

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEOPHUS GOULD,

Defendant-Appellant.

UNPUBLISHED
October 19, 1999

No. 207868
Recorder's Court
LC No. 97-000377

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was charged with two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a bench trial, defendant was convicted of one count of the lesser offense of felonious assault, MCL 750.82; MSA 28.277, and one count of felony-firearm, MCL 750.227b; MSA 28.424(2). As a third habitual offender, MCL 769.11; MSA 28.1083, defendant was subject to an enhanced sentence pursuant to MCL 769.13; MSA 28.1085, and was sentenced to one to eight years' imprisonment for the assault conviction, to be served consecutive to the mandatory two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that the trial court committed error requiring reversal in admitting the firearms and testimony concerning the firearms that were recovered by the police the day following the incident for which defendant was charged. Defendant contends that the evidence was irrelevant because there was no evidence linking the firearms to defendant or to the charged offense and was highly prejudicial. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury,

undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin*, 223 Mich App 530, 536; 566 NW2d 677 (1997). Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Crawford, supra* at 389.

To lay a proper foundation for the admission of real evidence, the article must be identified as what it is purported to be and shown to be connected with the crime or with the accused. *People v O'Brien*, 113 Mich App 183, 204; 317 NW2d 570 (1982). See, also, *People v Jennings*, 118 Mich App 318, 322; 324 NW2d 625 (1982); *People v Prast (On Rehearing)*, 114 Mich App 469, 490; 319 NW2d 627 (1982).

In this case, it was essential to the prosecutor's case to establish a connection between defendant and the weapon used on the night of the incident. There is no question that the .44 Ruger, which complainants identified at trial as the gun defendant used on the night in question, was relevant to show that defendant was in possession of a gun. Testimony that the police recovered the gun from an apartment where codefendant lived, where complainants observed defendant firing the gun, where an eyewitness saw defendant run after the gunfire ceased, and where defendant was seen and arrested the following day was relevant to show the process by which the police recovered the gun defendant used the day of the incident. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court indicated that it was "not offended or inflamed by seeing a weapon," and none of the guns, other than the one identified by complainants, were substantially linked to defendant. Accordingly, the trial court did not abuse its discretion in admitting the contested evidence.

Next, defendant argues that the 204-day delay between the date of his arrest and trial deprived him of his constitutional and statutory right to a speedy trial.¹ We disagree.

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MSA 28.1024. In determining whether a defendant has been denied his right to a speedy trial, this Court considers (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 defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Here, defendant was arrested and incarcerated on December 24, 1996, and his trial commenced on July 16, 1997. He did not assert his right to a speedy trial. Because the delay was less than eighteen months, the burden is on defendant to prove prejudice resulting from the delay. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant's general assertion that he was prejudiced because he "suffered through a lengthy and personal prejudicial period of incarceration" is insufficient to sustain this burden. See *Gilmore, supra* at 462 (a general allegation of prejudice caused by the delay is insufficient to establish that a defendant was denied his right to a speedy trial). Under these circumstances, we conclude that defendant was not denied a speedy trial.

Finally, defendant argues that the trial court erred when it denied him his statutory and constitutional right to be present when it viewed the scene without the prior knowledge or consent of the prosecution or defense. Defendant contends that the trial court's conduct denied him a fair trial because it created the possibility that the verdict was based on evidence other than that which was legally admitted at trial.

A criminal defendant "has the fundamental right to be present at every stage of trial where his substantial rights may be affected, including a jury view of the crime scene." *People v King*, 210 Mich App 425, 432-433; 534 NW2d 534 (1995), citing *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). Defendant has not cited, nor have we found, Michigan authority addressing the issue of a trial court's view of the crime scene in the absence of the defendant or his counsel. However, federal and state courts have held that the same principles apply. See *United States v Walls*, 443 F2d 1220, 1221 (CA 6, 1971) (in narcotics prosecution, trial court reversibly erred when it viewed the scene of the alleged crime without permitting the defendant or his attorney to attend); *Payne v United States*, 697 A2d 1229, 1235 (DC, 1997), citing *Lillie v United States*, 953 F2d 1188, 1191 (CA 10, 1992) (although trial court erred when it visited the crime scene alone, the defendant was not prejudiced).

In light of this authority, we conclude that the trial court erred when it visited the crime scene without the knowledge or consent of counsel, thereby denying defendant his constitutional and statutory right to be present at the scene. However, defendant's absence from the trial court's viewing of the scene does not warrant reversal. A defendant's absence from a part of a trial requires reversal of his or her convictions only if there is any reasonable probability of prejudice. *People v Woods*, 172 Mich App 476, 480; 432 NW2d 736 (1988).

Here, defendant has failed to demonstrate any reasonable probability of prejudice. The trial court's ruling merely indicates that it relied on its visit to the scene to obtain the approximate distance between 1727 Elsmere, where defendant was allegedly standing, and 1808 Elsmere, the location of complainants when the shots were fired. Viewed in context, the trial court's ruling reveals that its visit to the scene was to defendant's benefit and resulted in his acquittal of the charged offense of assault with intent to commit murder and his conviction of the lesser offense of felonious assault. The trial court apparently found that the fact that the distance between the two locations, being "more than a hundred feet," was a key factor in determining that defendant did not possess the requisite intent to murder. Therefore, reversal is not warranted.

Affirmed.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

¹ Defendant appears to have confused the issue of speedy trial with that of a 180-day rule violation, MCL 780.131(1); MSA 28.969(1)(1); MCR 6.004(D). See *People v Farmer*, 127 Mich App 472, 478; 339 NW2d 218 (1983) ("[a]lthough the 180-day rule is a legislative enactment of speedy trial

policy, consideration of a constitutional challenge to a delayed trial requires an analysis separate from the 180-day issue”). To the extent defendant argues a violation of the 180-day rule, he failed to cite authority to support his position and, therefore, has abandoned the issue on appeal. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). In any event, the 180-day rule does not apply to defendant because there is no indication that he was incarcerated in a state facility as a result of a conviction other than the untried information in question. *People v Chambers*, 439 Mich 111, 115-116; 479 NW2d 346 (1992).