STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EUGENE PERRY,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 174269
LC No. 93-7602 FC

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and armed robbery. MCL 750.529; MSA 28.797. He was sentenced to a term of imprisonment of fifty to seventy-five years with respect to the assault conviction, to be served concurrently with a term of fifteen to twenty-five years with respect to the armed robbery conviction. He now appeals as of right, and we affirm.

Defendant first contends that court the erred in determining that that the victim was unavailable and, therefore, in permitting the victim's preliminary examination testimony to be read into the record. The court ruled that the victim was unavailable based on a letter from the victim's physician describing the victim's condition and advising against his participation at trial. Defendant claims that the letter should not have been considered because it was hearsay; that the court should not, in reliance on the letter, have concluded that the victim was unavailable; and that the court should not, based on the unavailability of the victim, have allowed the introduction of the preliminary examination transcript.

We find no error in the court's consideration of the letter, and find no abuse of discretion in the court's decision to admit the preliminary examination testimony. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). While defendant contends that the letter was hearsay and should not have been considered by the court, MRE 104(a) provides that "[p]reliminary questions concerning the . . .

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

admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the Rules of Evidence except those with respect to privileges." Therefore, regardless of whether the letter was hearsay, the court properly considered it when determining whether the complainant was unavailable pursuant to MRE 804(a)(4) (witness unavailable due to death or illness), and, based on its conclusion, admitting the preliminary examination transcript into evidence.

Defendant also asserts that the prosecution failed to use "due diligence" in demonstrating that the victim was unavailable. However, there is no due diligence requirement under MRE 804(a)(4), the rule of evidence under which the victim was declared to be unavailable, as opposed to MRE 804(a)(5), upon which defendant apparently relies. Defendant's contention that he was "entitled" to have the victim's testimony taken at the hospital and transcribed is also based upon his confusion of the requirements of MRE 804(a)(4) with those of MRE 804(a)(5).

Defendant next claims that the trial court erred in permitting a police officer to be recalled to testify concerning inconsistent statements made by defendant's alibi witness. Defendant failed to preserve this issue for review because he did not specify at trial the grounds for his objection. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Instead, defense counsel made a general objection and then requested that, should the officer be allowed to be recalled to the stand, the witness be allowed to be recalled as well. The court agreed to defense counsel's request. The trial court, thus, did not have the opportunity to rule on the arguments defendant now raises in his brief on appeal as none of them were raised before the trial court. We review allegations of evidentiary error that were not raised in the trial court for manifest injustice. *People v Marsh*, 177 Mich App 161, 167; 441 NW2d 33 (1989). Given defendant's acquiescence, we find no manifest injustice.

Defendant also raises an issue concerning whether the court abused its discretion in refusing to permit defendant's brother to testify that the victim was "paranoid." Generally, lay witnesses may testify concerning the mental condition of a person where the witness has had sufficient exposure to the person to justify the drawing of conclusion as to his or her mental state. *People v Clark*, 172 Mich App 1, 8; 432 NW2d 173 (1988). Our review of the record leaves us uncertain as to whether the court refused to allow the testimony in issue. Upon the prosecution's objection, the court stated, "I'm going to sustain it the way [the question is] phrased at this point." Defense counsel then elicited testimony that the victim was suspicious of his neighbors, and frequently and unjustifiably accused them of taking his belongings. Thus, regardless of whether the court ostensibly refused to allow the testimony to be admitted, it appears that such testimony was given, though the word "paranoid" was not used. Therefore, to the extent that the court forbade the witness from testifying that the victim was "paranoid", we find the court's abuse of discretion to be harmless error in light of the testimony that was allowed.

Finally, defendant contends that the fifty to seventy-five year sentence imposed for his assault conviction is disproportionate within the meaning of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Specifically, he argues that the court's justification for exceeding the guidelines recommendation was adequately addressed in the sentencing variables. As set forth in *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995), quoting *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995),

> "[u]nder *Milbourn*, the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether [the sentence] reflects the seriousness of the matter" . . . . Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted.

In the present case, the defendant slit the throat of his uncle and left him for dead. The court, at sentencing, found defendant to be "untruthful," "manipulative and very dangerous," and that "the act by the defendant was premeditated [and] deliberate and but for the victim's good fortune this would have been a death." Given the particularly heinous circumstances involved in the present case where an individual cut the throat of a relative solely for financial gain, we do not find the sentence imposed to be disproportionate.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power