

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CORK,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 233019

Wayne Circuit Court

LC No. 00-001234

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of involuntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to ten to fifteen years' imprisonment for involuntary manslaughter and two years' imprisonment for felony-firearm. We affirm.

Defendant's first issue on appeal is that the trial court erred in allowing a statement to be read to the jury as a past recollection recorded. We disagree. The decision to admit evidence is within the trial court's discretion, and this decision is reviewed for abuse of discretion. *People v Furman*, 158 Mich App 302, 326; 404 NW2d 246 (1987). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

A recorded recollection must be made "when the matter was fresh in the witness' memory and . . . reflect that knowledge correctly." MRE 803(5). In this case, a witness testified about a conversation with defendant that took place on December 3, 1999, and the witness made a statement to the police about this conversation on January 17, 2000. While the witness' statement was given to the police over a month after the alleged conversation with defendant, there is no indication that the events were not fresh in his mind when he gave the statement. MRE 803(5) is identical to FRE 803(5). This Court may look to federal decisions concerning analogous evidentiary rules for guidance. See *People v Welch*, 226 Mich App 461, 466; 574 NW2d 682 (1997). In *United States v Smith*, 197 F3d 225, 231 (CA 6, 1999), the federal court

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

stated that “[c]ontemporaneousness is not required in determining whether an event was sufficiently fresh to satisfy FRE 803(5).” We find that the trial court properly admitted the witness’ statement under the recorded recollection exception to the hearsay rule. Moreover, any error was harmless because the witness had already properly testified about his conversation with defendant. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant’s next issue on appeal is that the trial court shifted the burden to defendant at sentencing to prove that he should not be sentenced as an adult. We disagree.

A “court shall sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to an institution or agency” MCL 769.1(3). A judge must conduct a hearing at the juvenile’s sentencing to determine whether the best interests of the public are served through sentencing the offender as a juvenile or as an adult. MCL 769.1(3). At the hearing, the prosecutor “has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence against the juvenile as though the juvenile were an adult offender.” MCR 6.931(E)(2).

At defendant’s sentencing hearing, the trial court correctly stated that the prosecution had the burden of proof by a preponderance of the evidence to convince the court that defendant should be sentenced as an adult. We find nothing in the record to indicate that the trial court shifted the burden of proof to defendant.

Defendant next argues that the prosecutor failed to satisfy the burden of proof supporting adult sentencing, and that the trial court abused its discretion by sentencing defendant as an adult. We disagree. The decision whether to sentence a defendant as an adult or a juvenile is reviewed for an abuse of discretion. *People v Thenghkam*, 240 Mich App 29, 42; 610 NW2d 571 (2000). The trial court’s factual findings supporting its determination are reviewed for clear error. *Id.* at 41. A trial court’s findings are clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 43. The absence of a required finding of fact or a factual finding without support in the record constitutes clear error. *Id.* at 41-42.

To determine whether a defendant should be sentenced as a juvenile or adult, the trial court must consider the six factors enunciated in MCL 769.1(3)(a)-(f), “giving greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency.” MCL 769.1(3). In this case, the victim was killed by a gunshot to the back of his head, and the impact on his family was devastating. In the presentence investigation report, defendant’s culpability was accurately described as “significant,” and even defendant’s own statement indicated that he held a gun close to the back of another person’s head and repeatedly pulled the trigger. The victim was left to die in a park while defendant went to a party. The evidence also showed that defendant sought to rob and shoot someone.

Defendant had numerous discipline reports at his former high school and at the juvenile detention facility, including repeatedly threatening teachers. Defendant was described as an intimidating and opportunistic young man who tended to victimize the more vulnerable youth. Further, the trial court noted that the juvenile justice system could not provide the punishment

that defendant's conduct warranted. The trial court did not abuse its discretion when it sentenced defendant as an adult because the court properly weighed and considered the evidence and arguments sufficiently presented by the prosecutor in the context of the required statutory factors.

Defendant's next arguments request resentencing because the trial court considered him guilty of first-degree murder, and because the sentence was disproportionate. The offense occurred on December 3, 1999; therefore, the legislative sentencing guidelines, rather than the Supreme Court's sentencing guidelines, apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

We first note that defendant fails to present his sentencing arguments in the context of the legal principles provided in the controlling statute, MCL 769.34, and the case law interpreting the statute. An appellant may not merely announce his position and leave it to us to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Moreover, even considering defendant's arguments, they lack merit. A court may consider all record evidence before it in determining a defendant's sentence, including criminal activity of which the defendant was acquitted, "because an acquittal does not necessarily mean that the defendant did not engage in criminal conduct, but only demonstrates a lack of proof beyond a reasonable doubt." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). The trial court heard sworn testimony presented in its courtroom, and carefully considered this information when determining defendant's sentence. We find that the trial court properly considered defendant's conduct before, during, and after the commission of the crime in fashioning defendant's sentence.

Additionally, after review of the record, we find no abuse of discretion by the trial court in sentencing defendant outside the statutory guidelines pursuant to MCL 769.34, where the court articulated substantial and compelling reasons to support the upward departure based on the circumstances of the crime and defendant's actions. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000). The sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender.

Defendant's final issue on appeal is that defendant must be resentenced by a different judge; however, in light of our decision, the issue is moot.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Roman S. Gribbs