STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2001
v	No. 217123 Wayne Circuit Court
DOUGLAS A. DUNLAP, Defendant-Appellant.	Criminal Division LC No. 97-006999

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of 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). He was acquitted of two additional counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). Defendant was sentenced to twenty-eight to sixty years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Through appellate counsel, defendant alleges instructional error and a disproportionate sentence. Defendant, in his supplemental brief submitted in propria persona, alleges ineffective assistance of counsel. We find no merit to any of these claims.

Defendant assented on the record to the jury instructions as given, thus waiving claims of instructional error on appeal. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). When pressing a claim of unpreserved, nonconstitutional error, "[t]he defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (appendix) (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Defendant claims the instructions on aiding and abetting should have been tailored exclusively to the murder charges, and they failed to articulate the specific intent required for assault with intent to murder. Concerning the former, defendant argues the evidence implicated

him in the assault only as a principal, not an accessory, and, therefore, the aiding and abetting instruction handed the prosecutor an alternative avenue to secure a conviction that did not comport with the evidence. We disagree. There was clearly evidence of a common plan among defendant and his companions to do great harm to the three men who were victims of the outburst of violence in this case. Although the assault victim unequivocally identified defendant as the person who shot him, the jury could conceivably have entertained doubts concerning the victim's identification of defendant as his specific assailant while believing defendant was present and part of the overall criminal plan. Further, because defendant concedes the evidence supported a finding that he was guilty of the assault as a principal, it hardly seems plausible to argue the jury could have doubted those evidentiary particulars, yet convicted him on some vague notion he was nonetheless culpable only as an aider and abettor. Thus we see no risk that the instructions resulted in the conviction of an innocent man, or otherwise threw into doubt the fairness, integrity, or public reputation of the proceedings below.

We likewise find no error in the way the trial court addressed the intent element in the aiding and abetting instruction. We agree the trial court initially failed to make clear that finding defendant guilty of assault with intent to murder under an aiding and abetting theory required finding that defendant specifically intended to commit that crime, or acted with knowledge that a person being aided and abetted in the matter acted with that specific intent. See *People v Triplett*, 105 Mich App 182, 187-188; 306 NW2d 442 (1981), remanded on other grounds 414 Mich 898 (1982). However, the record indicates when the jury expressed some confusion about the law of aiding and abetting the trial court provided the jury with a copy of CJI2d 8.1. This instruction should have cured the deficiencies of which defendant complains, clarifying that the charge involves a defendant "intentionally assisting someone else" in committing a crime, CJI2d 8.1(1), and the prosecutor must prove the defendant "intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance," CJI2d 8.1(3)(c). Because the instructions as a whole adequately covered the matter in question, see *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994), appellate relief is not warranted.

Defendant's final claim of instructional error, asserts that the trial court erred in failing to define the term "firearm" for purposes of the felony-firearm charge. "Firearm" is statutorily defined to include "any weapon from which a dangerous projectile may be propelled by using explosives . . . ." MCL 8.3t; MSA 2.212(20). The definition thus obviously covers the ordinary sense of the word "gun," and it was sufficient in this case to let the jury use the word in its ordinary, everyday sense. Defendant cites no authority for the proposition that an instruction on felony-firearm must always include a definition of "firearm," and we know of none. In this case, the record nowhere suggests the defense attempted to cast doubts on the nature of the weapon involved as a firearm. Since there is little doubt the jury considered the felony "firearm" charge in reference to the ordinary sense of the word, no manifest injustice resulted from the court's decision to exclude the definition of a firearm.

Finally, defendant claims the trial court's eight-year upward departure from the sentencing guidelines' recommendation for assault with intent to murder constituted an abuse of discretion. We disagree. An abuse of sentencing discretion occurs where the sentence imposed

does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Sentences that fall within the sentencing guidelines are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). However, the judicial guidelines are not a legislative mandate, and courts are not strictly required to follow them. *Milbourn, supra* at 656-657. The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

A court upwardly departing from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). Additionally, a court may consider, as an aggravating factor, that a defendant's actions reflected a more serious crime where that determination is supported by a preponderance of the evidence. *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994); *People v Ratkov (After Remand)*, 201 Mich App 123, 126-127; 505 NW2d 886 (1993). "[W]here . . . there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing . . . ." *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989). This extends to conduct for which the defendant was charged but acquitted. *United States v Watts*, 519 US 148, 157; 117 S Ct 633; 136 L Ed 2d 554 (1997) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"). However, a court may not go so far as to determine independently that a defendant is guilty of a crime for which the defendant was not convicted and then sentence the defendant for that supposed crime. See *People v Grimmett*, 388 Mich 590, 608; 202 NW2d 278 (1972), overruled in part on other grounds by *People v White*, 390 Mich 245, 257-258; 212 NW2d 222 (1973).

Assault with intent to murder is punishable by imprisonment for any term of years. MCL 750.83; MSA 28.278. First-degree premeditated murder, of course, demands life imprisonment, MCL 750.316(1)(a); MSA 28.548(1)(a). In light of the legislative determination that assault with intent to murder may at times warrant the harshest of sentences, the trial court's imposition of a twenty-eight year minimum in this case is justified. The evidence indicates that defendant acted with two others throughout a course of gruesome violence. Defendant shot his victim in the face, chest, and leg and left the victim for dead; defendant and his companions tied up the two other victims in the room and murdered them in cold blood. As the trial court stated, the assault occurred under "very gruesome" circumstances – extreme circumstances that the dispassionate scoring variables under the guidelines could not be expected to reflect. On this record, we find no error in the trial court's upward departure from the sentencing guidelines.

Defendant further claims the trial court erred in considering the two murders of which defendant was acquitted in formulating its sentence. Again, a sentencing court may consider conduct for which a defendant was acquitted. *Watts, supra* at 157. The court's upward deviation

from the minimum range under the guidelines properly considered the murderous context of defendant's actions as an aggravating factor. We find no error in the court's sentence.

Finally, defendant argues in propia persona that trial counsel was ineffective for failing to present an alibi defense in general, and for failing to call a specific alibi witness in particular. However, the following exchange at trial indicates defendant waived any claim of error associated with this issue:

> [PROSECUTOR]: Judge, I informed [defense counsel] and the Court Clerk Thursday afternoon that I was going to withdraw my motion about my request to call the alibi witnesses in my case in chief. I'm still in that position this morning.
>
> [DEFENSE COUNSEL]: Well, as we stated on Thursday, if that's the case, we're not going to put on any defense at all. Mr. Dunlap understands—you understand that you have a right to put on this alibi defense?
>
> [DEFENDANT]: Yes, I do.
>
> [DEFENSE COUNSEL]: You have a right to testify on your own behalf if you so choose?
>
> [DEFENDANT]: Yes, sir.
>
> [DEFENSE COUNSEL]: What do you want to do?
>
> [DEFENDANT]: I don't wish to testify.
>
> THE COURT: All right. You realize the jury would draw no adverse inference from your failure to testify. Is that a yes?
>
> [DEFENDANT]: Yes.
>
> [DEFENSE COUNSEL]: At this particular time, if that's the case, You Honor, I'd ask that [the alibi witness] be allowed to go back to work.
>
> THE COURT: You're excused. Thank you for coming this morning.

The record shows defense counsel deferred to defendant in the decision whether to present the alibi defense, and defendant participated specifically in the decision to excuse the alibi witness. A party may not request an action of the trial court and then challenge that action on appeal as erroneous. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Because defendant personally and affirmatively assented on the record to waive the alibi defense, defendant extinguished that issue on appeal, leaving nothing for this Court to review. *Carter, supra* at 214-216. Defendant's decision at trial was obviously a strategic one, and we will not

permit defendant to revise that strategy now through the device of alleging ineffective assistance of counsel. See *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald