

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LACOURIS PACELY,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 199922

Recorder's Court

LC No. 93-006338

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for involuntary manslaughter, MCL 750.321; MSA 28.553, and felony-firearm, MCL 750.227b; MSA 28.424(2).¹ We affirm.

I

Defendant first argues that the trial court erred in its instructions to the jury regarding aiding and abetting because the instructions did not adequately instruct on the intent required for aiding and abetting. We agree, but find the error harmless.

In order to convict a defendant as an aider and abettor, the prosecution must show: (1) that the crime was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which aided and assisted the commission of the crime; and, (3) that the defendant intended the commission of the crime, or had knowledge that the principal intended its commission at the time of giving aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). As it did in defendant's first trial, the trial court failed to instruct the jury on an essential element of aiding and abetting: that defendant intended the commission of a crime, or had knowledge that the principal intended the commission of a crime at the time defendant gave aid and encouragement. The instructions were erroneous.

However, this error does not require reversal because it was not prejudicial to defendant. Defendant admitted in his statement that he shot at the house but he denied intending to kill anyone. The extent of defendant's complicity here is clearly sufficient to render him liable as an aider and abettor to

involuntary manslaughter. One may be an aider and abettor of involuntary manslaughter where there exists a common and shared purpose to participate in the act which results in death. See *People v Turner*, 125 Mich App 8, 12-13; 336 NW2d 217 (1983). While defendant's statement indicates that he did not intend to kill the victim, defendant was not merely present, but participated in the shooting. Viewing the jury instructions as a whole, including the trial court's recharge to the jury, and in light of the jury's verdict of involuntary manslaughter, the erroneous instructions were not prejudicial to defendant and do not require reversal.

II

Defendant also argues that the trial court erred when it failed to include an instruction that the assistance necessary for aiding and abetting must be rendered before or during the crime. Because defendant failed to object to the instruction at trial, our review is precluded unless relief is necessary to avoid manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996).

Here, the trial court should have instructed the jury that the assistance underlying aiding and abetting must be given before or during the commission of the offense. *People v Crousore*, 159 Mich App 304, 317; 406 NW2d 280 (1987). However, manifest injustice will not result by our declining to address this issue because this aspect of aiding and abetting was not a basic or controlling issue at trial. See *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). Defendant admitted his participation in the shooting and defendant's main theory was that the prosecution could not prove beyond a reasonable doubt that defendant intended to kill.

III

Defendant also contends that he is entitled to resentencing because the trial court misscored OV3. We disagree. A challenge directed not to the accuracy of the factual basis of the sentence but rather to the judge's calculation of the sentencing variable does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997).

IV

Defendant next complains that his sentence is disproportionate because the recommended guidelines sentence on defendant's involuntary manslaughter conviction was four to seven years, yet defendant was sentenced to ten to fifteen years (in addition to the mandatory two-year sentence for the felony-firearm conviction). Defendant contends that the extent of this departure reflects the trial judge's personal belief that defendant was guilty of second-degree murder rather than involuntary manslaughter. Although we agree that the trial judge's statements were strong, we do not believe that the sentence imposed was disproportionate to the circumstances of this defendant and this crime.

Here, defendant and three others used two AK47 assault rifles and shot up the home of a rival gang member, killing a man who was not a gang member. The four men shot twenty-five rounds into the decedent's home after 11:00 pm., yet insisted that the death of the victim was an "accident." Where there is record support that a greater offense has been committed by a defendant than that for

which the defendant was convicted, this may constitute an aggravating factor at sentencing, because the standard at sentencing is a preponderance of the evidence. *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989). See also *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). Further, a defendant's post-arrest conduct can be an aggravating factor, appropriately considered in fashioning a proportionate sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Here, defendant had a pending concealed weapons offense at the time of sentencing, and he also had incurred four misconducts while in prison after his first trial. For these reasons, the guidelines here did not adequately reflect the severity of this crime or of defendant's display of extreme callousness toward human life. The sentence imposed was proportionate.

V

Defendant finally argues that the trial court erred when it denied defendant's motion for a second *Walker*² hearing before defendant's second trial. We disagree. Defendant argues that his statement should have been suppressed because there was a delay between his arrest and his arraignment and that this issue was not addressed in the previous *Walker* hearing or by this Court in his prior appeal. However, an otherwise competent confession will not be excluded solely because of a delay in arraignment. *People v Cipriano*, 431 Mich 315, 335; 429 NW2d 781 (1988). If the totality of the circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of prearraignment delay. *Cipriano, supra*, 431 Mich 338-339. Because defendant's statement could not be suppressed because of the delay alone, defendant's argument is actually that his statement was given involuntarily and should be suppressed for that reason.

This Court did not consider defendant's argument that the confession should be suppressed because of prearraignment delay in defendant's prior appeal, nor was this issue addressed by the trial court in the prior hearing. However, the factual record below is sufficient for us to decide this issue as a matter of law. *People v Spinks*, 206 Mich App 488, 497; 522 NW2d 875 (1994). Defendant's statement was properly admitted into evidence as it was made voluntarily and any delay between arrest and arraignment was not used to procure the statement. The trial court did not err in refusing to hold another evidentiary hearing regarding defendant's statement.

Affirmed.

/s/ Henry William Saad

/s/ Myron H. Wahls

/s/ Hilda R. Gage

¹ Defendant had been previously tried and convicted of second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm, and sentenced to consecutive terms of eighteen to thirty years and the mandatory two year's imprisonment for felony-firearm. This Court reversed and remanded for a new trial due to instructional error.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NWd 87 (1965).