STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PAUL CZINKI,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 202348
Otsego Circuit Court
LC No. 96-2121 FH

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of receiving and concealing stolen property valued in excess of $100, MCL 750.535; MSA 28.803. Defendant was subsequently found by the trial court to be an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to 80 to 120 months' imprisonment. We affirm.

Defendant first argues that the trial court erred when denying his motion for a change of venue, given the existence of unfavorable pretrial publicity involving an unrelated murder investigation. We disagree. "We review a trial court's determination whether to grant a request for a change of venue for an abuse of discretion." *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996). To be entitled to a change of venue due to adverse pretrial publicity, a defendant must prove not only the existence of unfavorable pretrial publicity, but also (1) a pattern of prejudice in the community so overwhelming that once exposed to the extensive publicity, a juror could not possibly be impartial; or (2) that the jury was in fact prejudiced or that the trial's atmosphere was likely to produce prejudice. *Id.*; *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992).

After reviewing the record, we conclude that the trial court did not abuse its discretion when denying defendant's change of venue motion. The only evidence defendant offered to support his claim of extensive unfavorable publicity was a statement by his attorney that earlier in the year there had been considerable media coverage about the aforementioned murder case. Defendant offered no examples or statistics regarding this media coverage, and he presented no evidence of overwhelming community

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

prejudice. *Passeno, supra* at 99. Moreover, the only juror who acknowledged that she had heard defendant's name reported in connection with the murder case, indicated that she had not formed an opinion about defendant with regard to that unrelated case. She also stated that she would be able to reach a decision based solely on the evidence adduced at trial. See *Hack, supra* at 311 (observing that if a juror swears that she can set aside any previously formed media based opinion "and try the case impartially, and the trial court is satisfied, then the juror is competent to try the case"). We also find it significant that defense counsel did not renew her motion at the close of jury selection. *Passeno, supra* at 99. Indeed, when specifically asked by the trial court if she was satisfied with the jury panel, defense counsel indicated that she was satisfied. *Hack, supra* at 311-312.

Next, defendant argues that the trial court erred when it denied his motion for a continuance in order to replace his appointed counsel with retained counsel. We again disagree. Defendant raised this motion at the start of proceedings on the day of trial. In evaluating whether a trial court's denial of a criminal defendant's motion for a continuance evidences an abuse of discretion, "we consider whether: (1) [the defendant] . . . was asserting a constitutional right; (2) [the defendant] . . . had a legitimate reason for asserting that right; (3) [the defendant] . . . was not negligent in asserting it; (4) prior adjournments of trial were not at [the defendant's] . . . request; and (5) on appeal, [the defendant] . . . has demonstrated prejudice resulting from the trial court's abuse of discretion." *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

The constitutional right being asserted in this instance is defendant's "constitutional right to counsel of his own choosing." *Id.*[1] However, the only reason defendant gave for needing a continuance was that he would be "unfairly prejudiced" if represented by his appointed trial counsel. We believe that this unsupported, cryptic statement does not establish that a "bona fide, irreconcilable difference," *People v Gatewood*, 103 Mich App 763, 765; 304 NW2d 3 (1981), existed between defendant and his appointed counsel that would justify the grant of a continuance, particularly given that defendant's attorney was prepared for trial. See *People v Shuey*, 63 Mich App 666, 672; 234 NW2d 754 (1975). We also conclude that defendant was negligent in the timing of his motion. He should have brought the motion at the earliest possible date (i.e., as soon as he heard that funds for retained counsel had been made available to him), which the record indicates was sometime during the week prior to trial. Furthermore, we are unconvinced that defendant was in any way prejudiced by the trial court's ruling.

Finally, we disagree with defendant's assertion that his sentence is disproportionate. In *People Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997), the Michigan Supreme Court observed:

> We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society.

By statute, the maximum sentence that can be imposed for a first conviction of receiving and concealing stolen property in excess of $100 is five years. MCL 750.535(1); MSA 28.803(1). MCL 769.11(1)(a); MSA 28.1083(1)(a), states in pertinent part that upon conviction, an habitual offender, third offense, may be sentenced by the trial court "to imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term." Because defendant's 80 month minimum sentence is within the statutory range authorized by the Legislature, and because we conclude that the record establishes that defendant "has an inability to conform his conduct to the laws of society," *Hansford (After Remand), supra* at 326, we are convinced that the sentence imposed by the trial court does not evidence an abuse of discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Roman S. Gribbs
/s/ Robert J. Danhof

[1] See US Const, Am IV; Const 1963, art 1, § 20.