STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2001
v	No. 222469 Saginaw Circuit Court
PERRIS DEMARIUS MONCRIEF, Defendant-Appellant.	LC No. 99-017351-FJ

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of assault with intent to commit murder, MCL 750.83, and one count of intentional discharge of a firearm from a motor vehicle, MCL 750.234a(1). Defendant, a juvenile when he committed these offenses, was tried and sentenced as an adult. See MCL 764.1f(1); MCL 769.1(1). The trial court sentenced defendant to concurrent terms of twelve to thirty years' imprisonment for the assault convictions and two to four years' imprisonment for the intentional discharge conviction. Defendant's convictions stemmed from his involvement as the driver of a car from which several gunshots were fired at another car, injuring a bystander. We affirm.

On appeal, defendant argues that the prosecutor presented insufficient evidence to support his convictions of assault with intent to commit murder. We review this issue de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When presented with a challenge to the sufficiency of the evidence at trial, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992) amended 441 Mich 1201 (1992).

"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). The intent to kill may be inferred from circumstantial evidence. *Id*. Defendant was convicted as an aider and abettor, MCL 767.39. To convict defendant under an aider and abettor theory, the prosecutor was required to prove the following:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

At trial, the prosecutor presented evidence that defendant flagged down Miguel Mireles as he drove around Saginaw. Defendant then got out of his own car and confronted Mireles, accusing him of stealing stereo equipment. At one point, defendant reached into Mireles' car and turned off the ignition. Defendant also put his fingers to Mireles' head to mimic pointing a gun and threatened to kill Mireles. Later that same evening, defendant followed Mireles as he drove to his sister's house. According to testimony at trial, defendant then pulled up to the corner of East Remington and Crapo and turned off the car's ignition and headlights. As Mireles' car approached, defendant's passenger fired several shots at Mireles. One of these bullets became lodged in Mireles' car. Although Mireles was not injured, a stray bullet struck a bystander on a nearby porch.

In our view, this evidence was sufficient to allow the jury to conclude that defendant's passenger assaulted Mireles with the intent to kill him. The use of a lethal weapon—here, a gun—"support[s] an inference of an intent to kill." *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). That intent to kill also transferred to the other victim. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). Moreover, the record evidence was sufficient to allow the jury to conclude that defendant assaulted the victims with the intent to commit murder as an aider and abettor. Defendant assisted in the commission of these crimes by parking his car and lying in wait for Mireles. Earlier that evening, defendant had threatened to kill Mireles. On this record, we are satisfied that a rational trier of fact could conclude beyond a reasonable doubt that defendant possessed the specific intent to kill. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985); *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

Likewise, we reject defendant's contention that his convictions should be reversed because the prosecutor did not refute his statement to the police that he did not know that his passenger was going to shoot at Mireles. The prosecutor was not required to disprove "every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Rather, the prosecutor was required only to present evidence sufficient to allow the jury to conclude that the elements of the crime were proved beyond a reasonable doubt. *Wolfe, supra*. The prosecutor satisfied this burden. Defendant's convictions were supported by sufficient evidence.

Defendant also argues that the trial court erred by failing to instruct the jury on several lesser offenses. Defendant failed to preserve this issue for appellate review because he did not request these instructions at trial. Accordingly, to avoid forfeiture of this issue defendant must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has not met this burden. It is well-settled that a trial court is not required to instruct the jury sua sponte on lesser included offenses. *People v Henry*, 395

Mich 367, 374; 236 NW2d 489 (1975); *People v Reese*, 242 Mich App 626, 629 n 2; 619 NW2d 708 (2000), lv gtd ___ Mich ___ (2001). Because the trial court did not err, defendant has not shown plain error affecting his substantial rights.

Defendant also challenges his dual sentences for assault with intent to commit murder. First, defendant argues that his sentences constitute cruel and unusual punishment. The United States Constitution prohibits the infliction of cruel and unusual punishment, but the Michigan Constitution provides greater protection, prohibiting cruel *or* unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16; *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). Thus, if a punishment is not "cruel or unusual" under the Michigan Constitution, "then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000). In considering whether a defendant's sentence is cruel or unusual, "we look to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation." *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996), citing *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Defendant does not argue that the length of his sentences render them cruel or unusual. Nor does he contend that they are inappropriate in light of the punishment imposed by other states or that imposed in this state for other serious crimes. Also, defendant does not assert that his sentences foreclose all possibility of rehabilitation. Rather, defendant's sole contention on appeal is that the trial court's failure to consider his age during sentencing rendered his sentences cruel or unusual. We disagree.

Our review of the record from the sentencing hearing confirms that the trial court considered defendant's status as a juvenile, but found that defendant's age did not justify a deviation from the legislative sentencing guidelines' range. Because the jury convicted defendant of two counts of assault with intent to commit murder, MCL 750.83, the trial court was required to sentence defendant as an adult. MCL 769.1(1)(b). However, contrary to defendant's assertion on appeal, MCL 769.1 did not expressly preclude the trial court from taking into account defendant's age. Rather, the trial court retained the discretion to do so pursuant to MCL 769.34(3).[1] In any event, defendant does not have a constitutional right to be treated as a juvenile. *People v Hana*, 443 Mich 202, 220; 504 NW2d 166 (1993).[2]

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[1] MCL 769.34(3) allows the trial court to depart from the legislative sentencing guidelines' range where "the court has a substantial and compelling reason for that departure and states on the record the reason for departure." See *People v Babcock*, 244 Mich App 64, 74-75; 624 NW2d 479 (2000).

[2] Defendant's reliance on *Eddings v Oklahoma*, 455 US 104, 102 S Ct 869; 71 L Ed 2d 1 (1982) is misplaced. The defendant in *Eddings* was a juvenile that shot and killed a police officer. *Id.* at 105. The United States Supreme Court reversed the trial court's imposition of the death penalty, holding that it violated the Eighth and Fourteenth Amendments because the trial court did not consider the defendant's turbulent family history as a mitigating circumstance. *Id.* at 113. To the extent that *Eddings* may require a trial court to consider a defendant's age as a mitigating

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In our opinion, defendant is hard-pressed to argue that his sentences are cruel or unusual, given the gravity of his offenses and the potentially fatal consequences. According to the record evidence, defendant initially threatened to kill Mireles on the evening of May 8, 1999. Defendant then followed Mireles through the streets of Saginaw, at one point parking his car to enable his passenger to take aim at Mireles. These events occurred in a residential neighborhood of Saginaw, and a fourteen-year-old girl sitting on a nearby porch was struck by a stray bullet. In spite of defendant's reckless actions in the instant case, his sentences are significantly lower than those imposed on other juvenile offenders for the same offense. See, e.g., *People v Whitfield (After Remand)*, 228 Mich App 659, 660; 579 NW2d 465 (1998); *People v Allen*, 90 Mich App 128, 135; 282 NW2d 255 (1979). Thus, we are not persuaded that defendant's sentences violate either the state or federal prohibitions against cruel and unusual punishment.

In a related argument, defendant contends that his sentences are disproportionately severe. Because defendant committed these crimes after January 1, 1999, he was sentenced under the legislative sentencing guidelines. MCL 769.34; *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Where, as in the instant case, a defendant's minimum sentence falls within the sentencing guidelines' recommended range, appellate review for proportionality is foreclosed. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Finally, defendant challenges the constitutionality of MCL 769.1, which required the trial court to sentence him as an adult. As defendant acknowledges in his brief on appeal, this Court upheld the constitutionality of MCL 769.1 in *People v Conat*, 238 Mich App 134; 605 NW2d 49 (1999). In *Conat*, a panel of this Court rejected the precise arguments defendant raises in the instant case.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski

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circumstance when imposing sentence, *id.* at 115-116, the trial court properly did so in the instant case, but found that it did not justify a departure from the sentencing guidelines' range.