STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 209951 Saginaw Circuit Court
PAUL LEE HEIT, Defendant-Appellant.	LC No. 96-012750-FC

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, for the death of his father. Defendant appeals by right from his conviction and challenges the trial court's denial of defendant's motion for new trial based upon the prosecution's purported withholding of favorable evidence and upon defendant's contention that the verdict was against the great weight of the evidence. The prosecution cross-appeals, claiming that the trial court erred in precluding the prosecutor from introducing evidence of certain statements by the decedent and erred in considering defense polygraph evidence in sentencing defendant. We affirm.

I.

First, defendant claims that he is entitled to a new trial pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), because the prosecutor failed to notify defendant that Dr. Malcolm Field changed his opinion before trial regarding the decedent's cause of death to a position favorable to defendant. We agree with the trial court that a new trial is not warranted on this basis.

Pursuant to the rule enunciated in *Brady*, the government is required to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. 373 US at 87. In the instant case, Dr. Field initially generated a report detailing his belief that the decedent's death was not accidental, but before trial apparently changed his mind and opined that the decedent's injuries could have been suffered accidentally, i.e., that the decedent died from an accidental fall down the stairs rather than from a homicide. Dr. Fields testified as a defense witness at trial, and defendant has not demonstrated that he could not have obtained Dr. Field's favorable change of opinion prior to trial with

the exercise of due diligence. Defendant has not established a violation of the *Brady* rule entitling him to a new trial. See *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998); *United States v Clark*, 928 F2d 733, 738 (CA 6, 1991).

II.

Defendant next contends that he is entitled to a new trial because the great weight of the evidence supports his innocence. Specifically, defendant argues that the experts presented by the prosecution in support of its theory that the decedent's injuries resulted from a massive blow to the head from a blunt instrument were unable to explain the presence of the frontal brain injuries, the absence of skin bruising in the shape of the supposed murder weapon, the position in which the decedent's body was found, and the presence of the decedent's remaining injuries. Defendant asserts that the only real explanation came from his experts—Drs. Cohle, De Jong and Field—who explained that the injuries were consistent with a fall down a flight of stairs—not a blow—and that the front and back bruising of the brain constituted classic coup contrecoup injuries, which most often result from a moving head injury in the form of a fall.

After reviewing the body of proofs presented in this case, we cannot say the evidence preponderates heavily against the verdict and that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The conflicting evidence between the prosecution and the defense as to the cause of the decedent's injuries and whether coup contrecoup brain injuries existed in this case ultimately were matters of credibility revolving around which experts to believe. The resolution of these matters was best left for the jury to decide and is an insufficient ground for granting relief on this issue. *Lemmon, supra* at 647. Moreover, we give substantial deference to the trial court's determination that the verdict is not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hospital (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). We cannot say the trial court abused its discretion in denying defendant's motion for new trial. *Gadomski, supra*.

III.

In light of our resolution of the issues raised on appeal by defendant, it is unnecessary for us to consider the prosecution's issue raised on cross-appeal regarding the trial court's preclusion of evidence of statements by the decedent expressing his belief that his children were going to kill him. We find plaintiff's remaining issue, regarding defendant's sentence, to be without merit.

Although in sentencing defendant the trial court referenced defendant's polygraph test, a remand for resentencing is not required in this case. If the trial court had sentenced defendant *below* the sentencing guidelines, we would not hesitate to remand for resentencing. However, defendant's sentence, is within the guidelines and is proportionate to the seriousness of the crime for which punishment was imposed. Clearly, as required, the trial court imposed sentence taking "into account the nature of the offense and the background of the offender. . . ," a background which is notably clean. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Were we to remand for resentencing, the trial court

could simply and properly, resentence defendant to the same sentence without mentioning the polygraph test and the sentence would certainly be deemed proportionate. We believe such an exercise would be a needless waste of judicial time and resources.

We affirm.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Jeffrey C. Collins