the shooting was either stationary or moving slowly based upon the separate groupings of shell casings he found at the scene of the crime. Defendant contends that the testimony was improperly admitted because it pertained to her intent, the ultimate issue in the case, was purely speculative, and lacked the proper foundation.

Because Officer Jamison was not qualified as an expert, the admissibility of his opinion is governed by MRE 701, which allows opinion testimony by a lay witness if it is rationally based on the perception of the witness and helpful to a clear understanding of a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). At trial, Officer Jamison testified that he observed two separate and distinct groupings of nine millimeter casings on the street near the scene of the crime. He opined that the grouping of the shell casings could mean that the car defendant was driving was stationary or moving at a slow rate of speed in the places where the groupings appeared. Officer Jamison's testimony, which was based on the location of the shell casings viewed just after the incident, assisted the jurors in determining defendant's conduct during the shooting. See *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997) (lay witnesses are qualified to testify about the opinions they form as a result of direct physical observation). In addition, his opinion could have been made by people in general and was not overly dependent on scientific, technical or specialized knowledge. Therefore, we hold that the trial court's decision to admit his testimony was not an abuse of discretion.

In addition, the error, if any, in admitting the testimony was harmless. Four eyewitnesses testified that defendant was either driving very slowly while the shots were being fired from the back seat or had actually stopped to allow the shooter(s) to open fire. Thus, it is unlikely that there was a "reasonable probability" that the admission of Officer Jamison's testimony affected the outcome of the trial. Cf. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

III

Finally, defendant contends that her 60- to 120-year sentence for the second-degree murder conviction, exceeding the guidelines' recommended minimum range of twelve to twenty-five years, or life, and her six- to ten-year sentence for the assault convictions,[2] exceeding the guidelines' range of two to five years, were disproportionately severe because she did not have a prior record and because her involvement was less egregious than that of her codefendants. We disagree.

We review a trial court's sentencing decision for an abuse of discretion. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). A sentence constitutes an abuse of discretion it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The "key test of proportionality is not whether it departs from or adheres to the

guidelines' recommended range, but whether it reflects the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 661.

The trial court reached its sentencing decision based on the following considerations: (1) the senseless nature of the crime (i.e. killing to protect a drug enterprise); (2) the resulting injury to several young lives including the victims and defendant's children who were exposed to weapons and illegal activity; (3) defendant's lack of remorse; and (4) defendant's demeanor in court that displayed her uncaring and unaffected attitudes toward the death of a nine-year-old child. See *People v Houston*, 448 Mich 312, 323;532 NW2d 508 (1995).

The trial court's imposition of defendant's sentence appropriately reflected the magnitude of the damage caused by defendant's senseless acts which were motivated by protecting a drug enterprise. In addition, as the trial court noted, defendant was equally responsible as her codefendants as the devastating impact of the gunfire may not have occurred had she not slowed down or stopped the vehicle to allow the shooter(s) to open fire. The level of concern expressed by the trial court is not adequately considered by the sentencing guidelines. A trial court may depart from the guidelines if there are circumstances about the offense or the offender that are not reflected in the guidelines' recommendation. *Milbourn, supra* at 659-660. We cannot conclude that the trial court abused its discretion when it departed from the guidelines in imposing defendant's sentence.

Defendant also argues that her sixty-year minimum sentence for the second-degree murder conviction must be reversed because it exceeds her life expectancy. In *People v Moore*, 432 Mich 311, 321; 439 NW2d 684 (1989), our Supreme Court held that, except for cases where the Legislature has authorized a sentence of life without parole, a sentencing court may not impose a sentence so lengthy that "the entire interval between the defendant's minimum sentence and his maximum sentence is certain to occur after his death." In *People v Weaver (After Remand)*, 192 Mich App 231, 234-235; 480 NW2d 607 (1991), this Court held that this principle is not violated when a defendant is not eligible for parole until his early nineties. See also *People v Holland*, 179 Mich App 184, 196-197; 445 NW2d 206 (1989). Here, defendant's minimum sentence will expire when she is ninety. Defendant, who was 30 years old at sentencing, would certainly be eligible for parole before her minimum sentence has expired. Therefore, in view of the above authority, the trial court did not abuse its sentencing discretion.

We affirm.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of discharge of a firearm in or at a building, MCL 750.234(b); MSA 28.431(2), and felony-firearm, MCL 750.227(b); MSA 28.424(2). Following the preliminary examination, defendant was bound over on all but the felony-firearm count.

[2] Defendant has incorrectly stated that she was sentenced to ten to twenty years' imprisonment for each of the assault with intent to commit great bodily harm convictions.