STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN CHRISTIAN THURMAN,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 186941
Ingham County
LC No. 94-067834

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of six to ten years in prison on each of the assault with intent to do great bodily harm convictions, consecutive to a two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erroneously supplied its own verdict instead of supporting the jury's clearly rendered verdict. We disagree.

When the verdict of the jury has sufficient language to sustain a lesser offense, such lesser offense is the limit of the verdict that may be accepted by the court. *People v Smith*, 14 Mich App 502, 505-506; 165 NW2d 640 (1968). If the verdict does not specifically identify a known crime, then the trial court has a right to clarify the form of the verdict if the jury has not been discharged, and the jury can change the form and the substance of the verdict to coincide with its intention. *People v McNary*, 43 Mich App 134, 142-143; 203 NW2d 919 (1972).

In this case, the jury foreperson initially told the court that the verdict as to Counts I, II, and III was not guilty, and as to Count IV (felony firearm) was guilty. In response to the trial court's inquiry,

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

the foreperson told the trial court that the jury's verdict on Counts I, II and III was "assault and battery and attempt to commit body harm." Because this does not specifically identify a known crime, the trial court was free to clarify it. It did so, and all the members of the jury, when polled, agreed that their verdict was that defendant was guilty of three counts of assault with intent to do great bodily harm less than murder. The trial court properly clarified the form of the verdict and did not act in a way inconsistent with substantial justice. MCR 2.613(A). We find no reversible error in this regard.

Defendant's second issue on appeal is that the trial court committed reversible error when it refused to instruct the jury on the cognate lesser included offense of reckless discharge of a firearm, MCL 752.a863; MSA 28.436(24). Defendant did not properly preserve this issue for appeal. Before the jury was instructed, the court and counsel discussed an instruction concerning reckless discharge of a firearm. The court recalled an earlier conversation that occurred off of the record.

> [THE COURT]: The first question you raised was the reckless discharge. And you, yourself, walked away saying: Well, I suppose that's too much to request, and never specifically made a request for it.
>
> Now, if something's wrong with my memory, please help me.
>
> [Defense counsel]: No. I think that's exactly what I said. But at the same time I'm trying to preserve the record for that, your Honor.
>
> THE COURT: Well, I like to preserve records in the manner in which they're made.
>
> [Defense counsel]: Well, you have done that. Although I certainly don't want to, if the Court is inclined to give that instruction, discourage the Court from doing it.

The court did not give the instruction. At the conclusion of the court's instructions, the court inquired whether the parties had objections to the instructions. The prosecutor and defense counsel responded that they had no objections. Thus, the record indicates that defense counsel did not specifically request the instruction and, in response to the court's inquiry, expressly waived any objection to the instructions. Because defendant did not preserve this issue for review, our review is limited to consideration of whether relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We find no manifest injustice in this case. The jury was presented with four possible verdicts as to Counts I, II, and III: 1) not guilty; 2) guilty of assault with intent to murder; 3) guilty of assault with intent to do great bodily harm; and 4) guilty of assault with a dangerous weapon. The jury rejected the least serious charge offered, indicating that they concluded that the proofs established an intent to do great bodily harm. The jury's rejection of assault with a dangerous weapon in favor of the greater offense of assault with intent to do great bodily harm indicates "a lack of likelihood" that the jury would have adopted the lesser charge of reckless discharge of a firearm. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Thus, even if the instruction had been requested, the court's failure to

give it would have been harmless error. *Id.* The court's failure to give the instruction in this case, where it was not requested by defense counsel, did not result in manifest injustice.

Defendant also argues that the trial court's upward departure from the sentencing guidelines' recommended range of two to five years to a six-year minimum sentence on the assault with intent to do great bodily harm convictions violates the principle of proportionality established by *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). We disagree.

Departures from the guidelines recommendations are appropriate where the guidelines do not adequately account for factors that legitimately can be considered at sentencing. *People v Watkins,* 209 Mich App 1, 6; 530 NW2d 111 (1995). Defendant's juvenile record, which was the main reason for the trial court's departure from the guidelines, was not adequately accounted for by the juvenile record variables of the sentencing guidelines. Defendant was sixteen at the time of the instant offense. He had already compiled an extensive record. He was repeatedly given the opportunity to rehabilitate himself during probation, but repeatedly chose instead to violate the terms of probation, often by committing additional offenses. The guidelines do not reflect defendant's true status as a chronic juvenile offender. Neither the decision to depart from the guidelines nor the extent of the departure was an abuse of discretion.

Defendant's final issue on appeal is that the trial court erred in failing to give defendant credit for time served between defendant's arrest and sentencing. We disagree.

Although the sentence credit statute, MCL 769.11b; MSA 28.1083(2)[1], is to be liberally construed as a remedial statute, the Supreme Court has held that the Legislature's intent in enacting the statute was to give a criminal defendant a right to credit only for presentence time served for the offense of which he is convicted, not any other conviction. *People v Prieskorn,* 424 Mich 327, 341; 381 NW2d 646 (1985).

In this case, defendant concedes that the court denied him credit because he was "concomitantly imprisoned for another offense." Although the record is somewhat unclear, it seems that before defendant was arrested for the present offenses, the bond that had been set for an unrelated offense (receiving and concealing over $100) was revoked, and defendant was ordered held in the Ingham County Jail. Defendant waived arraignment and stood mute to the instant charges on September 7, 1994. No bond was set, consistent with the earlier revocation of bond. Defendant was sentenced on the receiving and concealing and another unrelated conviction on October 19, 1994. Under *Prieskorn,* defendant is not entitled to credit for time served between his arrest and October 19, 1994, in these circumstances. Defendant was not in jail because of "being denied or unable to furnish bond" on the instant offenses. Rather, he was held because his bond set for the unrelated offenses had been revoked. Defendant was entitled to receive credit for this time, as well as the days following October 19, 1994, toward the sentences for the unrelated offenses. The trial court did not err in refusing to grant credit toward the sentences for the present offenses.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick

[1] "Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing." MCL 769.11b; MSA 28.1083(2).