STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2002
v	No. 225858 Wayne Circuit Court
JAY G. PORTER, Defendant-Appellant.	Criminal Division LC No. 99-001857

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

A jury convicted defendant Jay Porter of armed robbery[1] and carjacking.[2] The trial court sentenced him as a fourth habitual offender[3] to twenty-five to fifty years' imprisonment. Porter appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises from an incident in Leonard Lee's home on the morning of August 20, 1998. Sixty-nine-year-old Lee lived alone at 20293 Annott Street in Detroit and had come to know Porter through a friend. Porter and another person had done some work at Lee's house, for which Lee paid "the other man" even though the two had made a "bad job" of it.

Lee spoke to Porter about doing some painting for him and Porter quoted a price for the work. The work did not begin right away, and Lee "had to give him a check to get the paint." Lee made out the check to Porter, but Porter returned the check when he could not cash it, prompting Lee to give him another check, this one for $85. Porter went to get the paint, but was evidently delayed because he had some other job. When Lee found out, he left a note with his neighbor informing Porter, "'If you have a job, you just take the job and take your time coming to paint my place.'" Lee stated that the neighbor delivered the note to Porter's parents.

[1] MCL 750.529.

[2] MCL 750.529a.

[3] MCL 769.12.

Porter returned to Lee's house early in the morning a few days later. Porter was alone and Lee let him in the house. Porter announced that he had the paint, but Lee noticed no paint or painting supplies at that moment. Porter asked for some coffee, but Lee did not have coffee and instead provided Porter with a can of beer. Porter sat and drank the beer quickly, then asked for another, offering to get it himself. According to Lee, Porter said he could not find the beer and asked Lee for help finding it.

Lee said that when he got a beer from the refrigerator and handed it to Porter, Porter "grabbed me around the neck and got my arms and had a knife . . . [a]nd . . . said, 'This is a robbery.'" Lee first thought Porter was kidding. He quickly changed his mind when Porter held the knife up to his neck, took his gold neck chain holding a cross and two rings that had belonged to Lee's late wife, and then cut Lee's arm. Lee fell to the floor and said, "'You can have anything,'" but Porter picked him up and dragged him, then they "wrestled in the kitchen." Lee broke away, went to the door, and called for help, but Porter again grabbed him and threatened him with the knife.

Next, Lee said, Porter dragged him through the hallway and into the bedroom, where Porter demanded that Lee surrender all his money. Lee kept very little money, but Porter dragged him to the dresser where Lee kept a change purse with about $10 in it, plus a big jug containing his billfold and bank book, and his car keys. Porter took the billfold and bank book and put them in his pocket, and he also took the money from the change purse, the car keys, and some of Lee's wife's jewelry that was there. Lee and Porter struggled one more time before Porter pushed Lee, causing him to fall over the end of the bed, and Porter "took off and ran out the door." Lee heard his car start and then saw Porter drive away in that car. Lee promptly called the police, who responded quickly.

The defense maintained that no struggle or violence took place in the matter.

II. The Motion To Dismiss

A. Standard Of Review

Lee argues that the trial court erred in refusing to dismiss the charges after the prosecutor violated the 180-day rule. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion."[4] The same standard governs our review of a trial court's decision on whether to hold an evidentiary hearing.[5]

B. The 180-Day Rule

The 180-day rule is codified in MCL 780.131(1), which provides in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint

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[4] *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1999).

[5] See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

> setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The Legislature enacted the 180-day rule to "secure to state prison inmates their constitutional right to a speedy trial"[6] and to "give an inmate the 'opportunity to have sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.'"[7] One of three events starts the 180-day period:

> 1) The issuance of a warrant, indictment or complaint against a person incarcerated in a state prison or under detention in any local facility awaiting incarceration in any state prison;
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> 2) The incarceration of a defendant in a state prison or the detention of such defendant in a local facility to await such incarceration when there is an untried warrant, indictment, information or complaint pending against such defendant; and
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> 3) The prosecutor knows or should know that the defendant is so incarcerated when the warrant, indictment, information or complaint is issued or the Department of Corrections knows or should know that a warrant, indictment, or complaint is pending against one sentenced to their custody.[8]

Stated another way, "the 180-day period begins to run with the defendant's incarceration or detention when there is an outstanding warrant or complaint pending against the defendant and the prosecutor knows or should know that the defendant is so incarcerated."[9]

MCL 780.133 states the penalty for violating this rule:

> In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the

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[6] *People v Hill*, 402 Mich 272, 280; 262 NW2d 641 (1978).

[7] *People v Falk*, 244 Mich App 718, 720; 625 NW2d 476 (2001), quoting *People v Smith*, 438 Mich 715, 718; 475 NW2d 333 (1991), quoting *People v Loney*, 12 Mich App 288, 292; 162 NW2d 832 (1968).

[8] *Hill*, *supra* at 280-281.

[9] *People v Freeman*, 122 Mich App 260, 263; 332 NW2d 460 (1982).

> untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.[10]

Nevertheless, this rule does not automatically require dismissal if the prosecutor does not commence or complete a trial within the statutory period.[11] Rather, the statute "imposes a duty upon all law-enforcement officials to see that state prison inmates are brought to trial on outstanding warrants in *good faith* within 180 days."[12] This 180-day period is the time in which the "prosecution must take good faith action . . . to ready the case for trial."[13] Dismissal is a proper sanction required only when the delay violated the defendant's constitutional right to a speedy trial.[14] Otherwise, a violation of the 180-day rule only requires sentence credit for the delay.[15]

C. Application Of The Rule

At trial, Porter asked the trial court to count the 180-day period from December 18, 1998, when Porter returned to incarceration for a parole violation in another case. He offered no evidence suggesting that the prosecutor for this case knew of Porter's incarceration at that time. On appeal, Porter claims that the trial court counted from the date of the arraignment, "not designating whether she meant on the complaint or on the information," thus implying that the earlier of the two should establish when the clock began to tick, but he does not specify a particular date from which to begin counting 180 days. Our review of the record reveals that the first proceeding styled as an arraignment took place on February 11, 1999, which was within 180 days of when trial commenced. Because Porter fails to offer evidence of a specific date more than 180 days ahead of trial that satisfied the statutory criteria for starting the clock, he is not entitled to appellate relief pursuant to the 180-day rule.

III. Improper Prosecutorial Argument

A. Standard Of Review

Porter contends that the prosecutor's remarks during closing arguments denied him a fair trial. He failed to preserve this issue for our review by objecting at trial. Thus, we review this issue for plain error affecting Porter's substantial rights.[16]

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[10] See also MCR 6.004(D).

[11] See *Freeman, supra* at 263.

[12] *Hill, supra* at 281 (emphasis added).

[13] *Id*.

[14] See MCR 6.004(D)(2).

[15] *Id*.

[16] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. The Prosecutor's Remarks

Porter claims that the prosecutor improperly testified as an unsworn expert when he argued, "You don't get drag marks in a shag carpet unless you weigh, I would guess, as least 300 pounds." However, viewed in light of the defense challenge to the little physical evidence tying Porter to the scene of the crime, this argument was a proper appeal to the jurors' common sense, not an announcement of scientific fact.[17] In fact, the prosecutor couched the statement saying that it was a "guess," which left no room for the jurors to be confused regarding whether he was stating a scientific opinion. Even if erroneous, this remark was so insignificant in light of the arguments as a whole that we cannot conclude that it affected Porter's substantial rights.

Porter further argues that the prosecutor "exacerbated," improperly denigrated his character by describing him as a "con man" and as "the lowest form of a defendant." Porter asserts that "con" is short for "convict" and suggests that the characterization "con man" thus had the effect of sneaking into the jury's consciousness the fact that he had a criminal history. However, we understand the term "con man" to be short for "confidence man," meaning one who cynically exploits the confidence of another, which directly related to the prosecutor's theory of the case and does not address Porter's criminal history at all.[18] A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it.[19] "'[A] prosecutor must avoid inflaming the prejudices of a jury, but there is no requirement that he phrase his argument in the blandest of all possible terms. The prosecutor is, after all, an advocate and he has not only the right but the duty to vigorously argue the people's case.'"[20] In this case, the prosecutor's words, unsympathetic though they were, nonetheless reflected the prosecutor's theory of the case. This was not misconduct.

IV. Jury Instructions

A. Standard Of Review

Porter argues that the trial court erred in denying his request to instruct the jury on the offense of unarmed robbery. "The determination whether a jury instruction is applicable to the facts of the case[, and therefore must be given,] lies within the sound discretion of the trial court."[21] However, a court "by definition abuses its discretion when it makes an error of law."[22]

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[17] See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992).

[18] The *American Heritage Dictionary* (2d college ed, 1985), p 311, gives as the complete definition of "con man" the following: "*n. Slang*. A confidence man."

[19] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[20] *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

[21] *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[22] *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

B. Necessarily Included Offense

A trial court, regardless of the evidence, *must* instruct the jury with respect to a necessarily included lesser offense when the defense requests such an instruction.[23] "A necessarily included lesser offense is one that must be committed as part of the greater offense; in other words, it would be impossible to commit the greater offense without first having committed the lesser."[24] "Unarmed robbery is a necessarily included lesser offense of armed robbery, with the distinguishing element being the use of a weapon or an article used as a weapon."[25] Thus, in this case, the trial court committed a legal error when it refused to instruct the jury with regard to unarmed robbery.[26]

Nevertheless, if this error is harmless, it does not warrant reversal.[27] Errors relating to criminal jury instructions are constitutional in nature.[28] Thus, for this preserved, constitutional error, we must determine whether the prosecutor has proved beyond a reasonable doubt that it was harmless.[29] Though this harmless error standard is particularly high, we have no reservations in concluding that it has been surpassed. The defense theory was that Lee fabricated the entire episode, making whether a robbery took place at all the critical issue for the jury to decide. Lee's testimony was compelling, and clearly convincing to the jury. Lee's testimony that Porter held a knife to his throat is part and parcel of Lee's account. Porter has pointed to no reason why this testimony was less credible than any other testimony. The trial court instructed the jury on each element of armed robbery, including the prosecutor's burden of proving beyond a reasonable doubt that Porter used a weapon. As far as we can tell, the jury simply was persuaded that Porter actually committed an armed robbery. Had the jury entertained any doubts about whether Porter used a weapon, it would have acquitted him in accordance with the instructions, which means that the unarmed robbery instruction would have had no effect on the jury verdict. This was harmless error.

V. Jury Selection

A. Standard Of Review

Porter urges this Court to remand this case for a hearing on the constitutionality of the jury-selection procedure used to assemble his jury because, he claims, it did not represent a fair

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[23] See *People v Reese*, 242 Mich App 626, 629, 632; 619 NW2d 708 (2000), lv granted 465 Mich 851 (2001).

[24] *Id*. at 629-630.

[25] *Id*. at 630.

[26] *Id*. at 635.

[27] *Id.* at 635.

[28] See *Carines*, *supra* at 761.

[29] *Id*. at 774, citing *People v Anderson (On After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

cross section of the community. Assuming without deciding that raising this issue during sentence was adequate to preserve it for appeal, we review this constitutional issue de novo.[30]

B. The Wayne County System

Porter claims that merger between the Recorder's Court and the Wayne Circuit Court allowed African Americans to be underrepresented on juries because too few Detroit residents were called to serve on juries. Even if we presume for the sake of analysis that Porter has accurately related the circumstances affecting jury selection in the Wayne Circuit Court, he has not alleged that Wayne County systematically excludes African Americans from juries.[31] In fact, he notes that subsequent reforms to the jury system have increased the percentage of Detroit residents called to serve on juries so that juries now represent a fair cross section of the community.[32] Rather, he points only to the possibility that there may have been something awry with the way the Wayne Circuit Court drew jurors from the community and seeks the hearing as a fishing expedition to find error requiring reversal in his case.

Further, while Porter remarks that only two of the jurors who rendered the verdict against him were African American, he had no right "to a petit jury that mirrors the community and reflects the various distinctive groups in the population."[33] Instead, the Sixth Amendment ensures that the opportunity for a representative jury exists by "requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community."[34] In this case, if African Americans were under-represented on Porter's jury, Porter's own statement makes plain that this was not a function of their systematic exclusion. Thus, he is not entitled to the hearing he requests.

VI. Sentencing

A. Standard Of Review

Porter argues that his sentence constitutes an abuse of discretion. This Court reviews a trial court's sentencing decisions for an abuse of discretion.[35] An abuse of sentencing discretion occurs where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender.[36]

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[30] See *People v. Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

[31] *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000) (emphasis added).

[32] See *Id*.

[33] *Hubbard*, *supra* at 472.

[34] *Id.* at 472-473.

[35] See *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

[36] *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

B. Proportionality

The crux of Porter's argument is that imposing a sentence enhanced under the habitual offender statute is disproportionate because two of his previous offenses were twenty years old. However, "[i]f an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate."[37] In this case, the evidence showed that Porter took advantage of an older gentleman, using force to steal his property even while on parole for another offense. His history included a number of other armed robberies and assaults, demonstrating that, despite efforts to rehabilitate him, he remains an undeterred criminal, making this sentence within the statutory limits appropriate.

Porter also contends, briefly, that he should be resentenced because the trial court failed to explain adequately its reasons for imposing this harsh sentence. A sentencing court should articulate the reasons behind a particular sentence to allow the defendant to understand the factors leading to the sentence.[38] However, though brief, it is clear from the trial court's remarks at sentencing that it found the circumstances of the offense, his parole violation, and his extensive criminal history the factors supporting this sentence. This was sufficient.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[37] *People v Compeau*, 244 Mich App 595, 599; 625 NW2d 120 (2001).

[38] *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992).