

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE EARL LEWIS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2008

No. 279716

Wexford Circuit Court

LC No. 07-008244-FH

07-008245-FH

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Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of two counts of receiving and concealing stolen property, MCL 750.535(2)(b), and two counts of felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 28 to 180 months for each count. For the reasons set forth below, we affirm.

I. Excluded Evidence

The jury convicted defendant of exchanging marijuana for guns that were stolen from cabins in Mesick, Michigan. At trial, defendant sought to introduce the testimony of Harold Riggs, a guard at the Benzie County Jail. Riggs allegedly overheard a conversation between two of the men accused of stealing the guns, Andrew Williams and Travis Agar, while they were in jail. The men allegedly stated that guns were thrown in a river, and defendant contends this would establish that he could not have traded marijuana for them. The trial court declined to admit the evidence on the ground that it did not have sufficient guarantees of trustworthiness.

We review this evidentiary issue for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). “[A]n abuse of discretion occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes.” *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). While Riggs’s testimony would generally constitute hearsay, defendant claims it falls under the catch-all exception, MRE 803(24). The rule provides for the admission of “[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . . .”

We hold that the trial court did not abuse its discretion when it ruled that the evidence lacked sufficient guarantees of trustworthiness. At the motion hearing, Riggs testified that he overheard Williams and Agar talking and that he heard them say, “the guns went into the river.” However, Riggs also testified that he had “no idea” what guns or what river they were talking about. Further, Williams testified that Agar just “mentioned something about guns” but he was not sure what Agar was talking about. Agar also testified that he never said anything about throwing guns into the river, but that he did throw a “four wheeler” into the river. There is also no indication in the record that either Williams or Agar had any personal knowledge that the guns were thrown in the river. Accordingly, the trial court’s conclusion that the statements lacked credibility was not outside the range of reasonable and principled outcomes because there was no evidence to substantiate the hearsay statements and because the statements were not based on personal knowledge. Thus, the trial court did not abuse its discretion by excluding the statements.

Defendant also argues that the trial court’s exclusion denied him the right to present a defense. “A criminal defendant has a state and federal constitutional right to present a defense Const 1963, art 1, § 13; US Const, Ams VI, XIV.” *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002). However, as our Court recently explained in *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008):

[A]n accused’s right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). “A defendant’s interest in presenting . . . evidence may thus ‘bow to accommodate other legitimate interests in the criminal trial process.’ ” *Scheffer, supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers [v Mississippi]*, 410 US 284, 302-303; 93 S Ct 1038; 35 L Ed 2d 297 (1973).]

Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has “broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’ ” *Scheffer, supra* at 308, 118 S Ct 1261 quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

At trial, defendant took the position that he did not purchase any guns from the men who broke into the cabins. Arguably, the hearsay statement that guns were thrown into a river could have bolstered this defense. However, the trial court’s decision to exclude the hearsay statements did not deny defendant a defense. Defendant testified that he twice refused to purchase guns offered to him and he elicited testimony that Agar told Williams that defendant “refused” to purchase the guns. Thus, notwithstanding the trial court’s ruling, which was legally correct, defendant was able to present his defense to the jury.

## II. Jury Instructions

Defendant claims that the trial court inadequately instructed the jury because the court did not give a cautionary instruction about the unreliability of accomplice testimony under CJI2d 3.6. However, defense counsel did not request the instruction and, instead, expressly agreed to the instructions given. “By expressly approving the instructions, defendant has waived this issue on appeal.” *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Alternatively, defendant argues he received ineffective assistance of counsel because his lawyer failed to request a cautionary accomplice instruction under CJI2d 3.6. Because defendant did not raise the issue of ineffective assistance of counsel below, our review is limited to the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).<sup>1</sup>

The record shows that defendant based his entire defense on his claim that he was not associated with the men who stole the guns from the cabins. Defendant testified that his first involvement with the young men was when Eric Stroh “brought a kid over to” his house and asked defendant if he wanted to buy a gun. Defendant testified that the men told him they stole the guns and he told them he did not want to buy any guns because he did not have any money.

Thus, according to defendant’s own testimony, there was no basis for a cautionary accomplice instruction because defendant took the position that he was entirely uninvolved with the men who stole the guns. After attempting to distance himself from the gun thieves, it would have been illogical for defense counsel to request a jury instruction that would suggest a connection between defendant and the men. Accordingly, defendant has not shown that defense counsel provided ineffective assistance.

### III. Sentence

Defendant maintains that the trial court abused its discretion when it scored ten points for offense variable (OV) 14.<sup>2</sup> According to defendant, no evidence showed that he was the leader of the men who stole the guns and, to the contrary, evidence established that he was a passive participant who simply agreed to buy items the men offered him.

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<sup>1</sup> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving trial counsel was ineffective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish that counsel was ineffective, a defendant must show that “(1) counsel’s performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>2</sup> We review a trial court’s scoring decision to determine whether the trial court abused its discretion and whether the record adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). Further, “scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under MCL 777.44(1)(a), a trial court should score ten points for OV 14 if a defendant is the leader in a multi-offender crime. Further, MCL 777.44(2)(a) directs the trial court to consider the “entire criminal transaction” when scoring OV 14. The record supports the trial court’s reasoning that defendant was the leader of the “criminal transaction.” The young men who stole the guns were all between 16 and 17 years old, while defendant was 45 years old. Further, one of the young men testified that defendant knew the property was stolen, he traded marijuana for the property, and that this occurred on multiple occasions. The young man further testified that they went to defendant’s place “maybe four or five times” to trade stolen property for marijuana. Clearly, there is evidence to support the scoring decision of the trial court.

Affirmed.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Jane M. Beckering