STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK GRAHAM,

Defendant-Appellant.

UNPUBLISHED
July 1, 1997

No. 191845
Recorder's Court
LC No. 95-001133-FC

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of attempted armed robbery, MCL 750.92; MSA 28.287, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of two years' imprisonment for felony firearm and forty to sixty months' imprisonment for attempted armed robbery, and ordered that they be served consecutively to prior sentences for assault with intent to rob and steal while armed, MCL 750.89; MSA 28.284, and felony firearm, MCL 740.227b; MSA 28.424(2).[1] We affirm.

At approximately 5:00 p.m. on December 11, 1994, Amir Muhammad was shot and killed during an attempted robbery of the Fishtime Restaurant located on Mack near Newport in the City of Detroit. Ten minutes earlier, two men entered the restaurant and joined two customers already seated at the lunch counter. Muhammad, the proprietor of the restaurant, emerged from the kitchen and took their orders. When Muhammad returned to the kitchen, one of the men followed him while the other produced a handgun and ordered the customers to lie on the floor. One of the customers heard the men struggle in the kitchen, and then heard two or three gunshots followed by a pause and more shots. Both of the assailants subsequently fled the building.

The resident of a home located twenty feet from the corner of Mack and Newport testified that around the time of the shooting she saw defendant standing in her front yard, holding a handgun, and three other men sitting in a brown car parked in front of the house. The witness stated that one of the men had just entered the car, and defendant, after standing in the yard for a few minutes, joined his companions and they drove off.

Defendant contends that he is entitled to a new trial because he was prejudiced by the prosecution's failure to exercise due diligence in producing two endorsed witnesses, Ray Jones and DeShawn Simpson, and the trial court's failure to give the missing witness instruction, CJI2d 5.12. We disagree. Neither the prosecution's failure to exercise due diligence in producing a missing endorsed witness nor the trial court's failure to give the missing witness instruction, CJI2d 5.12, after finding a lack of due diligence, results in automatic reversal. See *People v Pearson*, 404 Mich 698, 723-724; 273 NW2d 856 (1979); *People v Bennett*, 157 Mich App 84, 90; 403 NW2d 103 (1987). Upon entry of a guilty verdict, the only relevant inquiry is whether the failure to produce the witness prejudiced the defendant. *Bennett, supra* at 90. If there was no prejudice, the trial court's decision not to give the missing witness instruction was proper. On the other hand, if there were prejudice, reversal is required regardless of the court's error in instructing the jury. *Id*.

In this case, we are limited to reviewing the missing witnesses' statements to the police because they could not be located for a hearing on defendant's motion for a new trial. Upon review of the statements, we find that defendant was not prejudiced by the prosecution's failure to produce the witnesses. Defendant correctly notes that Jones' and Simpson's descriptions of defendant's clothing on the date of the offense differed in some respects from the homeowner's description of the clothing worn by the perpetrator. However, in focusing exclusively on the clothing descriptions, defendant fails to recognize that the witnesses would have placed him and codefendant at the scene of the crime. Moreover, the witnesses would have testified that shortly after they dropped defendant and codefendant off in the parking lot, defendant and codefendant arrived together at a friend's house, where codefendant admitted shooting the victim. Accordingly, even if the missing witnesses' testimony would have conflicted with another witness' description of defendant's clothing, it would have bolstered her identification of defendant by placing him at the crime scene at the time of the offense. Accordingly, the trial court properly declined to give the missing witness instruction in this case. *Bennett, supra* at 90.

Next, defendant contends that his inculpatory statement should have been suppressed because the police delayed his arraignment in order to extract a confession. We disagree. In reviewing the trial court's decision that a statement was freely and voluntarily made, this Court examines the entire record and makes an independent determination. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). However, due to the trial court's superior position in viewing the evidence, we must give due deference to its findings and will not reverse a finding unless it is clearly erroneous. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991).

The failure to comply with the court rule, MCR 6.104(A), and statute, MCL 764.26; MSA 28.885, requiring that an arrested person be taken without unnecessary delay before the court for arraignment does not automatically result in the suppression of the statement. Instead, it is one factor to consider in determining whether the statement was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334-335; 429 NW2d 781 (1988). Upon review of the totality of the circumstances in the instant case, we conclude that defendant freely and voluntarily made the inculpatory statement. Defendant admitted that he made the statements contained in the written confession and that the police did not threaten or abuse him. Although defendant was not arraigned until two days later, the delay did not affect defendant's decision to make an inculpatory statement four hours after his arrest. *Id.*

Defendant argues that he should be resentenced before a different judge because the trial court was biased against him as a result of information obtained during its allegedly improper questioning of the jurors outside of defendant's presence. We disagree. A defendant has a right to be present "during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). However, the term "trial" does not include "matters occurring after the hearing on the merits or rendition of the verdict." *People v Medcoff*, 344 Mich 108, 115; 73 NW2d 537 (1955), overruled in part *People v Morgan*, 400 Mich 527, 535-537; 255 NW2d 603 (1977). Thus, the trial court's post verdict conversation with the jurors in this case did not violate defendant's constitutional or statutory rights.

Despite the lack of constitutional error, the Court in *People v Pulley*, 411 Mich 523, 530-531; 309 NW2d 170 (1981), held that a defendant's absence from a sentencing conference denigrates his personal right of allocution and is inconsistent with the appearance of fairness. In contrast with the objectionable discussions in *Pulley*, however, the discussion in this case did not concern sentencing but rather was an informal conversation with jurors about their reasons for rendering their verdict. To the extent the trial court's post verdict conversation with the jurors infringed on defendant's right of allocution, the error was harmless because the jurors' comments were directed at matters that were already apparent to the court--the quantum of evidence and potential juror confusion due to the length of the jury instructions. *People v Mosko*, 190 Mich App 204, 212; 475 NW2d 866 (1991), aff'd 441 Mich 496; 495 NW2d 534 (1992).

Defendant's remaining assertions of error also relate to sentencing. Defendant initially contends that the trial court improperly considered his insistence on a jury trial in fashioning his sentence because it indicated before trial that it would impose concurrent sentences. We disagree. The trial court may order consecutive sentences when, such as in this case, the offense was committed while another felony charge was pending. MCL 768.7b(2)(a); MSA 28.1030(2)(2)(a); *People v Evans (After Remand)*, 213 Mich App 671, 674-675 n3; 540 NW2d 489 (1995). However, as defendant correctly notes, the sentencing court may not penalize a defendant for exercising his right to a trial. *Mosko, supra* at 211. Upon review of the trial court's statements before trial and at sentencing, we find that the court did not improperly consider defendant's decision to exercise his right to trial in imposing consecutive sentences, but rather clearly stated that its decision was based on the fact that defendant was convicted of a lesser offense with a five year maximum penalty rather than the life offense supported by the evidence.

Finally, defendant contends that the trial court abused its discretion in sentencing him to a term that violates the principle of proportionality. Again, we disagree. In reviewing the imposition of consecutive sentences in cases where neither sentence exceeds the maximum punishment allowed, each sentence is considered separately under the principle of proportionality. *People v Miles*, __ Mich __; __ NW2d __ (Docket No. 100683, issued 3/6/97) slip op pp 4-5; *People v Landis*, 197 Mich App 217, 218-219; 494 NW2d 865 (1992). In this case, defendant's sentence of forty to sixty months for attempted armed robbery was within the guidelines' range and is therefore presumptively proportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Because defendant did not

present the circumstances that would make his sentence within the guidelines' range disproportionate when given the opportunity at his sentencing hearing, defendant may not challenge the proportionality of his sentence on appeal. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] In docket no. 185896, we affirmed defendant's March 30, 1995, convictions of assault with intent to rob and steal and felony firearm.