

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MANNIS,

Defendant-Appellant.

UNPUBLISHED

July 30, 1996

No. 178914

LC No. 93-013243

Before: Hood, P.J., and Griffin and J.F. Foley*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of careless, reckless or negligent use of a firearm with injury or death resulting, MCL 752.861; MSA 28.436(21), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and felonious assault, MCL 750.82; MSA 28.277.¹ He was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to one to two years' imprisonment for his careless, reckless or negligent use of a firearm conviction, five to ten years' imprisonment for his assault with intent to do great bodily harm conviction, and two to four years' imprisonment for his felonious assault conviction, the sentences to run concurrently. He was also sentenced to two years' imprisonment for his felony-firearm conviction, the former sentences to run consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence regarding his acts of threatening witnesses because it was prejudicial. We disagree. The decision to admit evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Evidence of a defendant's subsequent efforts to influence or coerce the witnesses against him is admissible where such activity demonstrated a consciousness of guilt on the part of the defendant. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973). In this case, the evidence demonstrated that defendant attempted to scare Jason Bowers and Christopher Randall into not testifying against him at trial. Such action

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

demonstrates a consciousness of guilt. We therefore conclude that the trial did not abuse its discretion in admitting the acts into evidence.²

Defendant also challenges his sentence of five to ten years for his assault with intent to do great bodily harm conviction as disproportionate under *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *Id.*, p 636. While a sentence within the recommended minimum range of the sentencing guidelines is presumed valid, a defendant may present sufficient mitigating factors to overcome that presumption. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994).

Defendant's sentence, which is at the upper end of the recommended guidelines minimum range of 24 to 60 months or two to five years, is presumed proportionate. Defendant urges us to find that his sentence is disproportionate based on his lack of a prior record, his age and education, and his family background and support. The fact that defendant was a first-time offender is incorporated into the calculation of his guidelines range and does not constitute an unusual circumstance sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Defendant's age and education, while permissible factors to be considered when sentencing a defendant, *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995); *Piotrowski*, *supra*, are not so unusual that defendant's sentence in this instance is disproportionate. Likewise, defendant's family background and support are not sufficiently unusual to overcome the presumption that defendant's sentence is proportional. The evidence in this case showed that defendant was involved in the shooting of four people, with one person dying. Because defendant has failed to present sufficient mitigating factors, we find that his sentence is proportional to the offense and the offender.

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley

¹ These were all lesser offenses to the original charges against defendant, which were one count of second-degree murder, MCL 750.317; MSA 28.549, and two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278.

² Although both plaintiff and defendant frame the issue as one involving MRE 404(b), a MRE 404(b) analysis is unnecessary.