STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JOSEPH KOPELLA,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 204643
Jackson Circuit Court
LC No. 97-079407 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to five to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant raises several issues on appeal. He first argues that the trial court abused its discretion when it refused to allow an unlisted witness to testify at trial. Alternatively, he argues that the trial court abused its discretion in denying his request for an adjournment on the first day of trial so that the new witness could properly be added. Defendant claimed to have submitted an amended witness list identifying the new witness. However, apart from the fact that the amended witness list apparently was filed with the wrong court, defendant also failed to produce a proof of service showing that the amended witness list was timely served on the prosecutor, and there was no indication that the prosecutor either actually received the amended witness list or had actual knowledge of the new witness. Under the circumstances, the trial court did not abuse its discretion by refusing to allow the new witness to testify or in denying defendant's request for an adjournment. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 188; 364 NW2d 609 (1984); *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781(1995). Furthermore, given the strength of the eyewitness testimony in this case, defendant has failed to demonstrate that he was prejudiced by either ruling. *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976).

Defendant next argues that he was denied a fair trial because the prosecution never revealed the scope or nature of its agreement with its witness, the man police saw buy drugs from defendant.

However, the record indicates that the extent of consideration received by the buyer in exchange for his testimony against defendant was fully explored at trial. There is no indication in the record that the buyer received any additional consideration that was not disclosed. *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976).

Defendant next argues that he was deprived of a fair trial by disclosure of the fact that one of the police officers who arrested defendant had prior contacts with him. Because defendant did not object to this testimony at trial, appellate review of this issue is precluded absent manifest injustice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Contrary to what defendant argues, the testimony did not involve admission of evidence prohibited by MRE 404(b). Moreover, in view of the testimony that the officer was a "street cop" in defendant's neighborhood, and the fact that the nature of the prior contacts was never disclosed, we conclude that manifest injustice has not been shown.

Defendant also claims that he was deprived of a fair trial when the prosecutor referred to him as a "big fish." Defendant failed to object to this remark at trial, thus foreclosing appellate review absent manifest injustice. *McElhaney*, *supra*. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). In reference to the dismissal of the charges against the buyer, the prosecutor remarked that "there are times . . . when you must release a small fish in order to catch a big fish." This remark was responsive to defense counsel's comments questioning why the case against the buyer was dismissed. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992) (prosecutorial arguments may be considered in light of defense arguments). Further, the reference to "big fish," viewed in context, was limited to comparing the seriousness of defendant's conduct to the buyer's actions. Under these circumstances, the remark did not lead to manifest injustice and any resulting prejudice could have been eliminated by a curative instruction. Accordingly, appellate relief is not warranted.

Next, defendant claims that the trial court erred when it failed to sua sponte instruct the jury that an accomplice's testimony must be examined with greater caution. A trial court is not required to give a cautionary instruction on accomplice testimony, absent a request, unless the issue is " closely drawn." *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974); *People v Smith*, 158 Mich App 220, 228-229; 405 NW2d 156 (1987). A case is closely drawn and instructions should be given sua sponte where there are no independent eyewitnesses and the case comes down to a credibility contest between the defendant and the accomplice. *Smith*, *supra*. Here, defendant did not testify and the buyer's testimony was corroborated by the testimony of two eyewitness police officers. Thus, the issue was not closely drawn and the trial court did not err in failing to provide sua sponte a cautionary instruction on accomplice testimony.

We also reject defendant's claim that the trial court erred when it failed to instruct the jury sua sponte on lesser included offenses. The record indicates that defendant expressly advised the trial court that it did not want the jury instructed on any lesser included offenses. Accordingly, no error occurred. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987); *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982).

Finally, defendant claims that he was denied the effective assistance of counsel and sets forth fourteen separate grounds upon which this claim is based. However, defendant's failure to move for a new trial or an evidentiary hearing forecloses appellate review unless the record contains sufficient detail to support defendant's claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that his counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *Barclay*, *supra*. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Several of defendant's claims are based on issues previously discussed in this opinion. We conclude that ineffective assistance of counsel has not been established with respect to these claims for the reason that defendant has failed to establish that counsel's performance was deficient or that any deficient performance was prejudicial. The remaining alleged claims of ineffectiveness, all of which are presented without citation to any supporting legal authority, are either predicated on factual matters that are not apparent from the record or involve decisions of trial strategy that have not been shown to be unsound or prejudicial. Thus, defendant has not established any basis for relief due to ineffective assistance of counsel.

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra