STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE COLIN HUBBLE,

Defendant-Appellant.

UNPUBLISHED
April 15, 1997

No. 181046
Oakland Circuit Court
LC No. 94-132886-FC

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to commit armed robbery, MCL 750.157(a); MSA 28.354(1) and MCL 750.529; MSA 28.797, attempted armed robbery, MCL 750.92; MSA 28.287 and MCL 750.529; MSA 28.797, second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (two counts), MCL 750.227b; MSA 28.424(b). He appeals and we affirm.

Alfredo Reyes sold his car to Donald James, a drug dealer, for $300 cash and some drugs. James "shorted" Reyes on the amount of drugs agreed upon for the transaction. The next day, Reyes called James wanting to repurchase the car; James agreed to sell it back to him for $800. However, when the two met, James robbed Reyes at gunpoint and took Reyes' $800.

In response, Reyes, defendant and several others, went to Richard Smith's trailer to get Reye's money and car back. (Smith, who worked for James in the drug trade, had introduced Reyes and James.) The men stormed the trailer and demanded Smith's money and drugs. During the confrontation, John Hurley came to the door – when he turned and ran, defendant shot him several times, killing him.

I

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

Defendant first argues that his motion to quash the information should have been granted because he engaged not in armed robbery, but instead exercised a valid "claim of right." Errors, if any, at the preliminary examination are harmless if sufficient evidence is presented at trial to convict. *People v Hall,* 435 Mich 599; 460 NW2d 520 (1990). Here, because defendant's conviction was supported by sufficient evidence adduced at trial, we need not address the bindover decision of the district court.

Defendant also claims that reversal is required because the trial court failed to instruct on the claim of right defense. However, because defendant made no request for the claim of right instruction (CJI2d 7.5), and he failed to object to the instructions actually given, any instructional issues are waived for review absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice results where the omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson,* 187 Mich App 621, 628; 468 NW2d 307 (1991).

We find no manifest injustice here because the claim of right defense is not available to a defendant who is engaged in illegal activities. In *People v Holcomb,* 395 Mich 326, 333; 235 NW2d 343 (1975), our Supreme Court held that if a defendant believes *in good faith* that property he demands belongs to him and therefore he is entitled to possess it, there is no felonious intent and consequently no armed robbery. In *People v Karasek,* 63 Mich App 706; 234 NW2d 761 (1975), we elaborated on why a defendant's illegal activities negate the claim of right defense:

> . . . if the defendant, in good faith, believed that the money which he demanded was his money, or that he was entitled to its possession, he could not be guilty of the crime of robbery, despite his use of force, because there would be no felonious intent.
>
> * * *
>
> After a careful review of the evidence in the instant matter, we find that there was no evidence presented to support the defendant's theory that he took the property under a bona fide claim of right. . . .
>
> In reaching this conclusion, we rely on the defendant's own testimony at trial. He admitted that he was engaged in collecting money from illegal activities and that he knew that the alleged debt in question was a product of such illegal activities. *We hold that such knowledge negates the existence of good faith on the part of the defendant*. His own testimony conclusively showed that *he did not in good faith believe that he was legally entitled to the possession of the bonds* and likewise, it showed that he did not believe that either he or his principal had a bona fide claim of right thereto. *Karasek,* 63 Mich App at 712-713. (Emphasis added).

In *Karasek,* defendant had no legal right to possession of money owed as a result of illegal gambling. We believe that the principle explained in *Karasek* applies equally here, where defendant had no legal right to either the money or the car he traded for illegal drugs. See also *People v Hodges*, 113 AD2d 514, 517; 496 NYS2d 771 (2d Dep't 1985) (declining to permit a defendant who had

purchased contraband to use a claim of right defense to robbery charge "since defendant was, by his own admission, involved in an illegal purchase of marihuana and has absolutely no legally cognizable right – common law or statutory – to recoup expenditures made in such an illegal transaction, much less through the use of force.")

Defendant also contends that there was insufficient evidence that this case involved an armed robbery, in light of his theory of claim of right. However, viewing the evidence in a light most favorable to the prosecution, a jury could have found that defendant conspired to commit armed robbery and committed attempted armed robbery, as opposed to simply seeking the return of stolen goods. The evidence at trial established that defendant and the others demanded money and drugs from Smith, who was not the person who allegedly stole the money and the car that they sought. Furthermore, there was evidence that Reyes had directed the group to take anything else they wanted in the process. Given this evidence, the jury clearly could have found that defendant's conduct did not relate to a claim of right.

II

Defendant also alleges that the armed robbery instructions were inadequate because the omitted several elements of the crime of armed robbery. However, as stated above, defendant failed to object to the instructions as given. The instructions the court gave informed the jury that they must find that defendant assaulted Smith, that defendant was armed, and that defendant had the intent to rob. Accordingly, we affirm, because no manifest injustice results from our refusal to review this issue.

III

Defendant asserts that a new trial is required because the court failed to excuse a juror who wanted to get off the panel on the second day of trial. Juror Satia Charma sent a note stating that she was emotionally disturbed from listening to the case, due to the evidence of crime, murder, guns and drugs, and that she would not be able to make a rational decision in the case. She indicated that it would be impossible for her to do justice to the case and requested to be excused. The court recalled the jury, informed the panel of the letter, without indicating who wrote the letter, and stated that it was not possible for the juror to be withdraw, absent a medical emergency. Importantly, *defendant did not object*.

Defendant says that the court's failure to excuse the juror denied him his right to an impartial jury, guaranteed by the US and Michigan Constitutions, US Const, Am VI and Const 1963, art 1, §20. Defendant also argues that the juror should have been excused for cause under MCR 2.511(D) and MCR 6.412(D). Had defendant objected, the court could have questioned the juror to see if she could comply with her oath and decide defendant's guilt or innocence based on the evidence and the law. See *Podbielski v Argyle Bowl, Inc*, 44 Mich App 280, 283-286; 205 NW2d 240 (1973). However, because the issue is unpreserved, we decline to review this issue. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 363; 533 NW2d 373 (1995).

IV

Defendant claims that there was no due diligence in the efforts to locate Richard Smith, the man whom the group confronted at the trailer. Smith could not be located for trial and therefore his preliminary examination testimony was admitted instead. The Sixth Amendment of the United States Constitution, and Const 1963, art 1, §20, guarantee an accused the right to "be confronted with the witnesses against him. . . ." *People v Conner*, 182 Mich App 674, 680; 452 NW2d 877 (1990). Former testimony of a witness is admissible in a later proceeding, consistent with these guarantees, where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. *Id*.

Here, the court concluded that the prosecution demonstrated due diligence in attempting to locate Smith and that defendant thoroughly cross-examined Smith at the preliminary examination. Given these findings, the trial court held that Smith's prior testimony could be admitted. After carefully reviewing the record, we conclude that this finding was not clearly erroneous.

V

Defendant next raises two related issues.

A

Defendant first alleges that the prosecutor and court deliberately allowed Francisco Sweeney (who pleaded guilty to conspiracy to commit armed robbery and attempted armed robbery), to mislead the jury about whether he received any consideration for testifying. However, the issue is unpreserved, and there was no transcript of Sweeney's sentencing. Therefore, it is impossible to know whether there were in fact promises of leniency made to this witness for his testimony. From the record, it does not appear that the prosecutor mislead the jury because during closing argument he conceded that Sweeney had an incentive to testify because this might affect his sentencing, and that it would be ludicrous to suggest that the witness did not testify with this hope. Under these circumstances, we find no error.

B

Defendant next claims that he was denied a fair trial because the prosecutor implied that defendant's witness had a duty to talk with police. The prosecutor questioned Kelly Maule, who claimed that someone other than defendant admitted shooting the victim, about whether he had spoken to any police or the prosecutor about this alleged fact. However, we find no misconduct on the part of the prosecutor. A prosecutor may question an alibi witness regarding why he did not come forward with his story before trial after the prosecutor has shown that it would have been natural for the witness to come forward. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). Here, the witness admitted that he knew defendant had been arrested and that his information would be important

with respect to the charges against defendant. Because it would have been natural for him to disclose the information to the police, the prosecutor did not err in questioning Maule.

VI

Defendant also asserts that introduction of a gory picture of the victim, a mannequin with bloody wounds depicted, and a videotape of fire tests of the assault weapon deprived him of a fair trial. We disagree.

The photo showed the victim lying in the street. The trial court admitted the photo, over defense objection, and ruled that the probative value outweighed the prejudicial effect. The photo provided the jury with a pictorial version of the layout of the area and could have aided the jury in its deliberations. There was no abuse of discretion in admitting the photo.

With respect to the mannequin and videotape, there was no objection. After careful review, we see no manifest injustice from the admission of this evidence. The mannequin was used as a visual aid by the doctor who performed the autopsy, and the videotape helped to explain previous testimony given about ballistic tests and clarified matters for the jury. We find no error.

VII

Defendant next contends that the prosecutor improperly suggested that Smith did not show up for trial because he would have been killed. We disagree. Here, the prosecutor's remark was a reasonable inference from the evidence of the violent nature of the crime and the fact that Smith failed to show up. Furthermore, if this remark was improper, it was made in response to an issue raised by defendant and does not require reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

VIII

Defendant also complains about the court's answer to the jury's question "Can a person be convicted of first-degree felony murder without pulling the trigger, and would it be considered aider and abettor?" The court answered yes, which defendant agreed was a proper response. However, defendant contends that, by merely answering "yes," the court effectively told that jury that it could find aiding and abetting just by finding that defendant did not pull the trigger and that the jury was not required to find any additional elements. We see no error. The jury had already been fully instructed on all of the elements of aiding and abetting, and merely wanted additional clarification, which the court properly gave, after consulting with both sides.

IX

Finally, defendant argues that that court abused its discretion in sentencing defendant at the top of the guidelines range, in light of defendant's youth, remorse, strong family support, lack of an adult

criminal record, and the fact that a co-defendant actually killed the victim. We find no violation of the principle of proportionality.

Here, the sentencing guidelines' range was 120 to 300 months; defendant was actually sentenced to a 25-year minimum term. In imposing sentence, the court stated:

> The question that I have, is what a 19 year old boy needs with a Chinese assault rifle with a bayonet.
>
> The question that I have is how you can keep these guns and use these guns and rob people and conspire to rob people and shoot those guns. When we're talking about this type of activity, we're talking about the loss of life of human beings. It is not the movies. It is not television.
>
> When you shoot people, they do not get up and live another life. They are dead. An the value of life seems to have been something that no [sic] one of you have considered.
>
> And the value of human life, is something, Mr. Hubble, that you have not learned about. And I'm going to make certain that you have a very long time in your young life to consider the value of human life. It is not a game. It is not television. And while you're very sorry now, I don't think you're sorry when you're running around town, carrying that type of weapon, using that type of a weapon to rob, and then shooting that weapon at some innocent person who happens to get a look at you. And shooting him ten times! Ten times!
>
> It is heinous, Mr. Hubble. It's a heinous crime.
>
> Hurley, who had merely come to the door of the trailer, was killed by multiple gunshot wounds.

We have held that lack of a criminal history and minimum culpability are not unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Therefore, the fact that defendant has no prior adult record and that there was evidence that someone else may have fired the gun that killed the victim do not indicate that the court abused its discretion. Furthermore, the court was not required to consider defendant's age at all. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). The fact that defendant expressed remorse and had strong support do not constitute such unusual circumstances which would warrant a conclusion that the sentence was disproportionate and constituted an abuse of discretion. Accordingly, resentencing is not required.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry