STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD HENRY ENGLE,

Defendant-Appellant.

UNPUBLISHED
April 12, 2002

No. 224305
Monroe Circuit Court
LC No. 97-028202-FC

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b, one count of attempted first-degree criminal sexual conduct, MCL 750.520b; MCL 750.92, one count of second-degree criminal sexual conduct, MCL 750.520c, and one count of armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to five terms of life imprisonment for the four CSC-1 convictions and the armed robbery conviction, and to two terms of fifty-two to seventy-eight years' imprisonment for the attempted CSC-1 conviction and the CSC-2 conviction, all to run concurrently. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

I

Defendant first argues that the trial court erred in giving retrospective effect to the 1994 amendments regarding the statutory procedures for disposing of a supplemental information charging a defendant as an habitual offender. Defendant committed the instant offense in December 1992. At the time, MCL 769.13 stated, in relevant part:

> If after conviction and either before or after sentence it appears that a person convicted of a felony has previously been convicted of crimes . . . the prosecuting attorney . . . may file a separate or supplemental information in the cause accusing the person of the previous convictions. . . . If the offender says he is not the same person, or remains silent, the court shall enter a plea of not guilty, and a jury of 12 jurors shall be impaneled . . . to determine the issues raised by the [supplemental] information and plea. . . . If the accused pleads guilty to [supplemental] information or if the jury returns a verdict of guilty, the court may sentence the offender . . . and vacate the previous sentence . . .

The statute was amended by 1994 PA 110, which eliminated a defendant's right to a jury trial. MCL 769.13; *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). However, the act specifically stated that the amendment was to take effect on May 1, 1994, and that it shall apply to prosecutions for criminal offenses committed on or after that date. Because the Legislature expressly indicated its intent to give the amendment prospective effect and because defendant committed the offense before the effective date of 1994 PA 110, defendant was entitled to a jury trial on his habitual offender charge.

In any event, defendant fails to address the trial court's ruling for applying the new procedure to his habitual offender status charge and finding him guilty of the charge rather than allowing a jury to decide the issue. Defense counsel waited until sentencing to raise the issue and then, only objected to the references in the PSIR that defendant was convicted as an habitual offender. The trial court ruled that defendant's failure to object to the supplemental information filed pursuant to the new procedure and his failure to object to the discharge of the jury, despite being asked if there was anything for the jury, constituted a waiver of his right to be processed under the former procedure. Impliedly, the court found that defendant waived his statutory right to a trial on the habitual offender charge, although we note that even at sentencing, defendant never requested one. Given defendant's failure to brief the merits of this ruling, we could deem the issue abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). Moreover, we also fail to understand how defendant was prejudiced since he does not claim that the underlying convictions that formed the basis for the habitual offender charge are invalid. Furthermore, he does not ask this Court to remand for a trial, but instead, summarily proclaims that he is entitled to be resentenced without enhancement. At most, however, defendant would be entitled to a remand for trial proceedings on the habitual offender charge. If defendant is convicted as an habitual offender, his sentences would remain intact. Because defendant has failed to demonstrate on appeal that a remand would not be a waste of judicial resources and still is not requesting a jury trial on the habitual charge, we decline to provide this relief.

Although the record indicates that defendant was sentenced to life imprisonment for armed robbery and to fifty-two to seventy-eight years' imprisonment for the CSC-2 conviction, the judgment of sentence, entered on November 24, 1999, erroneously switches the sentences. Although defendant does not raise this discrepancy on appeal, we remand this matter for the ministerial purpose of correcting the judgment of sentence to reflect defendant's actual sentences for these convictions. MCR 6.435(A); MCR 7.216(A)(7).

II

Next, defendant argues that the trial court abused its discretion in admitting into evidence two letters that he wrote to his mother and a former girlfriend in December 1996, while he was in the county jail for a pending unrelated charge. At the time, defendant was not yet charged for the sexual assaults, although the record indicates that he became a suspect during this period of time. The decision whether to allow evidence is within the trial court's discretion and will be reversed where there is an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). By definition, a trial court's decision on close evidentiary questions cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

On appeal, defendant argues that the letters were not relevant to any issue at trial. We disagree. Logical relevance is the foundation for admissibility, and is defined by MRE 402 and

MRE 401. *Layher, supra* at 761. MRE 402 provides that "[a]ll relevant evidence is admissible" and that "[e]vidence which is not relevant is not admissible." MRE 401 defines relevant evidence as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 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 (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

The issue whether defendant was the perpetrator of these offenses was a material issue, in light of the defense raised by defendant. Clearly, the statements in the letter to defendant's mother can reasonably be construed as admissions to these offenses. Defendant wrote in the letter that these charges he "may be facing" happened before his daughter was born (in 1994), and that he could not remember committing the acts, but then he remembered he "maybe did" commit the acts. At the time defendant wrote this letter, he was aware of the allegations and a blood sample had just been taken from him pursuant to the search warrant. Contrary to defendant's claim, this letter was not marginally probative of this material issue, but rather, made the existence of the fact at issue (i.e., whether defendant was the man who abducted and assaulted the complainant) more probable, and therefore, probative. Admittedly, the letter to defendant's former girlfriend is less evident of an admission of these particular offenses. However, defendant's statements were relevant to rebut the character testimony of defendant's wife, which implied defendant was not an aggressive or violent person and/or sexual partner, and to a lesser extent, to the issue whether defendant was the perpetrator. In this letter, defendant admits to hurting people and his thrill about committing violence and "getting away" with something.

Defendant also summarily asserts that any possible, marginal probative value was more than substantially outweighed by the unfair prejudice because the statements were not probative of what his motivation might be for the crimes at issue. We disagree. The letters were not marginally probative of the issue whether defendant was the perpetrator of the assaults; instead, they were probative of material issues at trial, as explained above. Furthermore, "prejudice" means more than simply "damaging" to the opponent's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "Evidence presents the danger of unfair prejudice when it threatens the fundamental goals of MRE 403: accuracy and fairness." *Id.* Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury. *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999). We cannot conclude that the admission of letters violated the fundamental goals of accuracy and fairness or otherwise were given preemptive weight by the jury to convict defendant.

Defendant further argues that the trial court erred in redacting the letters, causing confusion for the jury. However, the record reflects that the letters were given to the jury completely intact without any redaction. Accordingly, this argument has no merit.

III

Next, defendant argues that the trial court abused its discretion in allowing the prosecution to question him about his prior convictions for criminal sexual conduct. At trial, defendant's wife testified about her sexual relationship with defendant, which defense counsel

clearly stated was intended to prove that defendant was not the type of person "who would go out and rape somebody." Defendant's wife described their sexual relationship as "normal" and stated that defendant did not want to engage in anal sex, which was one of the acts the complainant was forced to endure. Because defendant opened the door, the trial court allowed the prosecution to introduce evidence that defendant was convicted of criminal sexual conduct in 1996.

Specifically, defendant claims that criminal sexual conduct "is not a type of crime involving an element of dishonesty or false statement" and that MRE 609 bars the use of convictions to impeach a defendant. Yet, defendant overlooks the implications of MRE 404 and MRE 405. MRE 404(a)(1) allows a criminal defendant to introduce evidence of his character to prove that he could not have committed the crime charged. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). Where such evidence is admitted, MRE 405(a) allows cross-examination into relevant specific instances of conduct. *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999). "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *Vasher, supra* at 503. See also *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997).

Defendant's contention that he did not raise the issue during his direct examination bears no relevance on this issue. Defense counsel intentionally elicited the testimony from defendant's wife, who was called to the stand by the defense. The admitted purpose for such testimony was to portray defendant as someone who would not commit these types of acts. Without question, the prosecution was then entitled to offer character evidence to the contrary. Here, the CSC convictions rebutted the proclamation that defendant was not the type of person who would "go out and rape somebody." Accordingly, we conclude that the trial court did not abuse its discretion in allowing the prosecution to question defendant about these convictions.

IV

Next, defendant argues that he was denied due process by the admission of DNA evidence at trial. Specifically, defendant contends that cases from other jurisdictions have held that the trial courts should conduct a pretrial hearing to determine whether accepted laboratory procedures were followed, and thus, whether DNA evidence will be admitted at trial, although he acknowledges that Michigan case law does not require such a hearing. Because this issue was not raised and preserved below, it is reviewed for plain error. To avoid forfeiture, defendant must show a plain error that affected his substantial rights, i.e., that the alleged error affected the outcome of the proceedings. This Court should reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999); *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001). Because defendant sets forth no challenge to the reliability of the testimony relating to the DNA evidence and has not produced any evidence that proper procedures were not followed by the people who transferred the evidence or by the experts in conducting their tests, we find no error occurred. *Id.* at 404-405.

V

Next, defendant claims that the trial court erred, on remand from this Court, to dismiss the charges due to the prosecution's violation of the 180-day rule, MCL 780.131(1); MCR 6.004(D)(1). The 180-day rule states that an inmate of the Department of Corrections must "be brought to trial within 180 days" after the prosecution is given notice of untried charges against him. "[T]he purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently." *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). However, even if not brought to trial within 180 days, "the rule is still satisfied if the prosecutor has taken good-faith action within that period to promptly ready the case for trial." *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

Here, defendant came within the jurisdiction of the Michigan Department of Corrections on May 30, 1997, when he was sentenced to a prison term of thirty-five to sixty years' imprisonment for a second-degree home invasion conviction. This Court granted defendant's motion to remand for proceedings on this issue, and the trial court conducted a hearing on August 27, 2001. The trial court subsequently issued an opinion, denying the motion because fewer than 180 days of the delay were attributable to the prosecution. This Court reviews a trial court's attributions of delay for clear error. *Id.*

First, we note that defendant has not provided this Court with transcripts of several pretrial hearings, which are critical in examining this issue. Normally, a defendant's failure to provide this Court with the relevant transcripts, as required by MCR 7.210(B)(1)(a), constitutes a waiver of the issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). Nonetheless, after thoroughly reviewing the lower court files and all the transcripts provided, we conclude that the trial court did not clearly err in denying defendant's motion.

While the Department of Corrections acquired jurisdiction of defendant on May 30, 1997, defendant had previously filed several motions in the trial court which were pending at this time. The trial court did not completely resolve all of these motions until August 6, 1997. Thus, the delay up to this point was attributable to defendant. See *People v Pelkey*, 129 Mich App 325, 329; 342 NW2d 312 (1983) (holding delay caused by motion filed by a defendant is attributable to the defendant).

Moreover, at the August 6, 1997, hearing, the court inquired about the status of the case, at which point defense counsel requested another pretrial hearing in three weeks to give him additional time to meet with his expert witness regarding additional materials, although the prosecutor stated his preference to schedule a trial date. When the court inquired about defendant's custody status, defense counsel simply responded that defendant was "up for a long time." Defendant subsequently filed a motion for discovery on September 10, 1997, requesting production of notes, reports, photographs and audio radiographs, and the results of tests. At the pretrial hearing on September 26, 1997, the court stated its concern about defendant's speedy trial right, to which defense counsel expressed a need for discovery regarding DNA and objected to the trial court's scheduling of a trial date. Defendant also stated that he was waiving any speedy trial right and counsel "absolutely" stated that he did not want a trial date until the materials were furnished and his expert reviewed the materials. The police lab eventually forwarded the DNA materials to defense counsel, apparently in November 1997, but the defense claimed that the labeling was indecipherable and confusing. The prosecution eventually provided dates in January 1998, for defendant's expert to contact the police laboratory employees to resolve the problem. We conclude that this additional delay was also attributable

to defendant due to his motion for discovery and desire to have the court-appointed expert review the materials. Although defendant argues that the prosecution's failure to provide the DNA evidence within twenty-one days of the trial court's discovery order demonstrates bad faith, we note that there is no order of discovery contained in the lower court record. Furthermore, we believe that the two-month delay in forwarding the materials and the subsequent delay due to the expert's inability to decipher the materials does not conclusively demonstrate bad faith on the part of the prosecution to cause a delay in defendant's trial.

The record further demonstrates that defense counsel was not prepared for the first scheduled trial date, January 26, 1998. Defense counsel repeatedly requested and eventually filed a motion to adjourn the trial six days before trial due the difficulty in obtaining the evidence and to his expert's inability to interpret the DNA materials provided by the prosecution. At a pretrial hearing on January 20, 1998, counsel requested a thirty-day adjournment and the court adjourned the trial. Apparently, the problem with the provided materials was resolved between the experts by the next pretrial hearing conducted a few weeks later, at which defense counsel stated that he would be meeting his expert the following week to review the status of evidence. Again, this delay was attributable to defendant in light of his motion for adjournment. *Crawford, supra* at 614-615 (holding delay stemming from adjournment requested by defendant is chargeable to defendant).

Although there were other delays, the record supports the trial court's finding that a majority of the delay was attributable to defendant. At a pretrial hearing conducted on February 20, 1998, the prosecution stated that he wanted to argue the MRE 404(b) motion, but defense counsel stated that he would be filing a motion for additional expert fees and a motion in limine and requested two weeks for a hearing. At the motion hearing on March 11, 1998, the trial court asked defense counsel if he wanted to schedule a trial, to which counsel responded that they could discuss this at the end of the hearing and then the issue was never addressed. Although the court granted the prosecution's motion, the court subsequently granted defendant's motion for reconsideration in part on April 10, 1998 to exclude one alleged similar incident. Another trial date was scheduled for August 19, 1998, but defendant discharged his attorney, who had filed with the trial court a motion to withdraw. One week later, the court appointed a new attorney for defendant, who subsequently filed a notice of insanity defense and requested a competency hearing only a few days before the scheduled trial. The issue relating to defendant's competency was concluded on December 4, 1998, when the court-appointed independent expert found defendant competent to stand trial. Subsequently, defendant stipulated to three adjournments of April, June and August 1999 trial dates. See *Crawford, supra* (holding delay caused by stipulated adjournment attributable to defendant). Even at the final pretrial hearing, defendant complained to the trial court about his attorney, indicated that he was not ready for trial, demanded an independent blood exam and threatened to have an outburst in the jury's presence if trial began as scheduled. As noted by the trial court, the majority of the delay was attributable to defendant, who clearly demonstrated a desire to postpone the trial. Accordingly, we agree with the trial court that the prosecution did not violate the 180-day rule.

VI

Finally, defendant argues that the victims' in-court identifications at trial were tainted by their identifications at the preliminary examination. Although defendant moved to quash the information, on the basis that identifications at the preliminary examination were tainted,

defendant did not move to suppress the in-court identifications before or at trial. Therefore, because defendant has not properly preserved the issue for our review, he must demonstrate plain error to avoid forfeiture. *Carines, supra*.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). The court must consider all relevant factors concerning a preliminary examination identification to determine if the identification violated due process. *People v Solomon*, 47 Mich App 208, 218-219; 209 NW2d 257 (1973) (dissent of Lesinski, CJ), adopted 391 Mich 767; 214 NW2d 60 (1974). Such factors include the length of time between the crime and the preliminary examination confrontation, the opportunity of the witness to view the culprit at the time of the crime and the witness's degree of attention, whether the police told the witness that they had the right person in custody, the level of certainty demonstrated by the witness at the confrontation, and the witness's prior description of the criminal. *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401, 411 (1972); *Solomon, supra*. "Also relevant is the witness's failure to give any identifying characteristics on cross-examination." *Id.* However, these cases do not establish that all confrontations at a preliminary examination are impermissibly suggestive. *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975).

In this case, several years had passed between the offenses and the victims' identifications of defendant at the preliminary examination. They also were not able to select defendant's photograph from the array conducted only a few months before the preliminary examination, whereas defendant was the only one in the courtroom wearing a jail outfit at the preliminary examination. Both women were informed that there was a DNA match, although it is not entirely clear at which time they were informed of this information. On the other hand, both women spent a considerable amount of time with defendant during their abductions and had a direct view of defendant. Although tentative about their identification during cross-examination, they finally stated with certainty that defendant was their assailant. One victim also stated that she remembered that defendant had acne scars. The fact that she saw an article with defendant's picture prior to the hearing is irrelevant, since there is no allegation that the police gave her the paper to read and it appears from her testimony that defendant's face was not fully depicted. In light of these factors, we cannot conclude that the identifications at the preliminary examination were so suggestive that defendant was denied due process. Therefore, because there was no basis to suppress their in-court identification of defendant as the assailant at trial, see *People v Syakovich*, 182 Mich App 85, 89; 452 NW2d 211 (1989); *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988), defendant has not demonstrated plain error to avoid forfeiture of the issue.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad