

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY ALLEN METCALF,

Defendant-Appellant.

UNPUBLISHED

July 31, 1998

No. 198344

Recorder's Court

LC No. 95-011960 FY

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to forty to sixty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction, the sentences to run consecutively with each other. We affirm.

Defendant first argues that the trial court erred in failing to sua sponte instruct the jury on the unreliability of accomplice testimony. We disagree. Because defendant did not object to the jury instructions at trial or request instructions on the unreliability of accomplice testimony, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

In the present case, defendant argues that Jonathan Sylvester was an accomplice and, therefore, instructions on the unreliability of accomplice testimony should have been given sua sponte by the trial judge. CJI2d 5.5 defines an accomplice as a "person who knowingly and willingly helps or cooperates with someone else in committing a crime." Neither the prosecution's theory of the case nor the defense's theory presented Sylvester as an accomplice. Instead, the prosecution's theory was that

defendant committed the murder, and defendant's theory was that Sylvester committed the murder. Therefore, the trial court did not err in failing to give instructions on the unreliability of accomplice testimony, since neither side presented Sylvester as an accomplice. See *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

Defendant next argues that he was denied a fair trial because the prosecutor improperly argued facts not in evidence when it argued that blood stains found on Sylvester's shirt were too small for DNA testing. We disagree. The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Questions regarding prosecutorial misconduct are decided on a case-by-case basis, and we evaluate each question within the context of the particular facts of the case. *Id.*

At trial, a stipulation was entered regarding the testimony of Charlotte Day, an expert in the area of serology. The parties stipulated to the fact that no blood was found on defendant, but that a light smear of blood, which was too small for any further serological testing, was found on Sylvester's shirt. During closing arguments, defense counsel criticized the police for not conducting any further tests on the blood stains, such as DNA testing. In response to this argument, the prosecution argued that DNA testing could not be completed because the blood sample was too minute. Defense counsel objected to this remark, stating that DNA testing and serological testing were not the same. The trial court stated that it did not know if DNA testing and serological testing were the same thing, and that no expert was presented on the subject.

A prosecutor is not permitted to argue the effect of testimony that was not entered into evidence at trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). However, a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *Id.* Furthermore, an otherwise improper remark may not require reversal when the prosecutor is responding to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In the present case, defendant was not denied a fair and impartial trial. Defendant's argument that the prosecutor argued facts not in evidence is without merit. A stipulation was entered at trial regarding the amount of blood found on Sylvester's shirt and that, because of this small amount, no further tests could be conducted.

Defendant also argues that the prosecutor's statement that the blood sample was too small for DNA testing was error because the blood sample was never sent for DNA testing. Defendant's argument must fail for two reasons. First, a prosecutor has great latitude to argue in response to defense counsel's arguments. *Kennebrew, supra* at 608. Second, even if defendant was prejudiced by the prosecutor's statement, the trial court instructed the jury that "[l]awyer's statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theory." Furthermore, the trial court went on to say, "[y]ou should only accept things the lawyers say that are supported by the evidence." Therefore, defendant was not denied a fair and impartial trial because of the remarks made by the prosecutor.

Defendant next argues that he was prejudiced by the prosecution's failure to test the shirt for DNA evidence. We disagree. Because defendant did not raise this issue below, the issue is not preserved for appellate review. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). Furthermore, absent a showing of bad faith, or that defendant requested DNA testing, the prosecution does not have a duty to conduct further testing. *People v Marks*, 155 Mich App 203, 219; 399 NW2d 469 (1986). Our review of the lower court record reveals that defendant did not request that Sylvester's shirt be subjected to DNA analysis, and that no showing of intentional misconduct by the prosecution regarding the failure to test the shirt for DNA evidence has been shown. Therefore, we will not order the prosecution to test Sylvester's shirt for DNA evidence.

Finally, defendant argues that the trial court improperly considered his lack of remorse when it sentenced him. We disagree. Our review of sentencing decisions by the trial court is limited to determining whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). Because the courts of this state have long held that lack of remorse is a proper consideration when sentencing a defendant, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995), *People v Terry*, 217 Mich App 660, 663-664; 553 NW2d 23 (1996), *People v Steele*, 173 Mich App 502, 506; 434 NW2d 175 (1988), defendant's claim that the trial court abused its discretion by considering his lack of remorse is without merit.

Affirmed.

/s/ Martin M. Doctoroff

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot