STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS TAYLOR,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 175218
LC No. 92-012190

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL LARRY, also known as, DONSHELL YOUNG,

Defendant-Appellant.

No. 178605
LC No. 93-009885

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Defendants appeal as of right from their bench trial convictions of 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 Taylor was sentenced to thirteen to thirty years' imprisonment for the second-degree murder conviction, and the statutory consecutive two years' imprisonment for the felony firearm conviction. Defendant Larry was sentenced to eighty months to forty-five years'

---

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

imprisonment for the second-degree murder conviction and the statutory consecutive two years' imprisonment for the felony firearm conviction. We affirm in both cases.

I.

We address defendant Taylor's claims of error first. Initially, defendant Taylor claims that the trial court erred in imposing consecutive sentences on him pursuant to MCL 333.7401(3); MSA 14.15(7401)(3). We disagree. That statute provides for an enumerated controlled substance sentence to run consecutive to a prior enumerated felony sentence. In this case, defendant was already serving a sentence for an enumerated controlled substance offense when his sentence for second-degree murder was imposed. Therefore, although a consecutive sentence was not mandatory under MCL 333.7401(3); MSA 14.15(7401)(3), the trial court nevertheless had discretion to impose consecutive sentences. See *People v Hunter*, 202 Mich App 23; 507 NW2d 768 (1993). MCL 768.7b; MSA 28.1030 provides in pertinent part:

> (2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense, the following shall apply:
>
> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.

The above statute clearly authorizes the trial court, in the instant circumstances, to exercise its discretion in deciding whether to impose consecutive sentences upon defendant. However, it is unclear from the record below whether the trial court recognized its discretion to impose consecutive sentences on defendant. While the trial court was silent on this matter, correspondence from the Michigan Department of Corrections to the court inquiring into defendant's situation incorrectly asserted that such sentencing was mandatory. We therefore remand this case for a determination by the trial court whether, in the exercise of its discretion pursuant to MCL 768.7b; MSA 28.1030, defendant Taylor's sentences should be served consecutively.

Defendant Taylor next argues that the trial court improperly denied his motion to suppress the use of testimonial and physical evidence that was disclosed to him in the middle of the trial because he was unfairly prejudiced by the admission of the evidence. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Hurt*, 211 Mich App 345, 350; 536 NW2d 227 (1995). At trial, the prosecutor called as a witness the evidence technician who analyzed the crime scene. During the course of his testimony, the witness referred to his sketch of the scene. A copy of the sketch had not been provided to defendant, even though numerous discovery requests were made. The trial court, therefore, recessed to give defendant time to review the sketch. When the trial court reconvened, it offered defendant additional time to review the sketches. Defendant eventually indicated that he was ready to proceed with trial.

A trial court has discretion to fashion a remedy for noncompliance with a discovery order or agreement. *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480, reversed on other

grounds 442 Mich 915 (1993). Questions of noncompliance with discovery orders are within the purview of the trial court's inherent power to control the admission of evidence, and such questions should be resolved within the discretion of the trial court. *People v Taylor*, 159 Mich App 468, 471; 406 NW2d 859 (1987). The remedy of suppression should be utilized only in the most egregious of cases. *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987). In the instant case, the prosecutor's failure to provide the sketch to defendant was inadvertent. The only prejudice resulting was that defendant was inadequately prepared to cross-examine the witness. The trial court effectively remedied this prejudice when it granted time to defendant to review the sketch. The trial court continued to offer additional time to defendant until defendant indicated that he was ready to proceed with trial. The trial court did not abuse its discretion when it denied defendant's motion to suppress the evidence.

Defendant Taylor's final claim is that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We find that defendant's sentence is proportionate. Defendant's sentence is within the guidelines range. Sentences which fall within the guidelines range are presumed to be neither excessively severe nor unfairly disproportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant claims that his sentence is not proportionate to his background because he had a troubled youth, his criminal record does not contain any assaultive offenses and his bullets did not kill the victim. A defendant's lack of criminal history and minimum culpability are not unusual circumstances which overcome the presumption that a sentence within the guidelines range is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant has not presented any unusual circumstances which negate the presumption of proportionality.

II.

We now turn to defendant Larry's claims of error. Defendant Larry first contends that his constitutional right to confrontation was violated when the unredacted statement of his nontestifying codefendant was admitted at trial. We disagree. Although this issue is not preserved because defendant Larry did not object at trial to the admission of his codefendant Taylor's statement, we will review the issue for manifest injustice because defendant claims violation of his constitutional rights. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

The introduction at a joint trial of a non-testifying codefendant's unredacted confession which inculpates the complaining defendant violates the complaining defendant's right to confrontation. *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). This Court has expressly held, however, that the *Bruton* rule does not apply in the context of bench trials. *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992). Defendant Larry and defendant Taylor received a joint bench trial. Codefendant Taylor's statement to the police was admitted solely against him, not against defendant Larry. "A judge, unlike a jury, is able to consider the confession for the limited purpose of establishing the guilt of the confessor." *Id.* Since defendant Larry was tried by the bench, his constitutional right to confrontation was not violated.

Defendant Larry urges this Court to follow *People v Spearman*, 195 Mich App 434; 491 NW2d 606 (1992). In *Spearman*, also a bench trial, the trial court made findings of fact indicating defendant's guilt which were supported *only* by the non-testifying codefendant's statement. There was no other evidence on the record for the trial court's findings. *Spearman* provides that the *Bruton* rule does not apply in bench trials unless the trial court improperly uses or relies on the non-testifying codefendant's statement as the sole basis for finding facts which indicate the complaining defendant's guilt. In the case at bar, there is no indication that the trial court improperly used defendant Taylor's statement against defendant Larry. All of the trial court's findings were supported by other testimony and evidence on the record. *Spearman* does not provide authority for applying the *Bruton* rule in this case.

Defendant Larry next claims that he was deprived of his presumption of innocence because the trial court, sitting as the finder of fact, concluded that he was guilty before all of the evidence was presented. We find that defendant's argument has no merit. The record reveals that the prosecutor asked the witness whether defendant Larry offered $100 apiece to Rock and defendant Taylor to shoot up the house. The witness responded, "Yes." The prosecutor then asked the witness what happened after the guns were in Rock's and defendant Taylor's hands, and the witness responded, "They went down and did what they had to do." Defendant objected to the answer on the grounds that the witness did not have personal knowledge. The court stated in response to the objection, "I don't see any reason to hold it in abeyance. It appears there was a contract and many lines of the contract." Defendant argues that the court's analysis indicates that it found that he (defendant) made a contract to kill and concluded at that point that defendant was guilty.

In ruling on defendant's objection, the trial court was required to resolve a preliminary question of admissibility pursuant to MRE 104(A). The witness' testimony was admitted as relevant to the issue of whether such a contract existed—a question not before this Court. The trial court specifically said, "It *appears* there was a contract." The use of the word "appears" indicates that the trial court did not form a final conclusion on the issue, but rather was receptive to considering further evidence on the issue. There is no evidence that the trial court found defendant guilty of anything prior to the conclusion of the trial. Defendant's claim is without merit.

Defendant Larry's final claim is that his motion for a new trial based on newly discovered evidence should have been granted. We disagree. Whether to grant a new trial is within the discretion of the trial court, and its decision will not be reversed absent a clear abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: 1) the evidence itself, and not merely its materiality, is newly discovered; 2) the evidence is not cumulative; 3) including the new evidence on retrial would probably cause a different result; and 4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988). A motion for new trial on this ground is not regarded with favor. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). The trial court may evaluate credibility in deciding a motion for a new trial. *People v*

Mechura, 205 Mich App 481, 484; 517 NW2d 797 (1994). We find that the evidence from the four witnesses that defendant presented at the post-trial evidentiary hearing was cumulative, could have been produced at trial, and would not probably have caused a different result at a new trial. Therefore, in our judgment, the trial court did not abuse its discretion in denying defendant's motion.

Affirmed but defendant Taylor's sentence is remanded for a statement by the trial court consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew