STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL NEWMAN,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 190105
Recorder's Court
LC No. 94-10398 FC

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of fifteen to twenty-five years' imprisonment for the assault convictions, plus a consecutive two-year term for the felony-firearm conviction. We affirm in part and reverse in part.

The charges against defendant stem from a shooting on February 8, 1994. Defendant and his two brothers, Henry and Dwight Newman,[1] got in an argument at a party in Detroit concerning Walter Respress' encroachment on the Newman brothers' drug territory. Dwight and Henry both shot Respress; Henry also shot Deshawn Wilson and two other women who were present at the scene. After the shooting, the three brothers left the party in Dwight's vehicle. A jury convicted defendant of two counts of assault with intent to murder relating to the assaults on Respress and Wilson. Although none of the witnesses claimed to have seen defendant with a gun, the prosecutor proceeded on a theory that defendant aided and abetted his brothers in the shootings, if he did not do the shootings himself, and the jury was instructed accordingly.

Defendant first argues that he was improperly bound over on the charges because the prosecutor failed to present enough evidence to support the verdict for the assault with intent to murder and felony-firearm charges. We review the circuit court's analysis of the bindover process de novo, *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994), and find that the evidence was sufficient. In any case, even if the evidence presented at the preliminary hearing was insufficient to

support the charges, such error was harmless. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). Not only did the prosecutor present sufficient evidence to support defendant's assault convictions at trial, but defendant has not demonstrated any prejudice resulting from the bindover process.

Defendant also contends that there was insufficient evidence to support his convictions. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The crime of assault with intent to murder requires (1) an assault, (2) with an actual intent to kill (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be proven by inference from any facts in evidence. *Id*. The elements of felony-firearm are that defendant "possessed a firearm during the commission or attempt to commit a felony." *Id*.

With respect to the assault charges, defendant contends that there was insufficient evidence indicating that he had an intent to kill the victims. However, shortly after defendant threatened to blow Respress' head off, Respress was shot in the face and then shot again as he ran away. This evidence was sufficient for the fact-finder to conclude that there was an actual intent to kill. Additionally, there was evidence presented at trial that defendant threatened to kill the other victim while he was hiding in the bedroom. Although defendant's brother was the one who actually shot this victim, the statement of defendant, who was apparently acting in concert with his brother, sheds some light on the intent with which this was done. With respect to the felony-firearm conviction, the prosecution concedes on appeal that the evidence presented at trial failed to establish that defendant aided and abetted in possession of a firearm during the commission of a felony. After reviewing the record, we conclude that both parties are correct on this issue, and therefore reverse defendant's felony-firearm conviction.

Defendant next contends that Deshawn Wilson's preliminary examination testimony should not have been admitted at his trial because police failed to exercise due diligence in producing the witness and because there was not a sufficient opportunity to cross-examine the witness at the preliminary examination. We disagree.

After reviewing the record, we conclude that the trial court did not abuse its discretion in admitting the evidence. The existence of due diligence is a finding of fact which this Court will not set aside absent clear error. See *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Because the trial court has the discretion to admit evidence, we review its ruling on admissibility for an abuse of discretion. *Id*. An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court relied in making its decision, would conclude that there was no justification for the ruling. *Id*. In this case, it is apparent that exhaustive efforts were made in an attempt to locate the witness. Police went to his last known address twice and called the hospitals and local jails. Police also checked the local post office, the LEIN computer system, and looked around the neighborhood for the witness. Other endorsed witnesses were contacted in an attempt to locate the witness. Given these efforts, the court's finding that there was due diligence was not clearly erroneous.

Similarly, we find that defendant's claim that there was not a full opportunity to examine the witness at the preliminary examination is without merit. The prior testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at the earlier proceeding. *Briseno*, *supra* at 14. The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. *Id*. The party wishing to have the declarant's former testimony admitted must demonstrate a reasonable, good-faith effort to secure the declarant's presence at trial. *Id*. In this case, a review of the preliminary examination transcript indicates that defendant was able to fully examine the witness on the issue of whether the two victims colluded to testify consistently. Thus, defendant's claim that his cross-examination was restricted on this point is without merit.

Defendant's next argument on appeal is that prosecutorial misconduct deprived him of a fair trial. In a related argument, he claims that he was denied the effective assistance of counsel due to his attorney's failure to object to the perceived misconduct. We find that both claims are without merit. Absent an objection during trial, appellate review of improper arguments by the prosecutor is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to consider the issue would result in a miscarriage of justice. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), affirmed 445 Mich 369; 518 NW2d 418 (1994). Having reviewed the remarks in question, we decline to reverse. With regard to the prosecutor's alleged attempts to appeal to the jury's sympathy and inject religion into the trial, any prejudice could have been cured by a timely instruction; thus, our failure to further review will not result in a miscarriage of justice. Nor do we believe that counsel's failure to object to these remarks constituted ineffective assistance of counsel because, even had an objection been made, defendant has not demonstrated a reasonable probability that the result of the proceeding would have been any different, *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The comments cited by defendant were brief and relatively innocuous. We have reviewed the other instances of alleged misconduct and find them to be without merit.

Next, defendant claims that the trial court erred in allowing the prosecutor to cross-examine a defense witness concerning the witness' failure to tell authorities that defendant was not involved in the shooting. We disagree. The extent and control of cross-examination is largely within the discretion of the trial judge, and an appellate court will not interfere absent an abuse of that discretion. *People v McClow*, 40 Mich App 185, 193; 198 NW2d 707 (1972). A prosecutor may cross-examine a non-alibi defense witness regarding his failure to come forward with the information testified to at trial if the information is of such a nature that the witness would have a natural tendency to come forward prior to trial. *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986).

The record in this case indicates not only that the information in question is of such a nature that the witness should have come forward with it prior to trial, but also that the prosecutor had reason to impeach the witness' testimony. First, the witness was defendant's older brother. He had personal knowledge of the events. In addition, information that the brothers did not plan together to harm or kill the occupants of the house would have exonerated the witness as well as defendant. Finally, since the

witness was in police custody, he had ample opportunity to convey this information to authorities without too much effort on his part. We therefore conclude that the witness would have a natural tendency to come forward and that no error resulted from the prosecutor's questioning. See *Emery, supra* at 666-667.

In his next issue, defendant contends that the court erred in refusing to instruct the jury on the crime of felonious assault. In reviewing issues related to jury instructions, this Court reviews the instructions in their entirety to determine if error requiring reversal occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Instructions may not be extracted piecemeal to establish error. *Id*. The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *Id*. Even if the instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *Id*.

Felonious assault is defined in MCL 750.82; MSA 28.277 as follows: "[A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony . . . ." Felonious assault is a cognate offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). A defendant has a right upon request to jury instructions on those cognate lesser included offenses which are supported by record evidence. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). However, the harmless error analysis is properly employed where a court errs by failing to give a requested instruction on a cognate offense. *Id*. at 502.

In this case, the evidence would have supported a felonious assault conviction, on an aiding and abetting theory, given the evidence that defendant's two brothers shot at the victims with a gun. See *Vinson, supra* at 487. Therefore, the instruction should have been given. However, we conclude that the error was harmless. First, the jury was instructed on aggravated assault, which has the same requisite mental state as felonious assault: "an intent to injure or to make the complainant reasonably fear an immediate battery." See CJI2d 17.6 and 17.9. The jury rejected defendant's theory that he did not intend to murder, as manifested by its refusal to convict him of aggravated assault. Thus, since conviction of felonious assault would have been precluded as well, any error was harmless. See *People v Smith*, 143 Mich App 122, 132-134; 371 NW2d 496 (1985) (failure to instruct on simple assault harmless where the only difference between simple and felonious assault is the use of a dangerous weapon).

We also find that defendant's claim that the jury was prevented from convicting him of aggravated assault because a gun was used, and therefore that there was no real opportunity for conviction of a lesser offense, is without merit. The jury was instructed in accordance with the standard instructions for aggravated assault. The jury was instructed that this crime required proof that (1) defendant tried to physically injure [the complainants], (2) that defendant intended to injure either person or place them in fear of an injury and (3) that the assault caused serious or aggravated injury. CJI 2d 17.6. There is no indication from the instructions that the jury could not convict defendant of this crime if they found that a gun was used. Accordingly, we decline to reverse on this basis.

Finally, defendant claims error in sentencing. First, he contends that the court based his sentences for the assault convictions on an erroneous statement contained within the presentence investigation report. Second, he asserts that the sentences are disproportionately severe and that they were vindictively imposed because he exercised his right to trial. We find both of these contentions to be without merit.

If a claim is made that part of the presentence report is factually inaccurate, the sentencing judge has discretion in determining how best to proceed. *People v Harrison*, 119 Mich App 491, 496; 326 NW2d 827 (1982). Here, however, the court did not abuse its discretion in concluding that an inference could be made that defendant had a gun. The court noted that there was testimony that there were numerous casings found at the house and testimony that defendant's two brothers had only fired a couple of shots. The court also pointed out that, in addition to the aiding and abetting theory, the jury was instructed that they could premise guilt on a finding that defendant had a gun. We therefore find no error.

We also conclude that defendant has presented no unusual circumstances warranting a conclusion that his sentences, which were near the low end of the guidelines' range, are disproportionate. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Although defendant points out that his brothers received lower sentences, the court was not required to consider their sentences. *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). Further, while it would have been inappropriate to punish defendant for exercising his right to trial, *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), affirmed 441 Mich 496; 495 NW2d 534 (1992), it appears that the court based its sentence on the evidence which came out at trial, defendant's role in the incident, and the applicable guidelines' range. Accordingly, this claim is without merit.

Defendant's convictions and sentence of assault with intent to murder are affirmed. Defendant's conviction of felony-firearm is reversed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[1] Henry and Dwight each pleaded guilty to four counts of assault with intent to murder and one count of felony-firearm. They received sentences on the assault convictions of seven to fifteen and eight to fifteen years' imprisonment, respectively. Both of their appeals were dismissed.