

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LAVON SMITH,

Defendant-Appellant.

UNPUBLISHED

March 12, 1999

No. 204474

Ingham Circuit Court

LC No. 96-70961 FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ALAN JENKINS,

Defendant-Appellant.

No. 204476

Ingham Circuit Court

LC No. 96-71222 FC

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Before: White, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendants' cases were consolidated for trial by jury and have been consolidated on appeal. Ronald Jenkins was charged with bank robbery, MCL 750.531; MSA 28.799, felony-firearm, MCL 750.227b; MSA 28.424(2), possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), and carrying a concealed weapon, MCL 750.227; MSA 28.979. Michael Smith was charged with aiding and abetting the bank robbery, MCL 767.39; MSA 28.979, and aiding and abetting the felony-firearm charge, MCL 767.39; MSA 28.979. Both defendants were convicted as charged. Jenkins was sentenced to ten to twenty years for the bank robbery, two years for the felony-firearm, and 3 ½ to five years for the two weapons offenses. Smith was sentenced to seven to twenty years for the bank robbery and two years for the felony-firearm. We affirm Jenkins' convictions, but

remand for correction of the judgment of sentence. We affirm Smith's conviction of bank robbery, but reverse and vacate his felony-firearm conviction.

## I

The charges arose out of a robbery of the Michigan National Bank located at 3215 S. Martin Luther King in Lansing on August 16, 1996. Thomas Matt testified that at about 10 a.m., he saw a black man coming out of the bank holding a yellow pillowcase with pink smoke pouring out of it and heading towards the back of a McDonald's. He saw the man from behind and could not identify him, but described him as being about five foot ten inches tall, thin (under 175 pounds) and in his twenties.

Officer Setla testified that she responded to the bank alarm and took a position behind the bank when she was approached by Steve Ehrhardt who told her he saw a black man with a pillowcase run to a black Cadillac that was parked backed into a space, with its engine running and another black man in the driver's seat. The man who was running got into the passenger seat and told the driver to hurry up. The Cadillac then sped off. Ehrhardt described the running man as being in his twenties and wearing a light sweatshirt and dark pants. Ehrhardt gave Setla the Cadillac's license plate number, and Setla broadcast the information over her police radio. Ten to fifteen minutes later, she heard a radio report that police were following a vehicle.

Sergeant Harrison testified that he received a radio report of the robbery and was at the Okemos rest area on westbound I-96 when he observed an older model black Cadillac traveling eastbound on I-96. The Cadillac was traveling about fifteen miles below the normal speed on the road. He pulled behind the Cadillac and confirmed that the license number matched the one broadcast, and then requested assistance and a road block, and made the stop. A tall, slender black male was driving, and was ordered out of the car, handcuffed and taken into custody. The passenger, a heavier black male, was also cuffed and arrested. Sgt. Harrison observed a .380 semiautomatic handgun on the driver's seat and a yellow pillowcase with purple dye on it on the passenger side floorboard. He identified Jenkins as the driver of the car and Smith as the passenger. He testified that Jenkins' birthdate was December 18, 1956.

Steve Ehrhardt testified that on the way out of his methadone clinic at around 9:50 a.m., he observed a black Cadillac back into a handicapped-parking zone without a permit. The driver, a black male of medium stature with a short bun-type pony tail about 2" long, left the engine running. About fifteen minutes later, a black man with a pillowcase with reddish purple dye came up to the car and said "Go, go, go, get the 'F' out of here." The car sped off before the passenger door was closed. Ehrhardt noticed the outline of what appeared to be a sawed-off shotgun in the pillowcase. He noted the license plate number and reported it to the police. He identified Jenkins as the man who ran to the car with the pillowcase. He could not identify the driver of the car.

Cami Jensen testified that she was a bank employee who sat near the front of the bank. She observed a man walk into the bank with a yellow pillowcase with a gun inside. He robbed three tellers and then left. The man was thin, average height, and probably in his twenties or thirties. He wore a

handkerchief over the bottom of his face, which fell down several times, a baseball cap and sunglasses. After the robber left, the dye packs exploded and began smoking. Jensen identified Jenkins as the robber, but conceded that she had not been able to pick him out of a lineup.

Investigator Holliday testified to inspecting the Cadillac. He found a yellow pillowcase, with a burn hole in it, containing \$6,123 in burned and unburned cash, and a Savage 22/20 gauge sawed-off shotgun. He processed a shell from the shotgun for prints, but found none. He also retrieved a .380 semiautomatic handgun, a white handkerchief, a baseball cap, two pairs of sunglasses, and a black T-shirt turned inside out. He also retrieved two fingerprints matching Jenkins'; one on the underside of the frame below the trigger guard on the handgun, and one on the interior, front, right window of the Cadillac. The Cadillac was registered to someone named Bradford.

Carl Bradford was called out of order as a witness by defendant Smith. He testified that he had a poor memory due to drug use, that he had known both defendants for about a year, that he loaned the black Cadillac to Smith, who said he did not have a license but that Jenkins did, and then gave them both permission to have the car. A receipt indicated that the car was given to them on August 7. Smith was going to buy the car, but never completed the transaction.

Sara Gaus testified that she was a teller at the bank and described the robbery. She identified Jenkins as the robber, but said she could not be absolutely positive about the identification. Another teller, Judith Dunn, also described the robbery and identified Jenkins as the robber. Both testified that the robber wore a white handkerchief over his face, which dropped, a black baseball cap, a purple sweatshirt and black jeans, and was in his twenties. Another bank teller, Janie Wilson, also identified Jenkins as the robber.

A trace evidence analyst testified that she received a pillowcase with red dye on it and \$6,123 in heat-sealed containers. She compared residue from these materials to evidence taken from the defendants and submitted some items to Phyllis Good for further analysis. Good testified that the extracts from the pillowcase, money and Jenkins' T-shirt were consistent; extracts taken from the money taken from Smith were not consistent with the other samples.

Smith's girlfriend testified that he is not a smoker. (A pack of cigarettes was also found in the car.) She also testified that on the morning in question, she heard a car honk and Smith told her he was going down to the methadone clinic to try to get off of prescription medicine he was abusing. She said that usually someone drove Smith around, and that she had seen Jenkins drive Smith in a black Cadillac or Jenkins' white Cadillac. She admitted that the black Cadillac was Smith's car that he had purchased recently.

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Defendant Smith first argues that there was insufficient evidence to convict him of aiding and abetting the robbery. The question is whether, looking at the evidence in the light most favorable to the prosecutor, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

The bank robbery statute provides:

Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money . . . shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [MCL 750.531; MSA 28.799.]

The aiding and abetting statute provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39; MSA 28.979.]

In order to support a conviction of aiding and abetting a bank robbery, the prosecution had to prove beyond a reasonable doubt that a bank robbery was committed by Smith or someone else; that Smith performed acts or gave encouragement that aided and assisted in the commission of the bank robbery; and that Smith intended that the crime be committed or had knowledge that the principal so intended when he gave the aid or encouragement.

Smith asserts that the evidence viewed most favorably to the prosecution established only that Jenkins robbed the three tellers and fled on foot to a parking lot where he entered the passenger side of a Cadillac, with engine running, and was driven away. The driver awaited Jenkins' return and sped off. Twenty to thirty minutes later, Smith was arrested in the passenger seat of the vehicle on the freeway with Jenkins driving. The shotgun, pillowcase and bank money were found in the car. No one ever identified Smith as the driver. Defendant argues that at most, he was guilty of accessory after the fact or possession of stolen property, and that no rational trier of fact could have found that he aided and abetted the bank robbery beyond a reasonable doubt.

The prosecution responds that there was overwhelming evidence that a bank robbery was committed by Jenkins. There was also ample evidence that the driver of the black Cadillac aided and abetted the robbery with the requisite intent. The driver parked illegally in a near-by handicapped space, with the front of the car facing outward and the motor running, all apparently to facilitate an easy escape; the car sped off before the passenger door was closed; and the shotgun was observable inside the pillowcase.

The question then is whether there was sufficient evidence to support the conclusion beyond a reasonable doubt that Smith was the driver. Smith was a passenger in the Cadillac when the car was stopped about twenty five minutes later. At that time, the pillowcase and shotgun were plainly visible to Smith. The Cadillac was either owned by or loaned to Smith (albeit to Jenkins as well). As a passenger in the Cadillac while it was being driven by Jenkins and followed by police, Smith kept looking back at the police, and appeared nervous to the point that the officer following the Cadillac informed the 911 dispatcher that the occupants were getting very nervous. Smith's girlfriend testified that Smith got picked up by someone in the morning and left saying that he was going to the methadone clinic, which was located near the bank, thus supporting an inference that Smith was with Jenkins before the robbery.

We thus conclude that there was sufficient evidence to support an inference beyond a reasonable doubt that Smith was the getaway driver.

### III

Smith next argues that there was insufficient evidence to support the aiding and abetting felony-firearm conviction. We agree.

In *People v Johnson*, 411 Mich 50; 303 NW2d 442 (1981), the Supreme Court discussed the proofs necessary to convict an unarmed defendant who participates in the commission of a felony involving a firearm of aiding and abetting the possession of a firearm in the commission of a felony (felony-firearm). The Court concluded that because felony-firearm is a distinct offense from the underlying felony, the defendant must be shown to have aided and abetted both the underlying felony and the felony-firearm offense. To convict of aiding and abetting the felony-firearm offense, it must be established that the defendant procured, counselled, aided or abetted and so assisted in obtaining the possession, or in retaining such possession otherwise obtained. *Id.* at 54. In the instant case, there was insufficient evidence that Smith procured, counseled, or aided or abetted in either the procurement of the firearm or the retention of the firearm.

The prosecution's arguments to the contrary are unavailing. First, there is no preservation requirement for challenges to the sufficiency of the evidence. *People v Wright*, 44 Mich App 111, 114; 205 NW2d 62 (1972). Second, there is no support offered for the argument that *Johnson* is inapplicable where the underlying offense does not necessitate the involvement of a weapon. Third, the evidence is insufficient; dropping Jenkins at the bank even with knowledge that he is armed, and driving him away in his initial escape does not constitute aiding and abetting the procuring or retention of the shotgun.

### IV

Smith next argues that trial counsel was ineffective in making a serious mistake in his argument to the jury and in failing to request instructions regarding accessory after the fact.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine the outcome. *Pickens, supra* at 314, citing *Strickland, supra* at 314. Decisions regarding what evidence to present and whether to call a witness are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d (1997). Moreover, that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

In opening statement and closing argument, defense counsel repeatedly conceded that the evidence "pointed" to Smith as being involved in the robbery. Smith asserts that while counsel's objective may have been to contrast the quantum of proof necessary to convict with the quantum actually introduced, the real effect was to deflect attention away from the defense, which was that Smith did not share Jenkins' intent and was simply along for the ride to go to the methadone clinic when Jenkins went to rob the bank on his own. Smith argues that counsel's concessions, such as:

So the question here isn't whether you think, you know as [the prosecutor] would phrase it, the evidence points to the guilt of Michael Smith, because surely, I'm not going to stand here and lie to you folks, it makes me suspicious as hell. It points in the direction, but does it establish guilt beyond a reasonable doubt?

and

It's better to let someone we think is guilty go, than convict someone who hasn't been proven guilty...

went too far in the direction of conveying to the jury that counsel believed that Smith was involved in the robbery.

Smith further asserts that if the defense theory was to have any viability, it had to have been carried through consistently. He argues that the argument that Smith went with Jenkins to be dropped off at the methadone clinic and to meet back at the car, that Smith went about his business and then went back to the car, started it and waited for Jenkins, that Jenkins came running back to the car yelling "go, go get the 'F' out of here," and that Smith in the shock and confusion of the moment did just that, should have been accompanied by a request for an instruction on accessory after the fact, which would be consistent with the defense theory. Smith argues that counsel's ineffectiveness deprived him of a substantial defense that might have affected the outcome of the trial.

While counsel could have, and probably should have, been more restrained in his concessions regarding the degree to which the circumstances suggested Smith's involvement, his strategy was sound and was executed with reasonable competence. Smith has not shown that counsel's performance in this regard fell below an objective standard of reasonableness. Further, counsel's performance taken as a whole was well within the standard of reasonableness.

Regarding the accessory after the fact instruction, while it now appears that it might have been better to have given the jury the option of an intermediate position, counsel's all or nothing strategy was not unreasonable in light of the complete lack of direct evidence of Smith's involvement before the robbery. *People v Armstrong*, 124 Mich App 766, 768-769; 335 NW2d 687 (1983). This Court will not substitute its judgment for trial counsel's in matters of trial strategy and evaluates counsel's performance as of the time decisions are made, not in hindsight. Defendant has failed to establish ineffective assistance of counsel.

## V

Smith's final claims of error concern his seven to twenty year sentence for bank robbery. He argues that the trial court 1) failed to consider established sentencing factors and standards and failed to articulate valid reasons for imposing the sentence, 2) failed to individualize the sentence after recognizing reasons for a more lenient sentence, and 3) imposed a disproportionate sentence.

While the court did not specifically allude to each of the factors recognized to be relevant to the sentencing decision, such articulation is not required. It is clear from the sentencing transcript that the court was aware of Smith's background and circumstances, and the degree of his involvement in the offense, as well as the sentencing guidelines. The minimum term of seven years was within the guidelines range of three to eight years and was proportionate to the offense and the offender. In short, there was no sentencing error.

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## VI

Jenkins first argues that the trial court erred in granting the prosecution's motion for consolidation of his trial with co-defendant Smith's where Smith's counsel clearly indicated that Smith's defense was going to be to put all the blame on defendant.

Pursuant to MCL 768.5; MSA 28.1028, and MCR 6.121 (D), we review a trial court's determination to grant or deny a consolidation of cases for abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682, amended on rehearing on other grounds 447 Mich 1203 (1994); *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). In order for severance to be mandated under MCR 6.121(C), a defendant must demonstrate that substantial rights have been detrimentally affected, and also demonstrate that severance is necessary, i.e., that there is no other available avenue of relief. *Hana, supra* at 345. Further:

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

While we recognize that a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, the standard for severance is not lessened in this situation.

\* \* \*

Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be ‘mutually exclusive’ or ‘irreconcilable.’ Moreover, ‘[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The ‘tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.’ [*Id.* at 346-347, 349, relying on *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993). Citations omitted.]

“Mutually exclusive” defenses are present if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant. *Hana, supra* at 349-350, quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984).

The *Hana* Court quoted *Zafiro, supra*, regarding examples of potentially reversible prejudice to a defendant:

Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant’s wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. Evidence that is probative of a defendant’s guilt but technically admissible only against a codefendant also might present a risk of prejudice. Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. [*Hana, supra* at 346 n 7, quoting *Zafiro*, 122 L Ed 2d at 325. Citations omitted.]

The risk of prejudice is reduced where one defendant is charged as an aider and abettor. *Hana, supra* at 360.

Finger pointing by the defendants when such a prosecution theory [aiding and abetting] is pursued does not create mutually exclusive antagonistic defenses. The properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal. [*Id.*]

Jenkins presented no affidavit below and the arguments made at the hearing on the prosecution's motion to consolidate did not present evidence that mutually exclusive defenses were going to be presented. Jenkins argues on appeal that "his right to have the prosecutor prove his guilt beyond a reasonable doubt was unfairly compromised," but does not explain how his defense was mutually exclusive of co-defendant's defense. Jenkins does not argue that any of the examples cited above as constituting reversible prejudice occurred in the instant case. Smith's defense was mere presence in the car used for the getaway, and Jenkins' defense was misidentification. These defenses are not mutually exclusive; the tension between the defenses was not so great that a jury would have to believe one defendant at the expense of the other. Because Smith was charged with aiding and abetting bank robbery and felony-firearm and Jenkins was charged as a principal, Smith's counsel's finger pointing did not create mutually exclusive defenses. *Hana, supra* at 360-361. Under these circumstances, the trial court did not abuse its discretion by consolidating the cases.

## VII

Jenkins next argues that the trial court's jury instructions effectively directed guilty verdicts against him.

Jenkins did not object to the alleged instructional error, thus appellate review is precluded absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We review jury instructions as a whole rather than piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights, there is no error requiring reversal. *Id.* at 276-277. We find no manifest injustice.

In preliminary instructions to the jury, the trial court stated:

I have already told you that there is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one of them is guilty. You should consider each defendant separately. Each is entitled to have his case decided on the evidence and the law that applies to him. If any evidence is limited, and it may be, to one defendant, you should consider it only as to that defendant.

In final instructions, the court stated:

Mr. Smith and Mr. Jenkins are both on trial in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is

guilty. You should consider each defendant separately. Each is entitled to have his case decided on the evidence and the law that applies to him.

Jenkins does not challenge any of the jury instructions pertaining to the charges against him. He argues that when the trial court instructed regarding the charges against co-defendant Smith, it unfairly prejudiced Jenkins by using language that presumed his guilt:

Defendant Michael Smith is charged with aiding and abetting, or intentionally assisting someone else in committing bank robbery. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else has been convicted of a crime. Second, that before or during the crime, the defendant did something to assist in the commission of the crime. Third, that the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving assistance.

Defendant Michael Smith is also charged in this case with aiding and abetting possession of a firearm during the commission of a felony. It is charged that the defendant did not directly possess a firearm, but instead intentionally assisted someone else to possess a firearm during the commission of a bank robbery.

Anyone who intentionally—anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it, is convicted of that crime as an aider and abettor.

Before you may convict the defendant, you must be convinced of the following beyond a reasonable doubt. First, that someone else carried or possessed a firearm during the commission of a bank robbery. That is not necessary, however, that anyone be convicted of that crime. Second, that the defendant did something to assist or encourage possession of the firearm, **knowing that Ronald Jenkins intended to possess the firearm during the commission of the bank robbery. Third, that the defendant intentionally helped Ronald Jenkins, who possessed the firearm, to get it or keep it.**

It does not matter how much help, advice, or encouragement that Defendant Smith gave. However, you must decide whether the defendant intended to help another commit the crime and whether his help, advice, or encouragement actually did help, advise, or encourage the crimes of bank robbery and possession of a firearm during the commission of a bank robbery.

Mere presence is not sufficient to constitute aiding and abetting . . . .

The crimes of bank robbery and aiding and abetting require proof of specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with intent to cause a particular result. For the crime of bank robbery that means that you must find that Defendant Jenkins possessed the intent to take property, money, and permanently deprive the owner of that money, of that property,

For Defendant Smith, that means that you must find that he **intended to aid, counsel, or encourage Mr. Jenkins in the commission of the bank robbery and the possession of a firearm during the commission of the bank robbery.** The defendant's intent may be proved by, one, by what he said, what he did, how he did it, or by any other facts and circumstances in evidence. [Emphasis added.]

Jenkins argues that the trial court invaded the province of the jury by telling the jury that Jenkins was guilty.

Jury instructions must be read as a whole. *Bell, supra*. In order to agree with Jenkins, we would have to assume that the jury disregarded the court's original instructions and all of the final instructions except the sentences in bold type above. Jurors are presumed to understand and follow the court's instructions. *People v Frazier*, 446 Mich 539, 542; 521 NW2d 291 (1994). The court did not remove from the jury the elements of the crimes with which Jenkins was charged.

## VIII

Jenkins next contends that the trial court erred by making his felony-firearm sentence run consecutively to his sentences for carrying a concealed weapon and possession of a short-barreled shotgun, where neither was the underlying offense for the felony-firearm charge. The prosecution agrees. Thus, we remand to the trial court for correction of Jenkins' judgment of sentence to reflect that the felony-firearm sentence is concurrent with the sentences for carrying a concealed weapon and possession of a short barreled shotgun. *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

## IX

Jenkins' last argument is that his sentence for bank robbery was disproportionate where it exceeded the top of the sentencing guidelines.<sup>1</sup>

We review sentencing issues for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). A court that upwardly

departs from the sentencing guidelines must state its reasons for doing so on the record at the time of sentencing. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, by the guidelines, as well as by introducing legitimate factors not adequately considered by the guidelines. *Id.* at 448.

The trial court in the instant case explained why it exceeded the guidelines:

I have [exceeded the guidelines] because I believe the sentence is proportional. I do not believe the guidelines adequately take into account the multiple firearm offenses, the multiple firearm convictions and the danger that is present when an individual is in a robbery situation in possession of a shotgun.

The SIR indicates that prior to the instant offenses, Jenkins had three felony convictions and four misdemeanor convictions, which included unlawful blood alcohol level, retail fraud, and manufacturing, and distributing an imitation controlled substance. These offenses escalated to the offenses involved in the instant case and to two other bank robberies in which Jenkins was involved in 1996 that also involved firearms. Although Jenkins' guidelines score reflected two or more subsequent or concurrent convictions, two of the felonies under consideration were life offenses and were paired with felony-firearm convictions. Under these circumstances, Jenkins' ten-year sentence for bank robbery was proportionate to the circumstances surrounding the offense and offender.

In no. 204474, we affirm Smith conviction of bank robbery and reverse his conviction of felony-firearm.

In no. 204476, we affirm Jenkins' convictions, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

<sup>1</sup> Contrary to Jenkins' argument that he was sentenced to twelve to twenty-five years for bank robbery and that his sentence exceeded the top of the sentencing guidelines by 50%, he was in fact sentenced to ten to twenty-five years and the guidelines range was three to eight years.