

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNY JAMES FLOYD,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 185233
Wayne Circuit Court
LC No. 94-008405

Before: Gribbs, P.J., and Holbrook, Jr., and J. L. Martlew,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549, and the subsequent sentence of fifty to seventy-five years in prison. We affirm defendant's conviction and sentence, but remand to the trial court for the limited purpose of preparation of a sentencing guidelines departure form.

Defendant's first contention on appeal is that the trial court erred when it refused to caution the jury on the special problems associated with accomplice testimony with regard to the testimony of Lorenzo Kato. We disagree. Although the trial court may have been mistaken in its recollection that no witness had testified to Kato's direct participation in the crime, it was correct in its conclusion that the requested instructions were not supported by the facts of the case.¹

The Michigan Supreme Court held, in *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), that it is error for a trial court to fail, upon request, to give a cautionary instruction concerning accomplice testimony. *Id.* at 240. This rule assumes that an accomplice has testified. See *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993); *People v Holliday*, 144 Mich App 560, 574; 376 Mich 154 (1986). In the instant case, the only testimony directly naming Kato as an accomplice came from Brent Woods, who also admitted that it was dark and that he was "not sure" about Kato's participation. In contrast, defendant himself told police that Stanley Garner was his accomplice, and Wanda Winans testified that Kato was on the porch while Garner and defendant committed the crime.

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

In addition, Kato was not charged with any crime relating to the incident, nor did his testimony come as the result of a deal with the prosecution.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if they are somewhat imperfect, there is no error if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* The rule announced in *McCoy, supra*, was not intended to preclude all discretion of the trial judge in assessing the necessity of giving an instruction on accomplice testimony, but was instead intended to ensure balanced instructions. See *People v Till*, 80 Mich App 16, 22-23; 263 NW2d 586 (1977), rev'd in part on other grounds 411 Mich 982; 308 NW2d 110 (1981). In the instant case, as in *Till, supra*, the jury was informed of Kato's possible bias during defendant's cross-examination of Kato, and it was given a detailed instruction on assessing the credibility of witnesses. When the trial court instructed the jury to consider possible bias, personal interest, promises, threats, or suggestions that may have affected the testimony of the witnesses, and specifically asked the jury to consider whether any of the witnesses might have a special reason to lie, it sufficiently protected defendant's rights. *Bell, supra*, 209 Mich App 276. Therefore, the trial court did not err in refusing to give the instructions on accomplice testimony.

Defendant next argues that his fifty to seventy-five year sentence, which exceeded the recommended minimum sentence guidelines range of ten to twenty-five, was disproportionately severe. We disagree.

Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality, which requires sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636, 661.

The sentencing guidelines do not convey substantive rights, but are merely a tool to assist the trial court in its exercise of discretion. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). The trial court may exceed the guidelines when to do so would not violate the principle of proportionality. *Milbourn, supra*, 435 Mich 659-660. On some occasions, the offender's conduct will be so extraordinary in degree that it is beyond the anticipated range of behavior treated in the guidelines. *Id.* at 660 n 27; see also *People v Merriweather*, 447 Mich 799, 805-808; 527 NW2d 460 (1994). We conclude that in this case defendant's conduct was of such a degree. Over an unpaid \$250 crack cocaine debt, defendant beat Merchant Lamont Sims until he laid helplessly on the ground, stomped on him repeatedly (causing severe internal injuries), dragged him on his back four hundred feet down the middle of a street, tossed him into a dumpster, poured rubbing alcohol over him, and set him on fire while he was still alive. This scenario prompted the trial judge to comment that it was the worst murder case he had heard in fifteen years on the bench. Accordingly, we hold that the trial court did not abuse its discretion when it sentenced defendant, the perpetrator of this extreme act, to an extreme sentence. *Milbourn, supra*, 435 Mich 634-636; see also *Merriweather, supra*, 447 Mich 805-808.

Finally, we note that although the trial court adequately articulated on the record its reasons for departing from the guidelines, it failed to do so on the sentencing information report as is required by MCR 6.425(D)(1). See *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Johnson*, 187 Mich App 621, 630-631; 468 NW2d 307 (1991). Therefore, although we affirm defendant's conviction and sentence, we remand to the trial court for the limited purpose of preparing a sentencing guidelines departure form. *Id.*

Affirmed and Remanded.

/s/ Roman S. Gibbs

/s/ Donald E. Holbrook, Jr.

/s/ Jeffrey L. Martlew

¹ Defendant requested CJI2d 5.5 and 5.6.