STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2001
v	No. 220811 Genesee Circuit Court
TEENA EILEEN McCLAIN, a/k/a TEENA WALKER, Defendant-Appellant.	LC No. 90-043516-FC

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). When the jury retired to deliberate, defendant fled the courthouse. The jury returned a verdict of guilty as charged, which the trial court received in defendant's absence. A bench warrant was issued for defendant's arrest, and she was apprehended more than eight years after her conviction. Defendant was then sentenced to ten to thirty years' imprisonment for the assault with intent to commit murder conviction, two to four years' imprisonment for the felonious-assault conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions resulted from her confrontation with the victim about a fight between the victim's daughter and defendant's daughter. Eyewitnesses testified that defendant pulled up in front of the victim's driveway and said, "Bitch, I'm gonna kill you for f------ with my daughter." Defendant then tried to shoot a gun at the victim three times, but the gun misfired. Defendant then successfully fired the gun three more times, aiming at the victim. The victim's daughter testified that defendant also pointed the gun at her.[1] No one was injured, and defendant sped off, hitting a parked vehicle as she fled.

[1] It was defendant's action of pointing the gun at the victim's daughter that led to her felonious assault conviction.

I

Defendant first argues that because the jury was permitted to consider the lesser included offense of felonious assault in connection with the principle charge of assault with intent to commit murder, the trial court erred by refusing to grant a requested jury instruction on self-defense by use of non-deadly force on the lesser charge. The trial court is only required to give requested instructions that are supported by the evidence. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). The determination of whether a jury instruction is applicable to the facts of a certain case lies with trial court and our review is limited to whether the trial court's determination was an abuse of discretion. *Ho*, *supra*; *People v Perry*, 218 Mich App 523, 526; 554 NW2d 362 (1996). In this case, defendant testified that she never shot at the victim but only showed her a gun after the victim first displayed a gun, and that when she heard sirens approaching, she fled. Defendant argues that her action in displaying a gun to the victim, in response to the victim's display of a gun, constituted the use of nondeadly force in self defense, entitling her to the jury instruction of nondeadly self-defense, see CJI2d 7.22, on the lesser-included offense of felonious assault.[2] We agree.

A person is guilty of felonious assault if that person, while using a dangerous weapon, intentionally places another person in reasonable apprehension of an immediate batter. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Here, defendant testified that she raised her gun to waist level, thereby showing to the victim, only after the victim first brandished a gun of her own. Thus, if the jury believed defendant's testimony, the victim's actions would have been sufficient to intentionally place defendant in a reasonable apprehension of an immediate battery, See *People v Pace*, 102 Mich App 522, 533-534; 302 NW2d 216 (1980), which in turn, would permit defendant to use non deadly force to defend herself. Therefore, the trial court erred when it refused to read the requested jury instruction. Nonetheless, because the requested instruction was sought as an affirmative defense to the lesser included charge of felonious offense, and the jury convicted defendant of the greater, charged offense, there was no reasonable possibility that the trial court's error contributed to defendant's conviction. *People v Anderson, (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). Thus, any error in the jury instructions was harmless beyond a reasonable doubt. *Id*.

II

Defendant next argues that her conviction of assault with intent to commit murder is not supported by sufficient evidence because the prosecutor did not prove beyond a reasonable doubt that she intended to kill the victim. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution in order to determine if a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowak*,

---

[2] Defendant does not claim self-defense as to the separate felonious assault conviction for her assault of the victim's daughter.

462 Mich 392, 411; 614 NW2d 78 (2000); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). This standard is a deferential one, requiring us to draw all reasonable inferences and to make credibility choices in support of the jury verdict. *Nowak*, *supra* at 400.

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In addition, the intent to kill may be inferred from minimal evidence. *Id*. On appeal, defendant challenges the sufficiency of evidence as to second element – that she intended to kill the victim. In *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996), this Court held that, even though the gun misfired, there was sufficient evidence of intent to kill. There, the defendant pointed a gun at the victim, threatened to kill the victim, and pulled the trigger several times. *Id*. Similarly, here, the prosecutor presented evidence that defendant went to the victim's house, threatened to kill the victim, pointed a gun at her, and pulled the trigger three times. In addition, unlike in *Davis*, when the gun misfired, defendant continued the assault, successfully firing three shots. This evidence, when viewed in the light most favorable to the prosecutor, was sufficient to infer that defendant intended to kill the victim. *McRunels*, *supra*; *Davis*; *supra*. Accordingly, the evidence presented was sufficient to convict defendant of assault with intent to commit murder. *Nowak*, *supra*; *Jaffray*, *supra*.

III

Defendant also argues that her sentence of ten to thirty years' imprisonment was disproportionately severe. Again, we disagree. This Court's review of an imposed sentence is for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A sentence constitutes an abuse of discretion where it violates the principle of proportionality. *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). The principle of proportionality requires sentences imposed by the trial court to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Knapp*, 244 Mich App 361, 389-390; ___ NW2d ___ (2001); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In this case, defendant's minimum term of ten years was within the recommenced sentencing guidelines range and is therefore presumed to be proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). To overcome this presumption, a defendant must show unusual circumstances that would render the presumptively proportionate sentence disproportionate. *People v Lee*, 243 Mich App 163, 188; 622 NW2d 71 (2000); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Here, defendant has failed to show any such circumstances. Instead, in sentencing defendant, the trial court appropriately considered defendant's criminal history, *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000) and her disrespect for the law, which was evidenced by her flight from punishment. *People v Curry*, 142 Mich App 724, 730- 731; 371 NW2d 854 (1985); See also *People v Albert*, 207 Mich App 73, 74-75; 523 Mich App 825 (1994). Further, the sentence imposed adequately reflected the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). Further, since a proportionate sentence is not cruel and unusual, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997), we reject defendant's argument that her sentence constitutes cruel and unusual punishment.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder