STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
V	No. 291900 Wayne Circuit Court
DEWAYNE JEROME MCELRATH, Defendant-Appellant.	LC No. 08-001694-FJ

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, first degree-home invasion, MCL 750.110a(2), and possession of a firearm when committing a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent terms of imprisonment of 18 to 40 years for the assault with intent to commit murder and armed robbery convictions and 9 to 20 years for the home invasion conviction to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant filed a delayed application for leave appeal, and this Court granted the application. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

First, defendant claims that the trial court erred in refusing to instruct the jury regarding two lesser offenses. This Court reviews de novo issues of law arising from jury instructions, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). The defendant bears the burden of establishing that the claimed instructional error resulted in a miscarriage of justice. *People v Dupree*, ___ Mich ___; ___ NW2d ___ (2010), slip op at 8. Reversal is only warranted if it is more likely than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In other words, to warrant reversal, refusal to instruct on the included lesser offense must undermine the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 176, 181-182, 185; 713 NW2d 724 (2006).

A requested instruction on a necessarily included lesser offense should be given if the charged greater offense requires the jury to find a disputed factual element that is not part of the included lesser offense, and a rational view of the evidence would support it. *Cornell*, 466 Mich at 357. A rational view of the evidence supporting instructing on a necessarily included lesser offense requires not only that there be some evidence that would support a conviction on the lesser offense, but also that the evidence regarding the element or elements that differentiate the two offenses be sufficiently disputed so that the jury could consistently find the defendant innocent of the greater and guilty of the lesser offense. *Id*. at 352, 357 n 11; see also *People v Steele*, 429 Mich 13, 20-21; 412 NW2d 206 (1987), overruled in part on other grounds *Cornell*, 466 Mich 335. The reliability of a verdict is undermined when, after reviewing the entire case, the evidence "clearly" supports instructing on the necessarily included lesser offense, but the instruction is not given. *Cornell*, 466 Mich at 365. Thus, reversal is required only when there is "substantial evidence" to support the lesser offense considered in light of the entire cause, including evidence supporting the greater offense. *Id.*

The crime of assault with intent to do great bodily harm less than murder, MCL 750.84, is a necessarily included lesser offense of assault with intent to commit murder, MCL 750.83. *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005). Similarly, our Supreme Court has held that entering without permission, MCL 750.115, is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a. *People v Silver*, 466 Mich 386, 392, 398; 646 NW2d 150 (2002). The prosecution concedes these points of law on appeal but argues that the trial court did not err by declining to instruct on these necessarily included lesser offenses because a rational view of the evidence did not support doing so. We agree with respect to the home invasion charge but disagree regarding the assault charge.

The offense of first-degree home invasion differs from the lesser offense of entering without permission in that the more serious offense requires "intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Silver*, 466 Mich at 392. The evidence presented at trial offered conflicting reasons about why defendant entered the home. The victim testified that defendant entered his home and held him at gunpoint in order to obtain more money after having robbed the victim of what money he had outside the home. Defendant admitted he entered the victim's home without permission but asserted that he entered only to confront the victim regarding the victim's having assaulted defendant. Defendant testified that he entered the home in order to "talk to" the victim and "ask him why he hit me in the face." On cross-examination, however, defendant admitted he told the police that he entered the home to get his "licks in." Defendant further admitted at trial that when he entered the home he "just wanted to get some licks in." Thus, although defendant denied he possessed a gun and denied that he assaulted or robbed the victim, he admitted during cross-examination that he entered the victim's home intending to get "some licks in," or commit an assault.

Because defendant admitted intent necessary for the charged offense, a rational view of the evidence would not permit the jury to consistently find that the defendant was innocent of it and guilty of only the lesser offense. *Cornell*, 466 Mich at 352, 357 n 11; *Steele*, 429 Mich at 20-21. Moreover, even if defendant's testimony that he entered the house just to "talk to" the victim were sufficient to create an evidentiary dispute requiring instructing on the lesser offense, reversal is not warranted. More than an evidentiary dispute regarding the element that differentiates the lesser from the greater offense is required to reverse a conviction because the

"entire cause" must be reviewed to determine if failing to give the instruction undermined the reliability of the verdict. Here, in addition to hearing defendant claim he just wanted to talk, they also heard defendant admit that he had told police that he entered the house "to get some licks in." Defendant further acknowledged during cross-examination that when he entered the home, he "just wanted to get some licks in." Even defense counsel in closing argument, while not evidence, acknowledged that defendant's "intention of going in the house was to make things right, get them straight, to get in a fuel [sic] licks." Accordingly, although there was some evidence to suggest that defendant entered the house without intending to commit a "felony, larceny or assault," that evidence was not "substantial." Any error in failing to properly instruct the jury on the necessarily included lesser offense of entering without permission was harmless. MCL 769.26; *Cornell*, 466 Mich at 365-365.

The offense of assault with intent to murder differs from the offense of assault with intent to commit great bodily harm less than murder only in the mens rea: assault with intent to murder requires a specific intent to kill. *Brown*, 267 Mich App at 150. In this case, the prosecution's evidence demonstrated that defendant shot the victim in the abdomen once and then fired two more times while the victim struggled with defendant for the gun. This was substantial evidence that would support finding that defendant intended to kill the victim or *at least* do great bodily harm.

The prosecution argues that instructing on the lesser offense was not required because defendant testified he did not commit an assault: It was the victim who assaulted him with a gun, and the victim was shot while defendant was attempting to take the gun from the victim. Thus, although defendant disputed he intended to kill, he did so not by contending his intent was only to do great bodily harm but rather that he did not commit an assault; he only acted in self-defense to disarm the victim. There is some support for the prosecution's position in *Cornell*, 466 Mich at 357 n 11. The Court discussed Justice Ryan's dissent in *People v Cargill*, a companion case to *People v Kamin*, 405 Mich 482; 275 NW2d 777 (1979). In *Cargill*, the defendant was charged with armed robbery, and defense counsel requested that the jury be instructed on unarmed robbery, among other lesser offenses. But the defendant testified in his own defense that he did not commit the offense and presented other evidence of alibi. Therefore, the factual issue for the jury to decide was whether the defendant committed the offense, not whether it was committed with a gun, which was undisputed. Thus, instructing on unarmed robbery was not warranted because "the factual issue was the same with respect to both the lesser and greater offenses, and there was 'no evidence which would justify the jury in concluding that the greater offense was not committed and the lesser included offenses were committed.'" *Cornell*, 466 Mich at 357 n 11, quoting *Kamin*, 405 Mich at 516 (RYAN, J., *dissenting*).

As in *Cargill*, defendant here contended he did not commit the crime. Nevertheless, defendant disputed he possessed the intent to kill necessary to commit the greater offense, and that factual issue was before the jury. The same evidence that would support finding that defendant intended to kill the victim would also support finding that defendant only intended great bodily harm to the victim. Consequently, we conclude the trial court erred not instructing on assault with intent to do great bodily harm. By contending he did not commit the offense, defendant sufficiently disputed the intent element necessary for the charged offense, and the evidence would permit the jury to consistently find that the defendant was innocent of the charged offense and guilty of the lesser offense. *Id*. at 352, 357 n 11.

The prosecution further argues that any error could not have been outcome determinative because the jury did not believe defendant's claim that it was the victim that produced a gun. Nonetheless, it is quite possible that the jury could have concluded from the evidence that defendant had the gun and shot the victim, but only intended to inflict great bodily harm. Indeed, the same evidence that supports finding that defendant acted with intent to kill also supports finding that defendant only intended to inflict great bodily harm. Thus, the reliability of the verdict is undermined because, after reviewing the entire cause, the evidence clearly supports the lesser offense, but the instruction was not given. Under the circumstances, it is more probable than not that the trial court's error in not instructing the jury on assault with intent to commit great bodily harm less than murder was outcome determinative. *Cornell*, 466 Mich at 364-365.

Because the trial court erroneously refused to instruct the jury on the lesser included offense of assault with intent to commit great bodily harm less than murder, MCL 750.84, and because that error was more likely than not outcome determinative, defendant is entitled to a new trial before a properly instructed jury on that charge.

Defendant next argues that the evidence presented at trial was insufficient to justify the verdicts of guilty beyond a reasonable doubt of assault with intent to murder, armed robbery, first-degree home invasion and felony-firearm. We disagree.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo, and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from the evidence are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Any conflicts in the evidence must be resolved in favor of the prosecution. *Terry*, 221 Mich App at 452. The trier of fact determines what inferences may be fairly drawn from the evidence and determines the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

"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). An assault is either an attempt to commit a battery or an unlawful act that places another in a reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

The elements of armed robbery are: (1) the use of force or violence, an assault, or other conduct that places another in fear; (2) to take property from the victim's person or presence; and (3) while the defendant is armed with a dangerous weapon, or an article a reasonable person would believe is a dangerous weapon, or represents orally or otherwise he possesses a dangerous weapon. MCL 750.529; *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully

present in the dwelling or the defendant was armed with a dangerous weapon. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or an attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In this case, the victim testified that defendant ran up to him on the street in front of his home, pointed a handgun at his head, and demanded money. Defendant took the victim's wallet, then demanded more money and forced him back into his home at gunpoint. Once inside, defendant shot the victim in the abdomen. During the ensuing struggle over the weapon, more shots were fired. This evidence was sufficient to establish the elements of armed robbery, first-degree home invasion, and felony-firearm.

This evidence was also sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed assault with intent to murder. Intent to kill may be proved by inference from any facts in evidence. *McRunels*, 237 Mich App at 181. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id*. The firing of a lethal weapon multiple times, and the infliction of serious injury will support the inference of intent to kill. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995); *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). Here, the jury could easily infer that defendant intended to kill the victim from evidence that he shot the victim more than once at close range causing serious injury. Indeed, the jury could have inferred that but for the victim's, and his family's, wrestling the gun away from defendant, he would have succeeded.

Finally, defendant argues on appeal that the sentences imposed in this case constitute cruel and unusual punishment, US Const, Am VIII, or cruel or unusual punishment, Const 1963, art 1, § 16. Again, we disagree. Defendant failed to preserve this issue for appeal by properly first raising it in the trial court. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). In general, a trial court's sentencing decisions are reviewed for an abuse of discretion, but a defendant asserting an unpreserved claim of error must show that plain error affected his substantial rights. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). This same standard applies to unpreserved claims of constitutional error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763.

Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review does not apply to claims of constitutional error. *Conley*, 270 Mich App at 316. Questions of constitutional law are reviewed de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Defendant admits that although the trial judge imposed sentences within properly calculated guidelines ranges, his youth, lack of criminal history, and exemplary record as a detainee at a juvenile home render his sentences disproportionate, and, therefore, cruel and unusual under the Eighth Amendment to the United States Constitution and cruel or unusual under Const 1963, art 1, § 16.

The Legislature incorporated the principle of proportionality into the statutory sentencing guidelines. *Babcock*, 469 Mich at 263. Proportionality requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and the offender. *Id*. at 262; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The guidelines arrive at a proportionate sentence recommendation range by accounting for the seriousness of the offense through offense variables and accounting for the circumstances surrounding the offender through prior record variables. *Babcock*, 469 Mich at 263-264. A sentence is presumed proportionate when it falls within the guidelines range. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A sentence that is proportionate is not cruel or unusual punishment. *Id*.; *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

In order to overcome the presumption that a sentence that falls within the guidelines recommended range is proportionate, "a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Here, the only circumstances defendant presents are his young age, his lack of previous criminal history, and his exemplary behavior in the juvenile detention facility. But our Supreme Court in *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997), rejected an argument that an offender's young age, by itself, renders a particular sentence disproportionate. Similarly, defendant's lack of criminal history does not make his sentences disproportionate because the principle of proportionality is incorporated into the sentencing guidelines system. *Babcock*, 469 Mich at 263-264.

Also, in choosing a sentence at the upper range of the guidelines, the sentencing judge considered defendant's behavior while in juvenile detention. Although the sentencing judge acknowledged that defendant had done well in the structured setting of a juvenile facility, that fact was clearly insufficient to overcome the judge's concern regarding the level of violence defendant demonstrated while committing the crimes for which he was being sentenced.

We also note that MCL 750.110a(8) provides that a court "may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Accordingly, the judge had the option of imposing defendant's sentence for first-degree home invasion consecutively to his sentences for assault with intent to murder and armed robbery, but declined to do so. This fact further discredits the claim that the sentences were unusually harsh.

In sum, defendant has failed to overcome the presumption that his sentences, which fell within guidelines recommended ranges, were proportionate. Accordingly, his sentences do not violate the constitutional prohibitions against imposing cruel and/or unusual punishment. *Powell*, 278 Mich App at 323; *Drohan*, 264 Mich App at 92.

We affirm defendant's convictions and sentences for armed robbery, first-degree home invasion, and felony-firearm. We vacate defendant's conviction and sentence for assault with intent to murder and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E.Thomas Fitzgerald
/s/ Jane E.Markey
/s/ Jane M. Beckering