STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 1999
v	No. 207638 Calhoun Circuit Court
ANDREW FREDERICK BABICK, JR., Defendant-Appellant.	LC No. 96-002562 FH

Before: Griffin, P.J., and Wilder and Danhof*, JJ.

PER CURIAM.

Following a seven-day jury trial, defendant was convicted of two counts of first-degree felony-murder, MCL 750.316; MSA 28.548, and one count of arson of a dwelling house, MCL 750.72; MSA 28.267. The trial court sentenced defendant to life imprisonment for the felony murder convictions and entered no sentence for the arson conviction. Defendant appeals as of right and we affirm.

I

Plaintiff first alleges a violation of his right to a speedy trial under the 180-day rule, MCL 780.131; MSA 28.969(1). This Court reviews the trial court's attributions for delay under the 180-day rule for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

"MCL 780.131; MSA 28.969(1) requires that a prisoner charged with a crime in this state be brought to trial within 180 days of the time that the MDOC [Michigan Department of Corrections] is notified of the pending charge and the MDOC subsequently notifies the prosecutor in question of the prisoner's location." *People v Taylor*, 199 Mich App 549, 551; 502 NW2d 348 (1993). The purpose of the statute is to dispose of untried charges against prison inmates so that sentences can run concurrently. *People v Bell*, 209 Mich App 273, 279; 530 NW2d 167 (1995). In addition, MCR 6.004(D)(1)(a) provides that the prosecution must make a good-faith effort to bring a criminal charge to trial within 180 days of the time from which the prosecutor knows that

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

the person charged with the offense is incarcerated at a state prison or is detained in a local facility awaiting incarceration in a state prison.

A lapse of more than 180 days between the time the prosecutor learns that a defendant is an inmate and the time of trial establishes a prima facie violation of the 180-day rule and the prosecutor has the burden of establishing a good reason for failure to bring the case to trial within the 180-day period. *People v Pelkey*, 129 Mich App 325, 328-329; 342 NW2d 312 (1983). However, the 180-day rule does not require that the defendant's trial be *commenced* within that time period. *People v Till*, 115 Mich App 788, 792; 323 NW2d 14 (1982). "Rather, the statute obligates the prosecutor to take good faith action on the case during the 180-day time period and to proceed promptly in readying the case for trial." *Id*. If the prosecutor takes such action, "jurisdiction over the case will not be lost unless the initial action is followed by an inexcusable delay that evidences an intent not to bring the case to trial promptly." *Id.*

In the present case, defendant was arrested on April 16, 1996. Although defendant was not incarcerated at the time of his arrest, he was sentenced on April 19, 1996, in a separate case and incarcerated at the Gus Harrison Correctional Facility in Adrian. On October 30, 1996, defendant filed a motion to dismiss pursuant to MCL 780.131; MSA 28.969(1) because more than 180 days had elapsed between defendant's incarceration on April 19, 1996, and the date of the motion. The trial court denied defendant's motion on November 4, 1996, and the trial commenced on November 5, 1996.

Our review of the record indicates that the only delay in bringing defendant's case to trial was an adjournment of defendant's preliminary examination in district court from April 30, 1996, to July 18, 1996. Defendant's preliminary examination was not finished on April 30 and the record reflects that defendant's attorney agreed to adjourn the examination for twenty-nine days to May 29, 1996. When the preliminary examination resumed on May 29, defendant was not present because plaintiff failed to obtain a writ for defendant's appearance outside of prison. Purportedly, the district judge preferred to have the hearing on another date in July. Neither party produced a transcript of the May 29 hearing. Accordingly, it is not known whether defendant's attorney stipulated to the five-week adjournment.

Under the above circumstances, we conclude that the 180-day rule was not violated. Calculating the 180 days from the date of defendant's incarceration on April 19, 1996, defendant's trial occurred within 198 days. It appears from the record that this brief delay beyond the 180 days, partially acquiesced in by defendant, *Pelkey, supra*, "was not accompanied by an evident intent not to bring the case to trial promptly." *Bell, supra* at 279. The trial court therefore did not commit clear error when it denied defendant's motion to dismiss under the 180-day rule.

II

Defendant next contends that the trial court abused its discretion by its order authorizing the reimbursement of defendant's expert witness fees by the State of Michigan. Defendant, as an indigent represented by appointed counsel, filed motions for funds for an arson expert and a private investigator. The trial court granted both orders for public funds, each in the amount of $500, with the proviso that

the State of Michigan, rather than Calhoun County, provide the funds. However, the attorney general prosecuting the case refused to reimburse defendant's attorney with the funds, citing MCL 775.21; MSA 28.1258, which states that in a criminal case instituted by the attorney general, court-ordered funds "may" be paid by the state "with the approval of the state administrative board." On appeal, defendant claims that he was denied his right to an expert witness because of defendant's refusal to consent to the payment of such an expense.

Rulings on motions for expert witness fees will not be reversed absent an abuse of discretion. See *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). An indigent criminal defendant is entitled to waiver of costs for expert witness services reasonably necessary for his defense. MCL 775.15; MSA 28.1252; *People v Davis*, 199 Mich App 502, 518; 503 NW2d 457 (1993). However, despite the significance of expert testimony on the fire's origin, defendant did not object to the order nor did defendant request any pretrial relief in response to the attorney general's alleged noncompliance with the trial court's order. Defendant neither attempted to retain an expert nor filed a claim with the administrative law board for reimbursement as provided by MCL 600.6419(1); MSA 27A.6419(1). Defendant's argument consists of unsubstantiated statements that both the state and Calhoun County erected "roadblock after roadblock" to prevent his attorney from securing an expert. On the contrary, it appears from the record that defendant abandoned his attempt to collect the fees. Because defendant did not raise or pursue this issue below, it has not been preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Carrick*, 220 Mich App 17, 19; 558 NW2d 242 (1996). *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

III

Defendant next alleges that the trial court erred in failing to instruct the jury that voluntary intoxication is a defense to the underlying felony of arson of a dwelling house and the lesser offense of manslaughter. However, defendant did not object or request that such instructions be given. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice to defendant. *People v Messenger*, 221 Mich App 171, 176; 561 NW2d 463 (1997); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Moreover, no error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Messenger*, *supra* at 177-178; *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991).

We find no manifest injustice under the present circumstances. "Voluntary drug intoxication could be a defense to felony murder to the extent that the underlying felony is a specific intent crime . . . and that the intoxication precluded the defendant from being able to form the specific intent required to commit the underlying offense." *People v Hughey*, 186 Mich App 585, 590; 464 NW2d 914 (1990). In this case, there was no evidence that defendant was intoxicated to the extent that he could not form an intent to commit arson. One witness testified that he sold crack cocaine to defendant; at that time, shortly before the fire, defendant told the witness that he was "buzzed," but not drunk, from drinking beer. Another witness testified that defendant came home and stated that he had started a fire. Defendant, conversely, did not present any evidence that his state of intoxication affected his ability to

form the intent to commit arson. Under these circumstances, the jury instructions as given did not result in a manifest injustice to defendant. *Haywood*, *supra*.

Defendant also contends that he should have received an involuntary manslaughter instruction. Defendant has abandoned this issue on appeal for failure to adequately brief it. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

IV

Defendant further alleges that the trial court abused its discretion in denying defendant's motion for new trial based on alleged jury misconduct. We disagree.

First, although juror Mary Kreiter may have been pressured, or felt pressured, by her co-jurors to agree on a verdict, "[g]enerally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). See also *Hoffman v Spartan Stores, Inc*, 197 Mich App 289; 494 NW2d 811 (1992).

Second, we agree with the trial judge, who in denying defendant's motion for a new trial, ruled that the "jury coordinator's" alleged comment that "this trial has already taken longer than I thought it would" was less egregious than the bailiff's comment found not to constitute error requiring reversal in *People v Tutha*, 276 Mich 387; 267 NW 867 (1936).

For these reasons, we hold that the trial court did not abuse its discretion in denying defendant's motion for a new trial based on alleged juror misconduct.

V

Next, defendant contends that the trial court abused its discretion in denying defendant's motion for a new trial and failing to conduct an evidentiary hearing on defendant's claim of newly discovered evidence. Defendant's argument is without merit.

A trial court's ruling on a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). "To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." *Id*. See also *People v Stricklin*, 162 Mich App 623, 631; 413 NW2d 457 (1987).

The alleged newly acquired evidence in this case consists of statements purportedly made by a prison inmate, William Walker, to defendant while they were both incarcerated in July 1997. Defendant claims that in November 1995, while Walker and Cindy Burton were "getting high" at a crack house, Burton told Walker that she and an unidentified man in a white van set a house on fire because the occupants of the house "beat her out of money." The trial court refused an evidentiary hearing and denied defendant's motion, concluding that the evidence was not newly discovered under the four-prong criteria set forth in *Davis, supra*.

We find no abuse of discretion in the trial court's ruling. Both Burton and Lewis Lawrence, the "unknown" man in the white van, were known to defendant before trial. Indeed, defendant had disclosed Lawrence as a witness and elicited testimony from him at trial. Defendant also knew, prior to trial, that Lawrence had passed a polygraph test regarding the incident. Thus, while Walker's alleged statement was newly discovered, the underlying facts regarding the statement were not. Defendant did not, with reasonable diligence, avail himself of the opportunity to call Burton as a witness or to elicit exculpatory testimony from Lawrence. Moreover, the evidence would not have rendered a different result probable on retrial because Walker's statement could only be used for the limited purpose of impeaching Burton's anticipated testimony in a future trial that she did not set the house on fire. In addition, as the trial court appropriately noted, Lawrence, the alleged accomplice, had passed a polygraph test regarding his involvement in the fire that contradicted Walker's statement. Therefore, we conclude that the trial court did not err in refusing to hold an evidentiary hearing and in denying defendant's motion for a new trial on the basis of newly discovered evidence. *People v Mechura*, 205 Mich App 481, 484-485; 517 NW2d 797 (1994).

VI

Finally, defendant contends that the verdict was against the great weight of the evidence. We disagree.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998). A trial court may grant a motion for new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *Id*., citing *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). It is well settled that this Court may not attempt to resolve credibility issues anew. *Id*.

In order to prove the crime of arson, the crime underlying defendant's felony murder convictions, the attorney general was required to establish beyond a reasonable doubt that defendant "wilfully or maliciously" burned the dwelling house, "either occupied or unoccupied." MCL 750.72; MSA 28.267. This issue necessarily turns on the strength of the circumstantial evidence against defendant. As this Court has observed, "[i]t is the nature of the offense of arson that it is usually committed surreptitiously. Rare is the occasion when eyewitnesses will be available. By necessity, proofs will normally be circumstantial." *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1972).

Following our thorough review of the record, we conclude that the verdict was supported by the great weight of the evidence. This case arises from the fire that occurred during the early morning hours of September 9, 1995, in Battle Creek and caused the death of two young boys, the children of one of the occupants of the house. The Battle Creek Fire Department received a fire call at 2:05 a.m. and arrived at the house only three to four minutes later to find the house completely engulfed in flames. Although the fire was quickly extinguished, the boys died from smoke inhalation in an upstairs bedroom. Two fire experts testified that the cause of the fire was arson; someone had poured an incendiary liquid on the front porch, into the house through the front door, around the ground floor and up the staircase.

The chief fire officer opined that the fire had probably burned for ten minutes before the fire department arrived and had started at the front of the house because of the intensity of the fire there.

There was ample evidence adduced at trial placing defendant at the scene shortly before the fire. Defendant himself, in addition to other witnesses, established his presence there during the pertinent time period. In an interview with a police detective on the day following the fire, defendant admitted that he had gone to the house around midnight on the night in question to purchase a $20 rock of cocaine. He then walked one mile to his sister's house to smoke the rock, spent approximately one hour there, and went back to the drug house to purchase another rock because smoking just one had not satisfied him. Because the person from whom he had purchased the drugs was not there, he waited on the front porch, dozing on a sofa and smoking a cigarette. Defendant denied any responsibility for the fire or that he was angry with anyone.

However, the statements made by defendant differed in several important respects from the testimony of an occupant of the house, who saw defendant when he first came to the house looking for cocaine and testified that when he returned later, he was very angry to the point of being irrational. She testified that defendant threatened to call the police because he had been cheated in the earlier drug deal. Defendant wanted to see "Quickie," the person who had sold him the drugs. When the woman told him that Quickie was not there, defendant said he would stay on the porch and wait. The witness testified that she returned to bed, only to be awakened one-half hour later by the smell of smoke and fire. She and her boyfriend tried unsuccessfully to reach the children and then jumped out the back window to safety.

Defendant's niece testified that on the night in question, she was sleeping over at defendant's house in the living room. She woke up because she heard defendant and her aunt arguing about "something about a fire and dropping a cigarette in a couch." She looked at the clock and saw that it was 3:00 a.m. Despite earlier testifying at the fire marshal inquiry and preliminary examination that defendant ran quickly and excitedly into the house, stating that he might be responsible for the fire and that he knew that two children died in the fire, the niece recanted much of this testimony at trial and could only "kind of" remember whether that was indeed the way defendant had acted and what defendant had said.

The person who allegedly sold defendant cocaine on the night in question testified as to defendant's presence at the house about midnight and further admitted that hours after the fire, he went with two other men to talk with defendant because he heard from them that defendant was the last one on the porch at the house before the fire started.

Accelerants were found by a trained dog at six different locations in the house. Four days after the fire, the dog also detected accelerant on a pair of defendant's shoes at his house, although the canine handler testified that he could not specify what type of accelerant it was because the dog was capable of detecting over thirty-three different flammable liquids.

Having reviewed this evidence, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence. There was ample

evidence demonstrating that defendant had the opportunity to commit the crimes – he was at the house when the fire was set. Motive was likewise established: defendant was angry at being cheated in a drug deal which occurred at that house earlier the same night. The jury may infer malice from the known circumstances of the case. *People v Williams*, 45 Mich App 630; 207 NW2d 180 (1973); *People v McKeller*, 30 Mich App 135; 185 NW2d 905 (1971). Although this case rests largely on the credibility of the witnesses, in general, trial courts must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses and only where exceptional circumstances can be demonstrated may the trial judge intrude upon the jury function of credibility assessment. *Lemmon, supra* at 642-643, n 22. The evidence herein supports the verdict and such exceptional circumstances do not exist.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof