

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL DECKER, SR.,

Defendant-Appellant.

UNPUBLISHED

June 25, 2002

No. 231980

Wayne Circuit Court

LC No. 00-003070-01

Before: Zahra, P.J., and Cavanagh and White, JJ.

MEMORANDUM.

Defendant appeals as of right from his bench trial convictions of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions because witness testimony established that he was at a nearby gas station at 6:45 a.m., the time the victim was shot in the bakery parking lot. We disagree.

The concept of sufficiency of the evidence focuses on the evidence as a whole. See *People v Phil Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988). Here, the witnesses testified as to the approximate times of the events that occurred. For example, the victim testified that he arrived at the bakery parking lot at about 6:45 a.m. and was shot by defendant shortly thereafter. However, McGrath testified that he arrived at the bakery at about 6:45 a.m. and saw the victim laying in the parking lot—he had already been shot. Obviously, then, the exact time of the shooting was not established. Although Laird testified that he saw defendant pull into the gas station at about 6:35 a.m. and that defendant was still at the gas station when he left about ten minutes later, Laird also testified that he could only provide approximate times of these events. Further, Detective Boteler testified that it took about one minute and thirty-three seconds to drive from the gas station to the bakery. Viewing the evidence in a light most favorable to the prosecution, we conclude that it was sufficient to justify a rational trier of fact in finding that defendant committed the crimes beyond a reasonable doubt. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

Next, defendant argues that he is entitled to a new trial because the trial court based its verdict on a mistake of fact. We disagree. This issue is not preserved for appellate review because defendant failed to timely move for a new trial in the lower court. See MCR 2.611;

People v Darden, 230 Mich App 597, 605-606; 585 NW2d 27 (1998); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Further, this issue is without merit.

Defendant argues that a new trial is warranted because during the trial court's recitation of the facts it improperly referenced Lieutenant Boteler's testimony as indicating that the 911 call was received by police at 6:40 a.m., instead of 7:00 a.m. as clearly established by his testimony. However, the trial court's reference to the 911 call was merely a misstatement because Lieutenant Boteler testified that his report regarding the shooting indicated that it occurred at 6:40 a.m. It is clear from the trial court's lengthy rendition of its factual findings that it was aware of the contested factual issues and resolved them; accordingly, defendant is not entitled to a new trial. See *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *People v Armstrong*, 175 Mich App 181, 184-185; 437 NW2d 343 (1989).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White