

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL D. KOROI,

Defendant-Appellant.

UNPUBLISHED

January 23, 2001

No. 215837

Wayne Circuit Court

LC No. 97-008616

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful driving away of an automobile (UDAA), MCL 750.413; MSA 28.645. The trial court sentenced him as a second habitual offender, MCL 769.10; MSA 28.1082, to 3½ to 7½ years' imprisonment for the UDAA conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arose from a traffic stop in the early morning hours of July 19, 1997. Defendant was arrested on outstanding warrants but escaped custody by driving off in a police patrol car. During the ensuing high speed pursuit from Dearborn to Detroit, there was a collision between one of the police vehicles and a civilian car that resulted in the death of the civilian driver. The patrol car defendant had been driving was found later that morning with the engine still running and the driver's door standing open.

Defendant first argues that his conviction must be reversed because he was denied his right to a speedy trial. Whether a defendant was denied a speedy trial is constitutional issue that we review de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *People v Levandoski*, 237 Mich App 612, 620, n 4; 603 NW2d 831 (1999), citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). The fourth element, prejudice, is critical to the analysis. *Cain*, *supra* at 112. A delay of eighteen months or more is presumed prejudicial and places a burden on the prosecutor to rebut the presumption. *Id.* However, where, as here, the delay is less than eighteen months, the defendant must prove that he suffered prejudice. *Id.*

The length of time between arrest and trial in this case was fourteen months. When assessing the reasons for delay, each period of delay is examined and attributed to either the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Scheduling delays and delays caused by the court system are attributed to the prosecutor but are given a neutral tint and only minimal weight. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997).

Here, the record shows that at the final pretrial conference held on January 9, 1998, trial was set for May 18, 1998, after earlier dates were rejected as conflicting with defense counsel's calendar. Accordingly, defendant agreed to waive the 180-day rule, MCL 780.131(1); MSA 28.969(1)(1). The longest period of the delay, however, was precipitated by the Detroit Fatal Squad's failure to provide discovery; the previously scheduled trial date of May 18, 1998, had to be abandoned and no other mutually convenient dates were available until September 14, 1998. The prosecutor was not responsible for the failure to provide discovery and once the nondisclosure was recognized, the prosecutor acted in good faith and allowed defense counsel access to his copies of the material sought. Given these circumstances, we conclude that the reasons for the delay should be given a neutral tint and assigned minimal weight in determining whether defendant was denied a speedy trial. *Id.*

Defendant acknowledges that he never made a demand for a speedy trial. A defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Defendant contends, however, that he was forced to choose between his right to a speedy trial and his right to discovery of the Fatal Squad report, which contained important information that eventually led to his acquittal of fleeing and eluding. Without question, a criminal defendant has a due process right of access to impeachment as well as exculpatory evidence. *People v Brownridge (On Remand)*, 237 Mich App 210, 214; 602 NW2d 584 (1999). However, defendant's motion for an adjournment due to the failure to provide discovery did not preclude an assertion of his right to a speedy trial.

With regard to the fourth and most critical element of the speedy trial analysis, we find that defendant did not establish that he was prejudiced by the delay. Prejudice to the person arises from incarceration pending trial while prejudice to the defense involves impairment of the defendant's ability to mount a defense. *Gilmore, supra* at 462. The latter prejudice is more crucial in assessing a speedy trial claim. *People v Ovegian*, 106 Mich App 279, 284-285; 307 NW2d 472 (1981). Here, defendant asserts that his defense was "critically prejudiced" by the delay because he was forced to reinvestigate the case and this affected his ability to adequately prepare. However, a generalized allegation of prejudice caused by delay is insufficient to establish that a defendant was denied the right to a speedy trial. *Gilmore, supra*. On balance, we conclude that defendant was not denied his right to a speedy trial.

Defendant next argues that his conviction for UDAA was not supported by sufficient evidence. Specifically, defendant contends that the prosecution did not establish that he had the intent to take possession of the police vehicle; rather, the evidence showed that his only intent was to elude the police. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of

fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

The essential elements of UDAA are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). UDAA does not require an intent to steal, i.e., to permanently deprive the owner of his property. *Id.*; see also *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). However, a specific intent to take possession unlawfully of the vehicle must be established. *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976). A showing that the accused took possession of the automobile and was inside it while it was being driven away wilfully and without authority is sufficient to establish the elements of the crime. *People v Shanks*, 21 Mich App 227, 229; 175 NW2d 331 (1970).

Here, police officer testimony and video footage from an on-board patrol car video camera showed that defendant, who had been placed in the back of the patrol car, climbed into the front seat of the vehicle, closed the driver's door, and drove the car away from the scene of the stop. One officer testified that he "banged" on the car door and ordered defendant to open the car door. The officer hung onto the vehicle and was briefly dragged alongside it. From this evidence, a rational trier of fact could conclude that defendant intended to take possession unlawfully of the patrol car, albeit for the purpose of escaping custody.

Defendant next argues that the prosecutor engaged in misconduct during closing arguments by denigrating defense counsel's argument and appealing to the jury's sense of civic duty. This Court reviews preserved questions of prosecutorial misconduct by examining the relevant portion of the record and evaluating the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Shutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

After careful review of the record, we find that the prosecutor's comments, when considered in the context of defendant's theory of the case and closing arguments, were a fair response to defendant's arguments and were not an appeal to the jury's sense of civic duty. Even assuming that the comments made by the prosecutor during rebuttal closing argument were inappropriate, they were not prejudicial to defendant. The challenged comments were made in rebuttal to defense counsel's argument regarding the charge of fleeing and eluding, the charge on which defendant was acquitted. Given the strength of the eyewitness testimony and video evidence regarding the UDAA charge, the prosecutor's comments, if inappropriate, constituted harmless error and do not require reversal. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Defendant's final claim on appeal is that he was denied the effective assistance of counsel because defense counsel did not advise defendant that the misdemeanor offense of use of a motor

vehicle without authority but without intent to steal, MCL 750.414; MSA 28.646, was a lesser included offense of UDAA,¹ and he did not request instruction on the lesser included offense.

A trial court must instruct on a lesser included misdemeanor when specifically requested and, among other things, the instruction is supported by a rational view of the evidence adduced at trial.² *People v Stephens*, 416 Mich 252, 261-262; 330 NW2d 675 (1982).

This means that not only must there be some evidence which would justify conviction of the lesser offense, but that “proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense.” [*Id.* at 262-263, quoting *United States v Whitaker*, 144 US App DC 344, 347; 447 F2d 314 (1971).]

The distinction between the misdemeanor of unlawful use of a motor vehicle and UDAA is that UDAA requires that the defendant take possession of the car without the owner’s permission, while the misdemeanor offense is committed when an individual who has been given lawful possession of the car uses it beyond the authority granted to him by the owner. *People v Hayward*, 127 Mich App 50, 61; 338 NW2d 549 (1983). The evidence presented in this case established that defendant was in unlawful possession i.e., he had *no* permission to drive the patrol car. Accordingly, instruction on the lesser included misdemeanor would not be supported by the evidence adduced at trial. *Stephens, supra*. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, defense counsel’s performance was not deficient in this regard and defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck

¹ Defendant refers to the misdemeanor offense prohibited by MCL 750.414; MSA 28.646, use of a motor vehicle without authority but without intent to steal, as “joyriding.” However, it is the felony offense prohibited by MCL 750.413; MSA 28.645, unlawfully driving away a motor vehicle, that is commonly referred to in Michigan case law as “joyriding.” *People v Hayward*, 127 Mich App 50, 61; 338 NW2d 549 (1983); see also *People v Hendricks*, 446 Mich 435, 448; 521 NW2d 546 (1994).

² “This requirement that the misdemeanor for which instruction is requested be supported by a rational view of the evidence at trial continues to distinguish the misdemeanor analysis from the rule for instruction on lesser included felonies.” *Hendricks, supra* at 445, n 16, citing *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982).