STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO F. BUENO,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 196870
Oakland Circuit Court
LC No. 95-141654 FC

Before: Sawyer, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the second degree, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to serve twenty to forty years in prison on the murder conviction and to the mandatory, consecutive two-year term on the felony-firearm conviction. He now appeals and we affirm.

Briefly, this case involves the murder of a drug dealer while defendant was trying to rob him of his marijuana that the victim was intending to sell defendant. Defendant, through his cousin, Antonio Perez, arranged to purchase a gun from Jason Appel. Defendant went directly from purchasing the gun to meet the victim at Pontiac Northern High School , where the robbery and murder occurred.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. We review a sufficiency of the evidence argument by looking at the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find each element of the offense proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). Defendant's argument does not point to any element which is lacking in evidence which, if believed by the jury, would support defendant's convictions. Rather, defendant devotes his argument to a discussion of why the jury should have acquitted him. Defendant argues that the jury should have believed certain witnesses over others. It is the jury's role, not ours, to determine which witnesses to believe. Rather, we look to determine whether there is evidence which, if believed, would support the conviction. In the case at bar, there was.

Specifically, Jason Appel testified that he sold a gun to defendant the evening of the murder and that, following the sale, defendant indicated that he was leaving Appel's home to go to Pontiac Northern High School (the murder scene) and would return later to pay Appel for the gun. Defendant never returned. Furthermore, defendant's fingerprint was found at the crime scene; specifically, on the victim's vehicle, which had been washed that afternoon. Moreover, there was evidence that defendant had purchased marijuana from the victim on numerous occasions and had spoken on a number of occasions prior to the killing about robbing the victim of his marijuana. While there was evidence to support defendant's alibi, the jury could conclude that defendant was, in fact, at the crime scene at the time of the murder and did commit the charged offense.

Next, defendant argues that he is entitled to a new trial because of newly discovered evidence, specifically that the prosecution had failed to disclose that its key witness, Jason Appel, had been promised immunity or leniency in exchange for his testimony. We disagree.

Defendant points to the testimony of Appel at the preliminary examination of the co-defendant, Antonio Perez, which occurred after the trial in the case at bar. At that preliminary examination, Appel testified that the prosecutor had indicated to him that they were not interested in prosecuting him for selling the gun to defendant. The prosecutor did indicate that Appel would be prosecuted if it came out that Appel was involved in the homicide itself. The trial court rejected defendant's motion for new trial on this issue, opining as follows:

> Appel's testimony at both defendant's and Perez's preliminary examinations does not establish that the prosecution agreed to treat Appel leniently in return for his testimony. Appel flatly denied at defendant's preliminary examination that he had been promised leniency for his testimony. The most that Appel's testimony from Perez's examination establishes is that prosecutors told Appel that they were "not really interested" in Appel's action of giving defendant a gun in order to calm him down while questioning him. In fact Appel confirmed the prosecutor's statement that "if I find out information that you were involved . . . with the death of Samuel James then you would be charged." Based on the above the Court finds that defendant is not entitled to a new trial because of his first issue.

First, we agree with the trial court that Appel's testimony falls short establishing that there was an actual promise of immunity or leniency in exchange for Appel's testimony. Rather, at most, it made Appel more comfortable in discussing the matter with police. Further, even assuming that this evidence does affect Appel's credibility, as the trial court pointed out, newly discovered evidence which relates only to witness credibility is not sufficient to require a new trial. See *People v McWhorter*, 150 Mich App 826, 834; 389 NW2d 499 (1986).

In a related argument, defendant argues that he is entitled to a new trial because the prosecutor violated his obligation under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), to disclose exculpatory information by not disclosing the so-called promise of leniency made to Appel. We disagree. As discussed above, there was no actual promise of leniency. If there was no promise, then there was nothing for the prosecutor to disclose.[1]

Next, defendant argues that the trial court erred in admitting hearsay testimony. Specifically, defendant argues that it was improper hearsay for Appel to testify that defendant's cousin, Perez, called Appel to ask if Appel had a gun to sell to defendant. We disagree. First, to be hearsay, there must be a statement offered to prove the truth of the matter asserted. MRE 801(c). However, there is no assertion here—only a question. That is, Perez' statement does not assert anything being offered to prove the truth of the matter asserted. Perez' question was not admitted to prove the truth of the contents of the question, but only that the question was asked, explaining Appel's behavior thereafter. Therefore, the statement was not hearsay.

Indeed, if there was an assertion, it is, as defendant suggests in his brief, that Perez wanted Appel to sell a gun to defendant. However, the question was not offered to prove the truth of that assertion. Rather, the question was offered to show why Appel acted as he did. That is, it is irrelevant to the case at bar whether Perez did, in fact, desire that Appel sell again to defendant (the "truth" of this "assertion"). What is relevant is whether Appel believed Perez desired him to make the sale, which is reflected by the "statement" (i.e., the question) made by Perez to Appel, regardless of Perez' true feelings on the subject.

Furthermore, even if it was inadmissible hearsay, any error was harmless. Even without the admission of the question itself, the jury would learn that Appel knew Perez, that Perez called Appel, that as a result of the phone call, defendant arrived a short while later and purchased a gun from Appel, and that defendant left with the gun following a page, with defendant indicating that he was going to the murder scene and would be back to pay for the gun. Therefore, Perez' question to Appel does not substantially add to the evidence of defendant's guilt.

In sum, the question may have bolstered Appel's credibility in that it might explain why Appel would sell a gun to defendant on credit (the relationship to Perez), thus making it more believable that Appel did in fact make the sale. However, if this is the case, then the question is clearly non-hearsay—it's not being offered to prove the truth of the matter asserted, only to explain why Appel acted as he did.

For the above reasons, we conclude that the trial court did not err in admitting the evidence.

In a similar argument, defendant next argues that his right to confront the witnesses against him was denied by allowing Appel to testify as to the phone call from Perez. However, defendant failed to preserve this issue for appellate review. His objection below was limited to the hearsay issue; that objection was insufficient to preserve the issue for review on this ground.

Next, defendant argues that he is entitled to a new trial because the prosecutor improperly injected hearsay evidence into the trial during closing argument. However, defendant failed to preserve this issue for appeal by making a timely objection in the trial court. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Defendant's next argument is that the trial court erred in failing to sua sponte instruct the jury on the dangers of accomplice testimony. However, the trial court has no such obligation to give an

instruction sua sponte and, absent a request, the failure to give the instruction is not preserved for appellate review. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). This also applies to defendant's next argument, which is that the trial court erred in failing to sua sponte instruct the jury that "mere presence" is not sufficient to convict the defendant of second-degree murder.

Defendant's final argument is that the trial court erred in sentencing defendant as an adult rather than as a juvenile. We disagree. Defendant does not argue why he should have been sentenced as a juvenile. Rather, defendant focuses on the single argument that the trial court improperly considered defendant's lack of remorse and refusal to admit guilt.

Defendant committed the offenses involved in this case approximately five weeks before his seventeenth birthday. He was charged as an adult under the automatic waiver statute, which required the trial court to conduct a hearing after the trial to determine whether defendant should be sentenced as an adult or a juvenile after considering the factors enumerated in MCL 769.1(3); MSA 28.1072(3). The trial court held the hearing, reviewed the statutory factors, and gave detailed reasons why he believed that defendant should be sentenced as an adult. Among the factors listed by the trial court was defendant's lack of remorse:

> He has not expressed any remorse or accepted responsibility for his actions. Although these offenses do not appear to be part of a repetitive pattern of offenses, it is unlikely that the defendant is amenable to treatment in the juvenile offender program primarily due to his unwillingness to accept responsibility for his conduct and, thus, unlikely that he will be rehabilitated by placement with the FIA.

The consideration of the lack of remorse in sentencing decisions is a confusing area of the law in Michigan. It is clear that a sentencing judge may not consider a defendant's refusal to admit guilt in determining the defendant's sentence. *People v Yennoir*, 399 Mich 892; 282 NW2d 920 (1977); see also *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987). However, in *Wesley*, at least some of the justices indicated that lack of remorse could be considered, while others indicated that it could not because it was impossible to distinguish lack of remorse from a refusal to admit guilt.

The prosecutor's brief, which devotes most of its attention to arguing why defendant should be sentenced as an adult, only refers us to *People v Lyons (On Remand)*, 203 Mich App 465, 473; 513 NW2d 170 (1994), to support the proposition that consideration of a lack of remorse in deciding to sentence a juvenile as an adult is not an abuse of discretion. However, the *Lyons* decision is less than helpful on this issue. The *Lyons* Court did refer to the defendant's lack of remorse in reversing the trial court's decision to sentence the defendant as a juvenile. However, the *Lyons* Court merely mentioned lack of remorse as one of several factors raised at the hearing and did not address the question whether consideration of that factor was appropriate or not.

After careful consideration of the trial court's opinion in deciding to sentence defendant as an adult, we are not persuaded that this factor determined the trial court's decision. That is, we are convinced that the trial court would have sentenced defendant as an adult even if it had not considered

defendant's lack of remorse. Therefore, even if it was error to consider this factor, we are satisfied that any such error was harmless.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry W. Saad

[1] We also note that the exculpatory value of such information is at best dubious. It does not tend show that defendant is not guilty. At best, it might bring into question the witness' credibility. However, that was already a fertile ground explored by the defense. That is, the witness had reason to cast blame on defendant to take the spotlight off himself for possibly being involved in the murder. It was not necessary for defendant to be aware of the comment to the witness to develop that line of attack on the witness' credibility. Cf. *People v Torrez*, 90 Mich App 120; 282 NW2d 252 (1979) (*Brady* violation occurred where prosecutor withheld fact that witness was facing unrelated perjury charges).