

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BASHARA MERRIWEATHER,

Defendant-Appellant.

UNPUBLISHED

July 10, 1998

No. 196089

Macomb Circuit Court

LC No. 95-003137-FH

Before: Holbrook, Jr., P.J., and Young, Jr. and J.M. Batzer*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of being a prisoner in possession of a weapon, MCL 800.283(4); MSA 28.1623(4). He was sentenced to two and a half to five years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that his speedy trial rights were violated by the prosecutor's seven-week delay in filing formal charges against him. However, speedy trial rights are not implicated until formal charges are filed. *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987). Pre-arrest delay, however, can violate due process rights if it deprives defendant of an opportunity to present a defense. *People v Wyngaard*, 151 Mich App 107, 111; 390 NW2d 694 (1986). The threshold test for determining whether a delay constitutes a denial of due process is whether defendant suffered prejudice. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). Once the defendant has shown prejudice resulting from the delay, the burden shifts to the prosecution to show that the reason for delay justified the prejudice. *Id.*

Defendant claims that he suffered prejudice because his wounds healed prior to his trial and therefore, the jury had less sympathy for him. However, as stated in *Wyngaard*, 151 Mich App at 111, due process rights are violated when a defendant is prevented from presenting a defense. Loss of jury sympathy is not the type of prejudice sufficient for denial of due process. In fact, the jury was instructed not to let sympathy or prejudice influence their decision. Additionally, defendant testified to the wound on his head and showed the jury the scar on his head. The wounds defendant sustained in the

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

altercation were not disputed. Several officers testified that defendant was bleeding profusely and his T-shirt was covered in blood. Therefore, defendant failed to meet his burden of showing prejudice as a result of the delay.

Defendant next argues that the prosecutor improperly argued to the jury that it was their civic duty to convict defendant. Because defendant failed to object at trial, review of prosecutorial remarks is generally precluded. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). If the prejudicial effect of the remarks could not have been eliminated by a curative instruction, this Court will review the misconduct for a miscarriage of justice. *Id.* While we agree that some of the prosecutor's remarks may have been improper, a curative instruction, if requested, would have prevented any prejudice against defendant. Moreover, the remarks certainly did not rise to the level requiring reversal and there was overwhelming evidence against defendant. Therefore, a miscarriage of justice will not result from this Court's refusal to review. *People v Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991).

Finally, defendant argues that his sentence is disproportionate to the offense and the offender and therefore, it violates the principle of proportionality. We disagree. Defendant was incarcerated for a serious prior offense. He was housed in Unit 4, a close custody unit for prisoners who are serving a long-term incarceration, who have received a number of misconduct reports, or who are assaultive or disruptive. In order to end this altercation, defendant was sprayed with tear gas after approximately an hour of pleading with him to release the weapon. Defendant repeatedly threatened to kill two other prisoners and, at one point, threatened a corrections officer. Because defendant committed very serious crimes in the past and the instant offense was potentially very dangerous, we find that the trial court did not abuse its discretion when it sentenced defendant to two and a half to five years' imprisonment. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Donald E. Holbrook, Jr
/s/ Robert P. Young, Jr.
/s/ James M. Batzer