STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 1998
v	No. 205804 Kent Circuit Court
MICHAEL ANTHONY DAVENPORT, Defendant-Appellant.	LC No. 96-011456 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to two to twenty-five years' imprisonment for the possession with intent to deliver less than fifty grams of cocaine conviction and 180 days for the possession of marijuana conviction. Defendant now appeals as of right. We affirm.

I. Basic Facts

A security guard from the Dwelling Place Inn, where defendant lived, noticed defendant entering and exiting the building several times. Defendant twice entered the building with an individual that the security guard did not recognize, stopped at the bottom of the stairway, sat down on the steps and exchanged something with this individual. The individual then left. The security guard noticed that defendant would reach up to the door before and after each exchange. After the third such exchange between defendant and such individuals, the security guard went to the door, explored where defendant had been reaching and found a plastic baggy with what appeared to be several small rocks. Two other employees, while viewing a security camera monitor, witnessed defendant sitting with someone and appearing to make a transaction. After the individual with defendant left, the employees observed defendant placing something above the door. After the third exchange, personnel from the Dwelling Place Inn called the police, who thereafter arrested defendant. The small rocks in the plastic baggy that the security guard recovered tested positive for cocaine and weighed approximately eight-tenths of a gram.

II. Sufficiency of the Evidence

Defendant claims that there was insufficient evidence to support his possession with intent to deliver less than fifty grams of cocaine conviction. We disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

To support a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecutor must prove four elements: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *People v Wolfe,* 440 Mich 508, 516-517; 489 NW2d 748 (1992), modified on other grounds 414 Mich 1201 (1992). "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. "Possession may be either actual or constructive." *Id.* at 519-520. Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence." *Id.* at 526.

We find that the evidence, summarized above and viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that each element of possession with intent to deliver less than fifty grams of cocaine was proven beyond a reasonable doubt.

III. Right to a Speedy Trial

Defendant argues that he was denied his right to a speedy trial. We disagree. A determination as to whether a defendant was denied a speedy trial is a mixed question of fact and law. We review the factual findings for clear error, while the constitutional issue is a question of law subject to de novo review. *People v Gilmore,* 222 Mich App 442, 459; 564 NW2d 158 (1997). Where the delay is less than eighteen months, the burden is on the defendant to prove prejudice resulting from the delay. *People v Daniel,* 207 Mich App 47, 51; 523 NW2d 830 (1994). There are two types of prejudice: prejudice to a defendant's person as pretrial incarceration deprives an accused of civil liberties and prejudice when the defense might be prejudiced by the delay. *Gilmore, supra,* 222 Mich App 461-462. Prejudice when it affects a defendant's ability to present a defense is the more crucial in assessing a speedy trial claim. See *id.*

The time between defendant's arrest and trial was not greater than eighteen months, therefore, defendant has the burden of proving that he was prejudiced by the delay. *Daniel, supra*, 207 Mich App 51. Defendant argues that he was prejudiced by the delay because of the natural decline in the recollection of events, anxiety, depression, stress and mental anguish and the inability to assist counsel in preparation of trial including the location and interview of witnesses and the gathering of evidence. However, defendant testified at trial in detail regarding the incident and also presented a witness in his defense. Defendant's claims of mere anxiety and general allegations of prejudice are insufficient to establish a violation of his right to a speedy trial. *Gilmore, supra*, 222 Mich App 462.

IV. Right To Counsel and Right To Testify

Defendant claims that he was deprived of both his right to counsel and his right to testify in his own behalf at his preliminary examination. We again disagree. The question here is whether defendant's constitutional rights were violated. We review constitutional questions de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). The right to counsel is fundamental because it is essential to a fair trial; the right to counsel attaches at all critical stages of the proceedings. *People v Pubrat*, 451 Mich 589, 593; 548 NW2d 595 (1996). However, a criminal defendant also has the right to represent himself. *People v Adkins,* 452 Mich 702, 720; 551 NW2d 108 (1996). The trial court must determine that the defendant's assertion of his right to represent himself is knowing, intelligent, and voluntary. *Id.* at 722. Here, defendant did not request that he be appointed substitute counsel, but did request to represent himself. The record supports the magistrate's finding that defendant waived his right to counsel at his preliminary examination.

Defendant also argues that the magistrate denied him his right to testify at his preliminary examination. "The right to a preliminary examination in Michigan is a creation of statute. There is no federal or state constitutional requirement." *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). "The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it." *Id.* The magistrate did not deny defendant the opportunity to testify, but merely strongly cautioned defendant against testifying at the preliminary examination. Therefore, defendant's contention is without merit.

V. Motion To Withdraw

Defendant argues that the trial court reversibly erred in denying defense counsel's motion to withdraw. We disagree. The decision regarding substitution of attorneys is within the sound discretion of the trial court and we will not reverse such a decision absent an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). An indigent person entitled to appointed counsel is not entitled to choose his own lawyer. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Ceteways*, 156 Mich App 108, 118; 401 NW2d 327 (1986). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *Mack*, *supra*, 190 Mich App 14.

Here, the trial court denied the motion to withdraw without stating its reasons for denying the motion. However, after reviewing the hearing transcripts, we find that defendant failed to show good cause why the motion to withdraw should have been granted. Further, after the motion to withdraw was denied, defendant wrote a letter to defense counsel thanking him for his professionalism and apologizing for questioning his ethics. It appears from defendant's letter that defendant reconciled with his trial counsel. There is no indication in the trial court record that defendant, after reconciling with his attorney, requested that this attorney be removed.

VI. Prosecutorial Misconduct

Defendant claims that the prosecutor committed misconduct by shifting the burden of proof to defendant during closing argument. We disagree. We decide prosecutorial misconduct issues on a case-by-case basis and examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Where the defendant does not testify, comment by the prosecutor on defendant's failure to explain where he was or what he was doing is impermissible shifting of the burden of proof. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). However, once the defendant presents a defense, the prosecution is permitted to attack the defense by commenting on the weakness of it. *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995); *Holland*, *supra*, 179 Mich App 191. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence. *Fields*, *supra*, 450 Mich 111-112.

Here, the closing arguments of the prosecutor, regarding defendant's unreasonable explanation of the events in question,[1] would have been error if defendant had not testified on his own behalf that there was a reasonable explanation for his actions and that the crack cocaine that was found was not his. However, because defendant did so testify, the adversarial challenge to the asserted defense did not impermissibly shift the burden of proof because the defense raised the issue. The prosecutor, during closing argument, was merely commenting on the weakness of defendant's case. Viewing the prosecutor's comments as a whole and evaluating them in light of defense arguments and the relationship they bear to the evidence admitted at trial, defendant was not denied a fair and impartial trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] Defendant testified that when he walks past a door ledge, he has a tendency to reach up to the door as if he were dunking a basketball.