

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERYL GWINNER,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 214703

Wayne Circuit Court

LC No. 98-000842

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to fifteen years' imprisonment for the manslaughter conviction, and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to suppress his statement to the police where he remained silent during his ride to the police station following the initial reading of his rights after his arrest. Defendant maintains that such silence constituted an invocation of his rights, precluding the police from later questioning defendant. We disagree. The Fifth Amendment is not self-executing. See, generally, *Minnesota v Murphy*, 465 US 420; 104 S Ct 1136; 79 L Ed 2d 409 (1984). The police are not required to cease questioning a suspect merely because, upon reflection, the suspect's conduct might be construed to amount to an assertion of his rights. Unless the suspect expressly makes an assertion of his rights, the police are under no obligation to terminate questioning. See *Davis v United States*, 512 US 452, 459-461; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995); *People v Catey*, 135 Mich App 714, 722-726; 356 NW2d 241 (1984).

Defendant also maintains that his statement to the police should have been suppressed as involuntary because he lacked the necessary intelligence and experience to be able waive his rights and to read and comprehend the assertions contained in the statement prepared by the police. Following an evidentiary hearing, the trial court found that defendant possessed the requisite knowledge, education and experience to be able to understand his rights, and sufficient reading ability to verify that the assertions in the statement were accurate. According deference to the trial court's superior ability to weigh the factual evidence, we conclude that the trial court's

determination was not clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997).

Defendant next argues that the trial court erred in refusing to instruct the jury on the lesser included offense of careless, reckless or negligent use of a firearm resulting in death. MCL 752.861; MSA 28.436(22). Because the uncontested facts adduced at trial established that the firing of the weapon by the defendant was intentional, the trial court properly refused the requested instruction. *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998).

Lastly, defendant argues that his ten to fifteen year sentence is disproportionate in light of the offense and the offender, especially where it exceeded the minimum guidelines' recommended range of two to seven years and was the maximum sentence allowable by law. We disagree. We review a trial court's sentencing decision for an abuse of discretion. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). An abuse of discretion will be found where the sentence imposed violates that principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The "key test of proportionality is not whether [the sentence] 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 660-661.

In this case, the trial court articulated several aggravating factors which justified its decision to depart from the recommended minimum guidelines' range. Contrary to defendant's contention, the fact that the offense involved a situation in which defendant was selling drugs and that defendant killed the victim with an assault rifle were not considered or adequately weighed by the guidelines for voluntary manslaughter. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). The court also properly considered evidence that the shooting occurred at a hospital sometime after the original struggle at defendant's house, which suggested that defendant had a reasonable time to "cool off." "Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges." *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998) (citations omitted); *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989) (where there is record support that a greater offense has been committed by a preponderance of the evidence, it may constitute an aggravating factor to be considered by the trial court at sentencing without an admission of guilt by defendant). After a thorough review of the record and the trial court's stated reasons for departure, we conclude that the minimum sentence imposed was proportionate to the circumstances surrounding the offense and the offender. Further, the maximum fifteen-year sentence did not exceed that authorized by our Legislature. MCL 750.321; MSA 28.553. Accordingly, the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter