STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALAN RUSZKIEWICZ,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 187088
Macomb Circuit Court
LC No. 94-001150-FC

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to fifteen to thirty years' imprisonment for his second-degree murder conviction. We affirm.

First, defendant argues that the trial court erred in denying defendant's motion for a directed verdict on the second-degree murder charge. We disagree. The elements of second-degree murder are: (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988). Malice, the requisite mental state for murder, consists of the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 270.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of second-degree murder were established beyond a reasonable doubt. *People v Daniels,* 192 Mich App 658, 665; 482 NW2d 176 (1991). Prosecution witnesses testified that defendant was mad at the victim for breaking his windshield and defendant yelled at the victim to "get the fuck out of the van" as he repeatedly shoved and pushed the victim against the passenger door. While in jail, defendant admitted to a cell mate that it took several attempts to get the victim out of the van because defendant "couldn't get the big mother fucker out." Nor did defendant try to pull the victim back into the van while the victim was still hanging on to the

door. Moreover, defendant snickered when the victim fell from the van, which was traveling approximately thirty-five miles per hour on a dark road with heavy traffic. Finally, defendant threatened to kill co-defendant Butler if he turned the van around and went back to assist the victim. We conclude that the prosecution presented sufficient evidence to justify a rational trier of fact to conclude that defendant intended to create a very high risk of death or great bodily harm with the knowledge that such death or harm would probably result, that there was no justification or excuse for defendant's actions and that the victim died as a result of injuries sustained when he was pushed from the vehicle. Thus, the court did not err in denying defendant's motion for a directed verdict.

Next, defendant maintains that the trial court erred in refusing to weigh the credibility of the prosecution's witnesses in denying defendant's motion for a new trial. We disagree. Contrary to defendant's assertions, he did not file a motion for a new trial. Following the jury verdict, defendant filed a motion for a directed verdict of acquittal pursuant to MCR 6.419(B). Absent a motion for a new trial, the trial court could not grant a new trial on its own initiative. *People v Bart (On Remand)*, 220 Mich App 1, 11; __ NW2d __ (1996); *People v McEwan*, 214 Mich App 690, 694; 543 NW2d 367 (1995). The court properly held that credibility was an issue for the trier of fact and that a court may not interfere with the jury's resolution of credibility disputes in granting or denying a directed verdict of acquittal. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Defendant further contends that the court abused its discretion in refusing to permit the introduction of evidence that the victim had fallen from a moving vehicle on a previous occasion. Again we disagree. At trial, defendant failed to object to the exclusion of this evidence; rather, to the contrary, defendant objected to the *admission* of the evidence.[1] On appeal, defendant asserts that the evidence was relevant for the trier of fact to determine whether the victim was pushed from the van, whether the victim fell from the van as the result of an accident or whether the victim jumped from the van. To preserve an evidentiary issue for appellate review, a party must timely object at trial and specify the same ground for objection as asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).[2]

Defendant also asserts that his federal and state due process rights were violated where the prosecutor misrepresented the full consideration given to defendant's cell mate and where the court limited cross-examination regarding the same. We disagree. The credibility of a witness is an issue "of the utmost importance" in every case and evidence of a witness' bias or interest in a case is highly relevant to his credibility. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). A defendant is "entitled to have the jury consider any fact which might have influenced an informant's testimony." *Id.* Nonetheless, where the jury is apprised of such facts by means of defense counsel's thorough and probing cross-examination, the disclosure requirement may be considered satisfied. *Id*. Here, during the informant's direct examination, the prosecutor fully inquired into any consideration the informant may have received in exchange for his testimony. The informant denied that he received any consideration. There is no affirmative evidence of any consideration afforded to the informant. Moreover, the informant was under no obligation to testify against defendant because the informant had already been convicted and sentenced. During his cross-examination, defense counsel elicited the informant's testimony that he received "eight months less than the maximum sentence allowed."

Accordingly, the disclosure requirement was fully satisfied. *Mumford*, *supra,* at 152. Finally, the court's limitation on defendant's cross-examination of the informant did not prevent defendant from exploring any bias where there was no evidence that the sentencing court considered the prosecutor's recommendation in imposing this sentence.

Next, defendant maintains that improper lay opinion testimony was introduced which was beyond the scope of that permitted by MRE 701. First, defendant argues that the city mechanic's testimony regarding the van's passenger side door latch mechanism was beyond the ambit of the mere perceptions of a "lay" witness and that he lacked the qualifications required for an expert opinion. However, defendant failed to object to the prosecutor's in-depth inquiry into the mechanic's opinion during his direct examination. Moreover, defendant continued the inquiry during the mechanic's cross-examination. We will not permit defendant to harbor error as an appellate parachute. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant also asserts that the court abused its discretion in permitting another witness to testify as to whether he believed that defendant was a "violent person." Although this was improper lay opinion under MRE 701, there was overwhelming evidence of defendant's guilt presented at trial. Thus, the error did not prejudice defendant and reversal is not required

Defendant further argues that the trial court committed reversible error where it failed to sua sponte instruct the jury regarding the lesser included offenses of second-degree murder, and that defense counsel was ineffective for failing to request the same. We disagree. Although a court may sua sponte instruct the jury on lesser included offenses if the evidence adduced at trial would warrant conviction of the lesser charge and defendant was afforded fair notice of those lesser included offenses, the court is not *required* to do so unless the defendant is charged with first-degree murder. *People v Stephens*, 416 Mich 252, 261-262; 330 NW2d 675 (1982); *People v Johnson*, 409 Mich 552, 562; 339 NW2d 536 (1980). Defendant failed to request instructions on any lesser included offenses nor did defendant object to the instructions as given. In fact, defendant made a special record indicating that he and defense counsel had discussed the issue of lesser included offenses and that defendant made the decision not to request instructions on the lesser included offenses. Thus, the court properly instructed the jury. Moreover, the decision whether to request instructions on lesser offenses is often a matter of trial strategy and defense counsel's failure to so request does not indicate ineffectiveness of counsel. *People v Thorin*, 126 Mich App 293, 299; 336 NW2d 913 (1983).

Finally, defendant raises three separate issues pertaining to his sentence, none of which amount to error. First, defendant maintains that the trial court did not consider the appropriate factors in sentencing defendant. The court considered appropriate factors, including: the nature of the crime, the circumstances surrounding the criminal behavior and the effect of defendant's crime on the victim's family. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989). Defendant next argues that the court failed to discuss defendant's potential for reformation or his potential for rehabilitation. However, the court's express reliance on the sentencing guidelines satisfied the articulation requirement. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). Defendant finally focuses on the proportionality of the sentence. Nonetheless, defendant waived this issue for

appellate review because he failed to present the trial

court any unusual circumstances that he believed existed. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). In any event, we do not find defendant's sentence to be disproportionate.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman

[1] Defendant apparently misunderstood the nature of the evidence which a co-defendant had sought to introduce regarding the prior incident. However, even after his co-defendant presented an offer of proof clarifying the nature of the evidence, defendant failed to withdraw his objection to its admission and did not object to the exclusion of the evidence when the court made its ruling.

[2] Reviewing the proposed evidence on its merits, the trial court held that the prior incident (which had taken place seven months earlier) was "too remote." Further, the co-defendant acknowledged that he did not see whether the victim was pushed or jumped from the vehicle in the prior incident, which occurred on a residential street. The court's decision would be subject to appellate review under an abuse of discretion standard. *People v VanderVliet*, 444 Mich 52, 74-5; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).