STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 1999
v	No. 206345 Recorder's Court
DWIGHT NELSON, Defendant-Appellant.	LC No. 96-000276

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), armed robbery, MCL 750.529; MSA 28.797, and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant was sentenced as an habitual offender, fourth, MCL 769.12; MSA 28.1084, to concurrent prison terms of twenty to forty years for the home-invasion conviction, thirteen years four months to twenty years for the armed-robbery conviction, and six years eight months to ten years for the assault conviction. Additionally, the court imposed a separate concurrent sentence of twenty-five to fifty years' imprisonment on defendant for being a fourth habitual offender. Defendant appeals as of right. We affirm, but vacate the separate sentence imposed for being a fourth habitual offender and remand for correction of the judgment of sentence.

The victim testified that, on the night in question, she went to bed leaving the door to her house unlocked because she expected her son, who did not have a key, to return later that night. On awakening during the night, the victim rose to investigate whether her son had come home. She testified that she saw a man in the hallway, armed with what appeared to be a shotgun, who attempted to hide his face by holding up a quilt. The man ordered her to return to her bedroom, where he covered her with the quilt and began to rummage through her belongings. The victim further testified that the man reached under the quilt and pulled her sweatpants down. The victim then resisted, was struck by the man, and ordered her dog to attack the man, who then fled from the house. The police arrested defendant that night, and the victim identified him as her assailant.

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

Defendant first argues on appeal that the charges against him should have been dismissed with prejudice based on a violation of the 180-day rule, MCL 780.131(1); MSA 28.969(1)(1); MCR 6.004(D). However, we conclude that the 180-day rule was inapplicable to defendant.

The 180-day rule provides that an inmate of a state correctional facility must be brought to trial for other untried charges pending against the inmate within 180 days of the Department of Corrections providing notice to the prosecutor of the place the inmate is imprisoned. MCL 780.131(1); MSA 28.969(1)(1); MCR 6.004(D). The 180-day period begins when the prosecutor "knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison," or when the Department of Corrections "knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison." MCR 6.004(D)(1). Unless the delay is caused by the failure of the Department of Corrections to notify the prosecutor, the charges must be "dismissed with prejudice if the prosecutor fails to make a good-faith effort to bring the charge to trial within the 180-day period." MCR 6.004(D)(2). See also MCL 780.133; MSA 28.969(3).

Whether the 180-day rule applies is a question of law that we review de novo. See *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995) (whether rule applies to habitual-offender informations is question of law reviewed de novo). "The purpose of the rule is to dispose of untried charges against prison inmates so that sentences can run concurrently." *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999). This purpose "does not apply in a case where a mandatory consecutive sentence is required upon conviction." *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). Consecutive sentencing is mandatory when a person is convicted of a felony committed while the person was on parole. MCL 768.7a(2); MSA 28.1030(1)(2). In this case, it is undisputed that defendant was on parole at the time of the instant offenses. Defendant's sentences for the instant offenses must be served consecutively to the sentence from which he had been paroled. Therefore, because defendant was subject to mandatory consecutive sentencing, the 180-day rule does not apply. *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999). Additionally, the 180-day rule "does not apply to an incarcerated parolee unless and until his or her parole is revoked." *Id*. at 279. Here, defendant's trial was held less than 180 days from the time his parole was officially revoked. Therefore, no violation of the 180-day rule occurred in this case because the rule was not applicable to defendant.

Defendant also argues that he was denied his constitutional right to a speedy trial. This is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review any factual findings for clear error, while we review constitutional questions de novo. *Id.* In determining whether a defendant's right to a speedy trial has been violated, we balance four factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *Id*. Even assuming that the reason for the delay is entirely attributable to the prosecutor, we find that defendant's right to a speedy trial was not violated. Although defendant did assert this right, defense counsel later indicated to the court that he was unprepared to try the case. Therefore, we give little weight to this factor. The conduct of a defendant inconsistent with and evidencing the insincerity of the defendant's assertion of the right to a speedy trial

is pertinent in determining how much weight to give that assertion in analyzing a speedy-trial claim. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

Furthermore, defendant has failed to demonstrate sufficient prejudice resulting from the delay. A delay of more than eighteen months is presumed to be prejudicial, and the prosecutor must then prove a lack of prejudice to the defendant. *People v Wickam*, 200 Mich App 106, 109; 503 NW2d 701 (1993). However, where the delay is under eighteen months, the defendant must prove prejudice. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). In this case, less than eighteen months elapsed between defendant's arrest on December 16, 1996, and the beginning of trial on June 5, 1997. Because the delay was less than eighteen months, defendant bears the burden of demonstrating that he was prejudiced by the delay. Two types of prejudice exist: prejudice to the person and prejudice to the defense. *Gilmore*, *supra* at 461-462. Defendant was incarcerated during the entire period and therefore suffered prejudice to the person. However, because defendant was subject to incarceration for violation of parole, the incarceration during the delay was not oppressive. Moreover, prejudice to the defense is considered to be more crucial in determining whether the right to speedy trial has been denied. *People v Ovegian*, 106 Mich App 279, 284-285; 307 NW2d 472 (1981). Defendant has not claimed, and the record does not reflect, that defendant's opportunity and ability to present a defense to the charges against him were prejudiced by the delay. Accordingly, we conclude that defendant's right to a speedy trial was not denied.

Defendant also contends that he is entitled to a new trial because of remarks made by the prosecutor during closing arguments. We review claims of prosecutorial misconduct case by case, examining the remarks in the context they were made in order to determine whether the defendant received a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

The defense theory was that the victim had wrongly identified defendant as her assailant. During closing argument, defense counsel noted that defendant was not found wearing the clothing described by the victim, nor were any missing items from the victim's house recovered from the place where defendant was arrested. Defense counsel argued that if defendant was the assailant, this corroborating evidence could have been found if the police had bothered to conduct a thorough search, and that the absence of this evidence gave rise to a reasonable doubt regarding defendant's guilt. In rebuttal, the prosecutor suggested that the missing items were probably in the house when the police conducted their initial search, but that the poor condition of the house hindered the search. The prosecutor remarked that the police could have called in the FBI and spent two weeks sifting through the debris looking for evidence. The prosecutor further suggested that this would be a waste of time and that other crimes would go uninvestigated. Defendant objected, arguing that these remarks were an impermissible appeal to the jurors' fear of crime that, in effect, urged them to ignore the lack of corroborating evidence on the basis that obtaining such evidence would negatively impact the ability of the police to handle other, unrelated crimes.

Prosecutors are allowed a great deal of latitude in closing arguments, but may not appeal to the fears and prejudices of the jurors and urge the jury to convict a defendant out of a civic duty. *People v*

Bahoda, 448 Mich 261, 282; 531 NW2d 659 (1995). However, we review the prosecutor's remarks in light of the arguments and remarks made by defense counsel. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810(1992). Therefore, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

When viewed in context, the prosecutor's remarks were a reasonable response to the comments of defense counsel regarding a lack of corroborating evidence. The suggestion that the police could have wasted two weeks sifting through debris to find the evidence was clearly intended as rhetorical hyperbole. The prosecutor did not appeal to the fears of the jury; rather, the prosecutor attempted to offer an explanation for the failure of the police to conduct a more thorough search. This was in response to defense counsel's implication that the evidence was not found because it did not exist. We therefore conclude that defendant was not denied a fair and impartial trial by the prosecutor's response to defense counsel's argument.

Defendant also argues that, because he was subjected to an unduly suggestive on-the-scene identification, he was denied his right to due process of law, and that the in-court identification by the victim should have been suppressed because of the suggestive pretrial identification. Although defendant moved to suppress the in-court identification, defendant did not base this motion on the allegedly improper on-the-scene identification. Defendant never raised the issue of this on-the-scene identification before the trial court. Indeed, the record does not reflect that this identification ever took place. "Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice." *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). We conclude that no manifest injustice will result from our refusal to review this unpreserved issue. Even where a pretrial identification procedure was unduly suggestive, an in-court identification may be allowed where the prosecutor demonstrates by clear and convincing evidence that an independent basis exists for the in-court identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). Here, although an evidentiary hearing to determine whether an independent basis existed was not conducted, we note that the victim testified that she saw her assailant face to face from only about two feet away. Thus, even if the on-the-scene identification occurred, and even if it were unduly suggestive, an independent basis likely existed for the in-court identification. *Id*. at 116-117. Therefore, no manifest injustice will result by refusing to grant relief on this issue.

Defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to move to suppress the in-court identification on the basis of the impermissibly suggestive on-the-scene identification. Defendant "must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, defendant must demonstrate that a reasonable probability exists that, but for the deficient performance of counsel, the result of the proceeding would have been different. *Id*. at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In this case, the victim testified that she saw defendant's face from about two feet away. Therefore, as noted above,

we are not convinced that, had defense counsel moved to suppress the in-court identification, the motion would have been granted. Indeed, defense counsel did move to suppress the in-court identification, but asserted different grounds than the on-the-scene identification. This motion was denied. Moreover, the police followed a trail of muddy footprints to the house where they found defendant hiding behind a couch wearing muddy shoes. Defendant has not demonstrated a reasonable probability that the outcome would have been different had defense counsel moved to suppress the in-court identification on the basis of the improper on-the-scene identification.

Finally, defendant contends, and the prosecutor concedes, that the trial court erred by imposing a separate sentence on defendant for being a fourth habitual offender. The habitual-offender statutes are sentence-enhancement mechanisms, not substantive crimes. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). Moreover, the 1994 amendment to MCL 769.13; MSA 28.1085 has eliminated the procedure of vacating sentences on the underlying convictions and imposing a habitual-offender sentence. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). We also note that defendant's habitual-offender status is reflected in at least one of his sentences because he was sentenced to twenty to forty years' imprisonment for the conviction for first-degree home invasion, which normally carries a maximum sentence of twenty years' imprisonment. See MCL 750.110a(4); MSA 28.305(a)(2). Therefore, we vacate the separate habitual-offender sentence and remand to the trial court to correct the judgment of sentence.

Defendant's convictions are affirmed, the separate habitual-offender sentence is vacated, and we remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns