STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 2001
v	No. 219717 Wayne Circuit Court
TERRELL SPENCER, Defendant-Appellant.	LC No. 98-008423

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to forty to eighty years' imprisonment for second-degree murder, twenty-five to fifty years' imprisonment for assault with intent to commit murder, and the mandatory two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in failing to provide a requested jury instruction on felonious assault, a cognate lesser included offense of assault with intent to commit murder. We disagree.

The trial court has a duty to instruct the jury with respect to the law applicable to the case. MCL 768.29; MSA 28.1052. Felonious assault is a cognate lesser offense of assault with intent to commit murder. See *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). A jury instruction on a cognate lesser offense is only required if the evidence presented at trial would support a conviction on that lesser offense. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998); *People v Zak*, 184 Mich App 1, 6; 457 NW2d 59 (1990). The erroneous failure to instruct on a lesser offense is subject to a harmless error analysis. *People v Mosko*, 441 Mich 496, 501-502; 495 NW2d 534 (1992).

Felonious assault is a specific intent crime that requires (1) an assault, (2) with a dangerous weapon, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In this case, the pertinent element that distinguishes the offense of felonious assault from assault with intent to commit murder is defendant's assaultive intent. The evidence adduced at trial included

the following: (1) defendant was forcefully ejected from the dance hall, (2) defendant proceeded to a parked vehicle that was located directly across from the dance hall with his friends, including DeWayne Clay, (3) Clay retrieved a handgun from under the passenger seat of the vehicle, (4) defendant grabbed the gun away from Clay, (5) defendant aimed the gun in the direction of a group of fifteen to twenty people who were standing in front of the doorway to the dance hall, (6) defendant aimed the gun directly at one of the victims and shot him in the arm, (7) defendant continued to fire the .22 caliber semiautomatic handgun at least three more times, but possibly seven more times, into the crowd standing in front of the doorway to the dance hall, (8) one bullet struck the second victim in the head, killing her, and (9) defendant stopped shooting because the gun jammed. Considering the circumstances of this crime, we hold that the evidence did not support a jury instruction for felonious assault because the evidence does not reasonably lead to an inference that defendant only intended to "injure or place the victim in reasonable apprehension of an immediate battery." The act of shooting a .22 caliber handgun several times into a crowd of people is a criminal act that naturally tends to cause death or great bodily harm; therefore, a felonious assault instruction was simply not justified.

Further, even if the trial court erred in failing to instruct the jury on felonious assault, the error was harmless. The trial court instructed the jury on the principal charge of assault with intent to commit murder and the lesser included offense of assault with the intent to do great bodily harm. The jury returned a verdict finding defendant guilty of assault with intent to commit murder. The jury had a choice to convict defendant on an intermediate charge and yet convicted him on the greater offense. The verdict indicates that it is unlikely the jury would have convicted defendant of felonious assault and thus any alleged error in failing to instruct on the charge was harmless. See *People v Beach*, 429 Mich 450, 490-491; 418 NW2d 861 (1988); *Sullivan*, *supra* at 520.

Defendant next argues that he is entitled to resentencing because the trial court exceeded the sentencing guidelines based on impermissible criteria. We disagree. We review sentencing decisions for an abuse of discretion. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). If the principle of proportionality is violated, an abuse of discretion has occurred. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

The policy of this state favors individualized sentencing for every defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). The trial court's discretion in imposing a sentence is broad, allowing the sentence to be tailored to the circumstances of the case considering the severity and nature of the crime. *Oliver*, *supra*; *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). The key test of proportionality is whether the sentence reflects the seriousness of the matter. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997), quoting *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

In this case, the sentencing guidelines' calculation resulted in a suggested sentence of ten to twenty-five years for the homicide conviction. Defendant argues that the trial court's reason for its upward departure from the recommended sentence, allegedly that several more people could have been injured in the shooting, was improper because such consideration was reflected in Offense Variable 6 (two or more victims) of the Sentence Information Report (SIR). We

disagree. The scoring of ten points under OV 6 does not foreclose the trial court from further considering the circumstances surrounding the criminal behavior. See *People v Castillo*, 230 Mich App 442, 448-449; 584 NW2d 606 (1998); *People v Barclay*, 208 Mich App 670, 685-686; 528 NW2d 842 (1995).

At sentencing, the trial court articulated several reasons in support of its decision to depart from the guidelines, including: the life of the murdered victim, defendant's behavior in the dance hall prior to the shooting, defendant's choice to open fire at a crowd of ten to fifteen people standing at the entrance of the dance hall, the number of shots that defendant fired, that several more innocent people could have been shot, that defendant only stopped shooting because his gun jammed, and that defendant's actions evidenced his complete disregard for human life. These are proper and sufficient reasons for departing from the recommended sentence in that they address the nature, severity, and circumstances of the crime in a way not fully addressed in the guidelines. See *Milbourn*, *supra* at 659-660; *Castillo*, *supra*. Consequently, the trial court did not impose a disproportionate sentence on defendant and did not abuse its sentencing discretion.

Defendant next argues that he is entitled to a new trial because (1) the prosecutor allegedly appealed to the jury's civic duty, and (2) the prosecutor allegedly vouched for a witness. We disagree. Defendant failed to object to the alleged prosecutorial misconduct; therefore, appellate review has been waived unless an instruction would not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

To determine whether a prosecutor has committed misconduct, this Court reviews the relevant portions of the record and considers the prosecutor's remarks in the context used. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In this case, review of the relevant portions of the record fails to reveal prosecutorial misconduct causing prejudice that could not be cured by a timely instruction and no miscarriage of justice results from our failure to consider the issue. See *People v Fisher*, 220 Mich App 133, 160-161; 559 NW2d 318 (1996); *People v Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder