STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 1999
v	No. 208014 Kalamazoo Circuit Court
DRUERVONN WASHINGTON, Defendant-Appellant.	LC No. 96001036 FH

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant Druervonn Washington was convicted of retail fraud, first degree, MCL 750.356c; MSA 28.588(3). Defendant was sentenced to twenty-four months' probation. We affirm.

Defendant first claims that he was denied his right to a speedy trial. We disagree. This Court considers four factors in determining whether a defendant was denied his right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

When the delay of trial is under eighteen months, a defendant must prove prejudice resulting from the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant was arrested on July 22, 1996; he was tried on September 9 and 10, 1997. The delay was less than fourteen months; thus, defendant must prove prejudice. Defendant contends that his defense was prejudiced because he was unable to locate a key witness to testify at trial. However, defendant has provided no evidence that he was unable to locate the witness or attempted to do so, or that his testimony would have been helpful to defendant. Thus, defendant has failed to substantiate his claim of prejudice.

Further, other factors do not weigh in favor of defendant's claim. First, defendant apparently did not assert his right to a speedy trial. Second, the reason for the delay is partially attributable to defendant, or otherwise of neutral tint, and assigned only minimal weight.

There were two adjournments of defendant's trial; the first was because the judge had another trial, and the second was because defense counsel had another trial. Delays in the court system, while technically attributable to the prosecution, are given a neutral tint and assigned only minimal weight in assessing whether a defendant was denied his right to a speedy trial. *Gilmore, supra* at 460.

Although the defense requested the second adjournment, defendant claims that the resulting four-month delay is nevertheless attributable to the prosecution because it resulted from court congestion. However, there is no evidence that the later trial date was due to court congestion. Even if that were the case, such delay would still be given minimal weight in the overall analysis. *Id*. Thus, the delay in this case was attributable to defendant or of neutral weight. Weighing all factors, we conclude that defendant was not denied his right to a speedy trial.

Defendant next claims that he was denied a fair trial due to prosecutorial misconduct. We find that the prosecutor's conduct was not improper. Even if certain questioning by the prosecutor may have been objectionable at trial, we find no error requiring reversal.

This Court decides questions of prosecutorial misconduct on a case by case basis, evaluating each question within the context of the particular facts of the case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). The test is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, issues of prosecutorial misconduct will not be reviewed absent objection unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Howard, supra* at 544.

Defendant alleges three instances of improper questioning during cross-examination, one instance of misstatement of testimony, and improper remarks during closing argument. Defendant failed to object to the prosecutor's conduct at trial, with the exception of the alleged misstatement of testimony. We consider each instance of alleged misconduct accordingly.

First, defendant claims that the prosecutor's cross-examination of defendant was argumentative and improper during an exchange about defendant's testimony. Even if the prosecutor's questioning was objectionable on the ground that it was argumentative, appellate relief is precluded absent a miscarriage of justice. There was direct evidence and eyewitness testimony supporting the prosecution's case, and defendant had ample opportunity to set forth his defense to rebut the prosecution's theory and evidence. Any prejudicial effect of the questioning could have been cured by an appropriate instruction.

Second, defendant takes issue with the prosecutor's references to a "scam." However, these references were based on the evidence presented at trial that defendant and his cohort, Marcus Daniels, were linked to a series of purchase and return transactions within a few days at different Hudson's stores. Although the prosecutor used the term "scam," the evidence provided a basis for the inference that defendant was involved in a fraudulent scheme. A prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Marji*, 180 Mich

App 525, 538; 447 NW2d 835 (1989). With regard to defendant's contention that the reference to a scam was improper evidence of an uncharged crime, we note that evidence of uncharged crimes may properly be admissible under MRE 404(b) when offered for the purpose of showing a plan, scheme, or intent. MRE 404(b); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The prosecutor's remarks and questions referring to a scam were not improper.

Third, defendant contends that the prosecutor improperly referred to defendant's economic status. However, the prosecutor's references in this case properly related to the defense theory and defendant's credibility. The prosecutor addressed whether defendant's explanation of his cutlery purchase was plausible, i.e., that a college student would purchase a $256 set of cutlery for an apartment that he planned to lease with another student. The prosecutor did not suggest that defendant was more likely to commit the crime because of his economic status. See *People v Andrews*, 88 Mich App 115; 276 NW2d 867 (1979). Nor was the prosecutor's reference an unfounded character assassination on the basis of defendant's poverty or unemployment. See *People v Johnson*, 393 Mich 488; 227 NW2d 523 (1975). The prosecutor's inquiry was not improper.

Next, defendant argues that the prosecutor misstated the testimony of Chad Meisterheim, a member of Hudson's loss prevention staff, and included facts not in the record when, during her cross-examination of defendant, the prosecutor stated that Meisterheim knew about defendant from other incidents in Hudson's. Defense counsel objected to these statements, arguing that the previous testimony only established that Hudson's personnel knew about Daniels, not defendant.

Contrary to defendant's argument, the record reflects that the prosecutor did not refer to facts not in evidence. Although Meisterheim testified on direct examination that he himself saw only Daniels in Hudson's the day before the instant incident, his testimony, read as a whole, indicates that both defendant and Daniels were under suspicion because *they* had been in the previous three days "doing a lot of exchange."

The prosecutor reasonably inferred from Meisterheim's testimony that *defendant and Daniels* were under suspicion. Prosecutors may not make a statement of fact to the jury which is unsupported by the evidence, *Stanaway*, *supra* at 686, but they are free to argue the evidence and all reasonable inferences arising from the evidence as it relates to their theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant's final allegation of prosecutorial misconduct is based on the following statement made by the prosecutor in closing argument:

> So, going back to those elements, the Judge is going to instruct you that the Defendant took some property that the store offered for sale. No question, ladies and gentlemen, took some property that was offered for sale.

When viewed in context, the implication of the statement was evident: that the judge would instruct the jury that *the prosecutor* must prove that defendant took some property offered for sale. In fact, the judge instructed the jury accordingly. The prosecutor's statement does not constitute

prosecutorial misconduct. Regardless, no miscarriage of justice would result because the court subsequently provided the proper jury instruction.

Defendant's next claim on appeal is that he was denied the effective assistance of counsel. Defendant did not advance this claim before the trial court. Failure to do so forecloses appellate review unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Stanaway, supra* at 687-688.

Defendant first contends that counsel was ineffective because counsel delayed in presenting his opening remarks, and, in general, did little to minimize the negative impact of the prosecution's case. Defendant points to no specific deficiency in counsel's performance such that it falls below an objective standard of reasonableness.

Counsel's manner and timing of the defense and his decision to delay his opening remarks is a matter of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant next contends that counsel's failure to object to the prosecutor's argumentative questioning and her closing argument constituted ineffective assistance. We have already decided that the prosecutor's conduct did not constitute prosecutorial misconduct; therefore, defense counsel's performance was not deficient on the ground that he failed to object to the prosecutor's actions. Moreover, defense counsel did object to the prosecutor's questioning at one point, with regard to an alleged misstatement of testimony. It cannot be concluded that the lack of objection to other questioning or the prosecutor's closing argument was not trial strategy.

Finally, defendant asserts that defense counsel failed to move for a mistrial. However, defendant fails to state any basis for a mistrial. Defense counsel is not obligated to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). We conclude that counsel was not ineffective for his failure to move for a mistrial.

Further, defendant's claims of ineffective assistance fail because defendant has not shown that but for counsel's errors, the result would have been different or that the proceeding was fundamentally unfair or unreliable. The prosecution presented Meisterheim's eyewitness testimony that defendant took two sets of knives, along with supporting evidence of store transactions that contradicted defendant's testimony and primary defense. Defendant does not challenge the direct evidence or Meisterheim's

testimony. Defendant has failed to show that the actions of counsel affected the outcome of the proceedings.

Defendant's final claim is that he was denied due process and a fair trial because of the cumulative effect of several alleged errors. The cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, where this Court finds no error on any single issue, there can be no cumulative effect. *Id*.

Affirmed.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ Mark J. Cavanagh