STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HENRY KETCHINGS, JR.,

Defendant-Appellant.

UNPUBLISHED
August 20, 1999

No. 205012
Wayne Circuit Court
LC No. 94-013688

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to forty to eighty years in prison for the murder conviction, five to ten years' imprisonment for the assault convictions, two to four years for the discharge of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

The present case stems from a fatal drive-by shooting in Detroit, motivated by revenge against a person responsible for the robbery of one of the participants in the shooting on the previous day. Defendant and three other individuals allegedly drove to the neighborhood where the purported robber resided and, upon finding that he was not there, opened fire with several weapons at the front of the house. The consequences were tragic – a nine-year-old girl, an innocent bystander, was killed and two others were wounded.

I

Defendant first contends that the trial court abused its discretion in admitting other-acts evidence contrary to MRE 404(b)(1).[1] We are inclined to agree but hold that the error was harmless.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *People v Hoffman*, 225 Mich App 103, 104-105; 570 NW2d 146 (1997); *People v Ullah*, 216 Mich App 669, 674-675; 550 NW2d 568 (1996). MRE 404(b) is consistent with an inclusionary, not exclusionary, theory of admissibility. *Hoffman*, *supra* at 105. The admissibility of other-acts evidence is a matter within the trial court's discretion. *Id*. at 104. Other-acts evidence is not admissible simply because it does not violate MRE 404(b); the trial court must also determine whether the evidence is relevant under MRE 402 and whether the danger of unfair prejudice substantially outweighs the probative value of the evidence under MRE 403. *VanderVliet*, *supra* at 74-75; *Ullah*, *supra* at 675.

Immediately prior to the trial in this case, defense counsel notified the prosecutor that he was going to challenge the circumstances surrounding the voluntariness of defendant's statement to the police. In response, the prosecutor moved to admit evidence of defendant's prior contacts with the legal system for the limited purpose of establishing defendant's familiarity with the criminal justice system and the process of interrogation. The trial court ruled that the prosecutor could admit evidence of defendant's other police contacts *if the defense attempted to challenge the voluntariness of defendant's statement* on the ground that his alleged intellectual limitations and general naivete rendered him incapable of voluntarily waiving his rights.

Subsequently, following defendant's father's contention *on cross-examination* that defendant had not been advised of his *Miranda* rights, the prosecutor elicited testimony that defendant had prior contacts with the police as a juvenile, including charges for breaking and entering, receiving and concealing stolen property, curfew violations, and a minor traffic offense. It was also brought out that one of these prior contacts involved codefendant Dennis Gover. Defendant's juvenile system experiences were again mentioned later in the trial during the cross-examination of defendant's psychiatric expert.

First, because defendant did not object at trial to this testimony, our review is limited to prevent manifest injustice. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096; MCR 2.613(A). See also *People v Carines*, ___ Mich ___; ___ NW2d ___ (1999)(Docket No. 110737, issued 7/27/99). Further, assuming arguendo that the unfair prejudice of this evidence substantially outweighed its probative value, *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998), see also *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), we conclude from our review of the record that the evidence against defendant was overwhelming. Under these circumstances, we hold that the errors, if any, in the admission of this testimony was harmless. *People v Lukity*, ___ Mich ___; ___ NW2d ___ (1999) (Docket No. 110737, issued 7/13/99). Defendant has not sustained his burden of demonstrating that it is "more probable than not" that the alleged evidentiary errors resulted in a miscarriage of justice. *Id.*

II

Defendant next contends that the trial court erred in failing to instruct the jury on the cognate lesser included offenses of voluntary and involuntary manslaughter and careless, reckless, and negligent use of a firearm with death resulting.[2] We disagree.

The test to determine whether an instruction on a cognate lesser included offense must be given is as follows:

> The record must be examined and if there is evidence which would support a conviction of the cognate lesser offense, then the trial judge, if requested, must instruct on it. *People v Van Wyck*, 402 Mich 266, 270; 262 NW2d 638 (1978); *People v Van Wyck (On Remand)*, 83 Mich App 581; 269 NW2d 233 (1978). Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error. 402 Mich 270. If the evidence presented could not support a conviction of the lesser offense, then the judge should not give the requested instruction. See *People v Beach*, 429 Mich 450, 480; 418 NW2d 861 (1988). [*People v Pouncey*, 437 Mich 382, 387; 471 NW2d 376 (1991).] [Footnote omitted.]

See also *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Flowers*, 222 Mich App 732, 734; 565 NW2d 12 (1997).

In the instant case, it is unclear from the record whether the omitted instructions were even requested by defendant. In support of his claim that the instructions were requested at trial, defendant relies on the following exchange which took place in open court following closing arguments:

> *Mr. Magidson*: I just want to put on the record that I requested lesser included voluntary manslaughter and careless and reckless use of a firearm and we had discussed that.
>
> *Ms. Lindsey*: Object.
>
> *The Court*: I don't think so but for the record, I said that we'd put it on. Request denied. This case is recessed until tomorrow morning at 9:00 am.

It appears that an off-the-record discussion may have taken place with respect to voluntary manslaughter and careless/reckless discharge of a firearm instructions. However, defense counsel did not pursue the matter thereafter or attempt to make any further record regarding the issue of lesser offenses. In fact, at the conclusion of the trial court's instructions, defense counsel clearly expressed his satisfaction with the court's instructions. Under these circumstances, the issue has been waived absent manifest injustice. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995); *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997); *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995).

We find no manifest injustice in light of the fact that the evidence adduced at trial does not support these instructions on lesser offenses. The offense of voluntary manslaughter is comprised of three components: first, the defendant must kill in the heat of passion; second, the passion must be caused by an adequate provocation; and finally, there cannot be a lapse of time during which a reasonable person could control his passions. *Pouncey*, *supra* at 388. The test is whether a reasonable person would have been provoked under the circumstances. *Id*.

At trial, the evidence established that defendant's friend had been robbed the night before the drive-by shooting in question. The next day, defendant, along with three other persons, sought revenge for the robbery. They set out in a car in search of "Rick," the alleged robber. Defendant was armed with a .380 automatic and the other persons in the vehicle were likewise armed with an AK-47 and a 9 millimeter semi-automatic pistol. They stopped in front of a house looking for Rick, and unable to find him, emptied a barrage of gunfire at the house, outside of which children were playing. Although testimony at trial indicated that defendant's gun jammed, witnesses testified that defendant raised himself out of the driver's side window of the car as he fired at the house. Spent shell casings were later found at the scene belonging to both defendant's .380 automatic and the codefendant's 9 millimeter weapon. A nine-year-old girl who was playing outside of the house was shot and killed as a result of the gunfire.

This evidence certainly does not support an instruction on either voluntary manslaughter or the careless and reckless discharge of a firearm resulting in death. The robbery which allegedly provoked the shooting occurred twenty-four hours before the incident in question, providing ample "cool down" time to quell heated passions and rage. The robbery did not, in any event, constitute adequate provocation for the reaction that followed. Most importantly, defendant was not the victim of the robbery and had no personal grounds for revenge. Finally, the shooting was neither reckless nor careless, but planned, with obvious and foreseeable consequences. We therefore find no error in the trial court's refusal to instruct on the lesser included cognate offenses of voluntary manslaughter or careless and reckless discharge of a firearm resulting in death.

As to defendant's claim of error that the trial court failed to instruct on involuntary manslaughter, the record indicates that such an instruction was never even requested. Defendant has therefore waived this issue on appeal. MCL 768.29; MSA 28.1052; *Pouncey*, supra at 386; *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod on other grounds, 450 Mich 1212; 539 NW2d 504 (1995).

III

Defendant next claims that the trial court abused its discretion when it denied defendant's motion for a mistrial. Specifically, defendant alleges that he was entitled to a mistrial when a witness for the prosecution interjected the fact that codefendant Dennis Gover, who had been tried and convicted separately before defendant's trial, was "in custody." The prosecutor's follow-up question likewise mentioned the codefendant's "incarceration" on an unspecified offense. In response to this comment, defense counsel objected, a sidebar was conducted and the trial court immediately gave a cautionary instruction to the jury. At the conclusion of the witness' testimony, defense counsel moved for a mistrial. The motion was denied by the trial court.

We find no error in this regard. As previously explained by this Court in *People v Barker*, 161 Mich App 296, 305-306; 409 NW2d 813 (1987):

> The power to declare a mistrial should "be used with the greatest caution, only under urgent circumstances, and for very plain and obvious causes." 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 698, p 426. A mistrial will not be declared as a consequence of any mere irregularity which is not prejudicial to the rights of the defendant. . . . The grant or denial of a motion for a mistrial rests in the trial court's sound discretion and an abuse of discretion will only be found where denial of the motion deprives the defendant of a fair trial. . . . The test is the defendant's inability to get a fair trial. . . . In the instant case, if prejudicial error occurred, it came from witness Emerson's volunteered and unresponsive statement. Generally, unresponsive statements by prosecution witnesses are not grounds for declaring a mistrial.
>
> "A witness cannot bring error into a case by volunteering inadmissible testimony which is immediately stricken out. It may be true that such remarks work a certain amount of mischief with the jury, but a conviction is to be tested on appeal by the rulings of the judge. A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the jury; and if what he or she says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his or her instructions if requested to do so. Unresponsive testimony by a prosecution witness, although error, is not necessarily grounds for reversal. . . . [2 Gillespie, *supra* at § 600, pp 203-204.]" [Citations omitted.]

See also, *People v Coles*, 417 Mich 523, 554-555; 339 NW2d 440 (1983).

Thus, while it is an established rule of law that the conviction of another person involved in the criminal enterprise is not admissible at defendant's separate trial, *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), inadvertent reference by a witness that a codefendant is in custody or incarcerated typically does not impair a defendant's ability to get a fair trial to the extent that a mistrial is warranted. *People v Stegall*, 102 Mich App 147, 151-152; 301 NW2d 473 (1980); *People v McQueen*, 85 Mich App 348, 349-350; 271 NW2d 231 (1978). Our review of the record in the instant case reveals that the witness' answer to the prosecutor's question was non-responsive and completely unsolicited. The trial court's immediate corrective instruction to the jury cured any prejudice resulting from the witness' inadvertent comment. In light of this cautionary instruction, the fact that the codefendant was tried separately from defendant, and our conclusion that the remark did not influence the outcome of the jury verdict, we decline to reverse defendant's conviction on this basis. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV

Next, defendant argues that he was denied his right to a speedy trial pursuant to US Const, Ams VI, XIV, Const 1963, art 1, § 20, and MCL 768.1; MSA 28.1024. Our review of the record

and the reasons for the 27 1/2-month delay between defendant's arrest and his release on his own recognizance prior to trial leads us to conclude that no such constitutional violation occurred in the instant case.

Whether a defendant has been denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews constitutional questions of law de novo, *id.*; a trial court's factual findings regarding speedy trial violations are reviewed under the clearly erroneous standard. *Id.* In order to determine whether defendant has been denied his right to a speedy trial, this Court must consider (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right to a speedy trial, and (4) any prejudice to defendant. *Id.*; *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). A delay of more than eighteen months is presumed to be prejudicial and the burden is then on the prosecution to prove lack of prejudice to the defendant. *Id.* A presumptively prejudicial delay "triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Wickham, supra* at 110. See also *Gilmore, supra* at 459.

Defendant was arrested and arraigned on the charges in the instant case on October 31, 1994. Defendant was charged along with three other codefendants, each of whom were represented by separate counsel. On January 30, 1995, defendant filed several motions, including a motion to suppress his statements, a motion for severance, a motion to quash the bindover, a motion to assist the defendant in obtaining a res gestae witness, and a motion for supplemental discovery. Defendant's motion to suppress his statement was problematic from the standpoint of a speedy trial, because in the midst of the evidentiary hearing defense counsel raised the issue of defendant's alleged mental incompetency to waive his *Miranda* rights. Consequently, defendant was referred for evaluation to the Recorder's Court Psychiatric Clinic, a process which the trial court noted could take from 60 to 180 days. On February 14, 1997, defendant brought a motion to dismiss for violation of his right to speedy trial. The trial court denied the motion, but granted defendant personal bond. Thus, despite the gravity of the charges, defendant was released on his own recognizance approximately two months before trial in this matter, which began on April 22, 1997.

Based on these facts, the trial court in its written opinion and order denying defendant's motion to dismiss found the 27 1/2-month delay to be presumptively prejudicial, but nonetheless concluded in pertinent part that:

> This is a case with multiple defendants and multiple counts against each defendant. Where the case against the defendant is complex or involves multiple defendants, more delay is tolerated. *People v Missouri*, 100 Mich App 310; 299 NW2d 346 (1980). The delays accruing to defendant include the filing of a separate trial motion, ruling on defendant's motions and conducting evidentiary and competency hearings. The majority of the delay was due to delays inherent in the court system, i.e. docket congestion, the scheduling of pretrial conferences, adjournment to permit the filing of motions and answers to motions, and so forth. Although these delays are technically attributable to the prosecution, they are given a neutral tint to the prosecution

and are assigned only minimal weight in determining whether a defendant was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993); *People v Sickles*, 162 Mich App 344, 356; 412 NW2d 734 (1987).

Furthermore, defendant has the burden to show that he was actually prejudiced by the delay. *People v Simpson*, 207 Mich App 569; [526 NW2d 33] (1994). There are two types of prejudice: prejudice to the person, and prejudice to the defense. [*People v*] *Collins*, [388 Mich 680; 202 NW2d 769 (1972)] *supra* at 694. Defendant states that the delay has caused him difficulty in locating res gestae witnesses in his defense. However, a review of the record does not indicate that defendant suffered any prejudice in preparing or presenting his defense. The codefendant's trial was held three months prior, and the witnesses are relative to both cases, therefore, defendant's claim fails as to his actual harm.

Upon review of the record, the Court finds that the prosecution was at all times ready and willing to proceed to trial. Furthermore, in defendant's own brief, it is stated that "the prosecution has opposed the delays." (Defendant's Brief, p. 3) Additionally, the reasons for delay in this case run against the defendant at least as strongly as the prosecution, if not more, and as such will not cause dismissal. *People v Finley*, 177 Mich App 215; 441 NW2d 774 (1989). Although there was over a twenty-seven month delay, defendant was not denied the right to a speedy trial. Moreover, defendant has failed to assert or show that he was prejudiced by the delay. The Court therefore denies defendant's Motion for Dismissal.

We find no clear error in the trial court's factual findings. Moreover, our assessment of the appropriate speedy trial factors mirrors that of the trial court and leads to the same conclusion – defendant was not denied his right to a speedy trial. Although the 27 1/2-month delay was presumptively prejudicial, *Gilmore, supra*, defendant suffered no actual prejudice from the delay and failed to pursue the speedy trial issue in a timely fashion. Defendant's failure to assert timely his right in this case weighs against a finding that he was denied a speedy trial. *Wickham, supra* at 112. As the trial court noted, defendant was as causally responsible for the delay as the prosecution. In the absence of any prejudice to defendant, dismissal was not warranted. We therefore conclude that the trial court properly denied defendant's motion to dismiss on the basis of an alleged speedy trial violation.

V

Defendant's next claim of error on appeal is that the trial court improperly took defendant's failure to admit guilt into account at sentencing. We disagree.

A sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). See also *People v Adams*, 430 Mich 679, 687, n 6; 425 NW2d 437 (1988). However, evidence of a lack of remorse may be considered in determining an individual's potential for rehabilitation. *People v Wesley*, 428 Mich 708,

711; 411 NW2d 159 (1987) (opinion of Archer, J.). As previously explained by this Court in *People v Calabro*, 166 Mich App 389, 396; 419 NW2d 791 (1988),

> [A] defendant's lack of remorse may be considered by a court in imposing sentence. It is undeniable that when a defendant is remorseful, it is urged in mitigation by him or on his behalf, and it is healthful to ventilate the process from both perspectives rather than to sanction the use in amelioration while condemning it in aggravation.

See also *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

In this case, it is clear from our review of the full comments made by the sentencing judge that the court was merely addressing the factor of remorsefulness in the context of defendant's rehabilitative potential and avoidance of responsibility for his actions. There is no indication in the record that defendant's sentence was improperly influenced by his failure to admit guilt or that the court was attempting to punish defendant for exercising his constitutional right to maintain his innocence. *Wesley, supra*; *People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 715 (1996); *People v Drayton*, 168 Mich App 174, 178; 423 NW2d 606 (1988). We therefore find no error.

VI

Defendant lastly contends that his sentence of forty to eighty years for second-degree murder violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Specifically, defendant claims that the sentence is disproportionate in light of the fact that he has no prior adult felony or misdemeanor record, minimal juvenile history, a work history, lack of substance abuse, and family support. Defendant also maintains that the trial court offered no reasons for the substantial guidelines departure other than a four-word handwritten phrase, purportedly illegible,[3] in the departure evaluation form. Finally, defendant argues that the trial court improperly based its departure from the guidelines on factors already considered in the guidelines. We disagree.

"[A] sentencing court may base a sentence more lengthy than that suggested by the sentencing guidelines on factors accounted for in the sentencing guidelines." *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). As the *Granderson* Court noted, *supra* at 680-681:

> As recently reiterated in *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995), "[u]nder *Milbourn*, the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether [a sentence] reflects the seriousness of the matter." The *Houston* Court, in affirming a sentencing court's upward departure based on factors otherwise accounted for in the offense variables, explained that "*Milbourn* did not state or establish that any factors accounted for in the guidelines had been adequately considered or appropriately weighed." *Id*. Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted. *Houston, supra, passim*.

* * *

> Defendant also argues. . .that where a defendant's prior record variables are scored at zero, a sentencing court abuses its discretion by imposing the maximum sentence. To paraphrase, he submits that imposition of the maximum sentence under such circumstances necessarily evinces a failure to consider the "background of the offender" as required by *Milbourn, supra*, p 651. . . . However, as elucidated in *Houston, supra*, the primary consideration in sentencing a particular defendant is whether the sentence imposed is proportional to the seriousness of the offense when considered in conjunction with the particular defendant. While circumstances warranting imposition of the maximum sentence with respect to a defendant who had no prior adult offenses hopefully would be rare, the present case merits such a sentence.

In the present case, defendant's guidelines range was 120 to 300 months (ten to twenty-five years); thus, the trial court substantially exceeded the top end of the guidelines range. However, we find no abuse of sentencing discretion. We agree with the trial court that the circumstances of the offense and the offender warrant such an upward departure from the guidelines. The record reflects that the sentencing court substantiated its deviation from the guidelines, noting the seriousness of the offense and the senselessness of this tragic drive-by shooting in which an innocent nine-year-old girl was killed. In addition, the trial judge stated that there were "a plethora of things [factors in this case] that really don't come under the guidelines." The court cited these numerous considerations at length, including defendant's continued association with codefendant Dennis Gover, a person with whom he had been criminally involved in the past; defendant's manipulative nature; defendant's "willingness to join others [in committing the offense] when [he] had no motive for revenge;" the fact that there were not one, but four weapons in the car with defendant and his accomplices; and finally, the severe and devastating impact of this crime on the victim's family.

After our thorough review of the record, we conclude that the trial court adequately articulated its reasons for the upward departure. The sentence imposed by the court is proportionate to the offense and the offender, *Milbourn, supra,* and does not constitute an abuse of discretion. *Granderson, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

[1] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system of doing an act, knowledge, identity, or absence

> of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[2] Necessarily included lesser offenses are those in which the defendant cannot commit the greater offense without also committing the lesser offense; conversely, cognate lesser included offenses are those in which the lesser offense shares some common elements with the greater offense, but which may also include some elements not found in the greater offense. *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990); *People v Beach*, 429 Mich 450, 461-462; 418 NW2d 861 (1988). Voluntary manslaughter, involuntary manslaughter (common law and statutory), and careless, reckless, or negligent use of a firearm resulting in death are all cognate lesser included offenses of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *Heflin, supra* at 496-497; *Beach, supra* at 462; *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

[3] The phrase reads "probation rec. lifetime prob," presumably meaning "probation recommends lifetime probation."