STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VALERIE JEAN FULKERSON,

Defendant-Appellant.

UNPUBLISHED
June 18, 1996

No. 170653
LC No. 93-48567-FH

Before: Hoekstra, P.J., and Michael J. Kelly and J.M. Graves, Jr.* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering (B&E) an occupied dwelling with intent to commit felonious assault, MCL 750.110; MSA 28.305 and two counts of possession of a firearm during the commission of a felony, MCL 750.277b; MSA 28.424(2). She was sentenced to five to fifteen years for the B&E count, to be followed by concurrent two-year sentences for the felony firearm counts. Plaintiff appeals of right. We affirm.

Defendant's convictions arose out of an incident where she and her teenage daughter drove across the country and entered defendant's in-law's home attempting to retrieve defendant's baby from her estranged husband. During a struggle that ensued, defendant's husband was shot and killed and his father was shot and injured.

Defendant first raises three issues regarding jury instructions. The first issue is whether it was error for the court to not give the separate instruction, CJI2d 11.35, on aiding and abetting felony-firearm. This alleged error was not preserved and therefore, this Court will provide relief only to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Defendant argues that the instruction was required for the jury to find that defendant knew her daughter intended to assault defendant's father-in-law. However, this contention is based on the premise that it was undisputed that the daughter was the one who shot the father-in-law. Although the evidence strongly suggested this, the jury could have concluded that defendant had the independent intent to assault her father-in-law. The testimony indicated that she entered the room and

* Circuit judge, sitting on the Court of Appeals by assignment.

aimed a gun at both her husband and his father. Therefore, the court's failure to give CJI2d 11.35, absent defendant's request, did not result in manifest injustice.

Defendant also argues that it was error for the court to instruct the jury on B&E with intent to commit felonious assault as a lesser included offense to felony murder when it was not separately charged in the information. Defendant made no objection to the trial court regarding the instruction. Defendant's failure to object indicates that she did not rely on this Court's earlier ruling that a predicate felony to a felony murder charge is not a lesser included offense. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991). This case is distinguishable from *Sanders* because defendant was on notice that the prosecutor intended to prove the elements of B&E with intent to commit felonious assault since it was the named predicate felony for the felony murder charge in the information. Further, unlike *Sanders*, the evidence in this case did support a theory of the case that defendant had committed the breaking and entering offense but lacked the requisite intent for the murder charge. To extend the holding in *Sanders* to mean that a predicate felony can never be given to the jury as a lesser included offense would be unwarranted. Therefore, there is no indication of prejudice, much less manifest injustice.

Defendant's last alleged instructional error, also unpreserved, is that the court did not instruct the jury on B&E with intent to commit felonious assault separately from its instruction of the offense as the predicate felony for the felony murder charge and thus the necessary intent was unclear. While instructing the jury on felony murder, the court explained separately the elements of breaking and entering with intent to commit felonious assault, clearly stating the elements of that offense. The jury was properly instructed regarding the elements it must find to convict defendant and therefore, no manifest injustice resulted.

Defendant argues that her conviction should be reversed because the prosecutor inflamed the jury's sense of civic duty in closing argument by stating that the jury should not condone a parent taking the law into their own hands in a custody dispute. Defendant failed to object to the prosecutor's remarks and therefore, review of the remarks are foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977). The primary theory of defendant's case was that her actions were justified due to her desire to retrieve her young child. Therefore, the prosecutor's comments addressed an issue raised by defense counsel. *People v Bahoda*, 448 Mich 261, 263, 283-285; 531 NW2d 659 (1995). Further, if the comments appealed to the jury's sense of civic duty, they did so only marginally and a curative instruction could have easily remedied any error. *Id.*, 263.

Defendant next argues that there was an ambiguity in the verdict because the court instructed the jury on the fifteen-year felony of B&E an occupied dwelling with intent to commit felonious assault but the jury verdict form listed only breaking and entering with intent to commit felonious assault, a ten year felony. The jury was instructed that the dwelling must have been occupied as a required element of the B&E offense and therefore, there was no ambiguity in the verdict. The jury was not given the option to

find defendant guilty absent a finding that the dwelling was occupied. Further, this was hardly a disputed point where six people were living in the home at the point defendant entered it.

Defendant raises several sentencing issues. First, defendant argues that her sentence for B&E was disproportionate. The overall severity of defendant's offense was not reflected in the guidelines range and therefore, the court's upward departure was not an abuse of discretion. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Phillips (On Rehearing)*, 203 Mich App 287, 291; 512 NW2d 62 (1994). Although the guidelines did take into account that someone was killed as a result of defendant's crime (OV 2), that weapons were discharged (OV 1), that defendant was a "leader" in the criminal activity (OV 9) and that the crime was committed in the presence of others (OV 11), in this case, one person was killed, another was severely injured and innocent children and bystanders were placed at risk due to defendant's conduct. In addition, the consideration of defendant as a "leader" did not take into account that she involved her minor daughter, including placing a loaded weapon in her hand.

Defendant also challenges two statements in her presentence report as inaccurate. The court agreed to add the basis of defendant's challenges to the report. Defendant did not object to this resolution to her concerns, yet argues on appeal that the court erred by failing to conduct a hearing regarding the accuracy of the challenged statements. However, defendant did not request such a hearing below and cites no authority for the proposition that the court should have sua sponte conducted one. Further, nothing indicates that defendant was prejudiced by the court's handling of her objections.

Finally, defendant argues that the court made errors in the scoring of four offense variables. This Court will uphold scoring decisions for which there is any supporting evidence. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The court properly scored OV 1 (firearm is discharged) because the discharge of weapons clearly occurred The instruction for OV 2 states that a court should assess a score of "100" when "death results from the commission of *a* crime," it does not say *the* crime. The jury convicted defendant of the felony that set the series of events in motion that resulted in defendant's husband's death. Defendant's argument that because her daughter was acquitted, there was no second offender for defendant to lead to warrant a score of ten for OV 9 (that defendant was a "leader" in the criminal activity), lacks merit. The entire criminal episode should be taken into account in determining whether a defendant was a leader. *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 11 (1993). Nothing in the guidelines or instructions indicate that the other "offenders" need be charged, much less found guilty beyond a reasonable doubt, for the offense variable to be scored. The score of five points for OV 13 (psychological injury to victim) may have been error because there was nothing in the record that referred to any professional psychological treatment. But this possible error was harmless because it would not change the offense level. *Id.*, 290.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.