STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME HALE,

Defendant-Appellant.

UNPUBLISHED
December 13, 2002

No. 234038
Wayne Circuit Court
LC No. 00-008301

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for his felony murder conviction, to be served consecutively to two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that the trial court improperly questioned prospective jurors regarding biases, thereby intimidating the remaining prospective jurors into not revealing their own prejudices or embarrassing them so as not to admit emotional biases for which they could not provide a logical explanation. We disagree.

Defendant failed to object to any of the complained-of comments, so we review this issue for a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, "a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges." *People v Tyburski*, 196 Mich App 576, 581; 494 NW2d 20 (1992), aff'd 445 Mich 606 (1994). This Court reviews the trial court's comments in their entire context to determine if they were likely to unduly influence the jury. See *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995).

In the cases defendant cites, either the trial court exclusively questioned the prospective jurors, *Tyburski, supra*, 445 Mich at 611, *People v Milkovich*, 31 Mich App 582, 583-585; 188 NW2d 124 (1971), or the record was "replete with instances of highly questionable judicial conduct," *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). Here, there is no indication that the trial court contravened any Canons of Judicial Conduct, and defense counsel asked prospective jurors questions during voir dire. In fact, defense counsel's questions probed potential biases against defendant, such as past law enforcement experience, drug involvement,

religious beliefs, and views regarding a defendant's refusal to testify. Defense counsel was permitted "to ask such questions [s]he deemed necessary to determine how to best exercise [her] challenges." *People v Brown*, 393 Mich 174, 179; 228 Mich 38 (1974). Thus, the trial court's comments to prospective jurors did not restrict voir dire in a manner that prevented the development of a factual basis for the exercise of peremptory challenges, *Tyburski, supra*, 196 Mich App at 581, and defendant has failed to show a plain error that affected his substantial rights. *Carines*, *supra* at 763.

Defendant next argues that his conviction must be reversed because of a violation of his right to a speedy trial. We disagree. Since no formal demand for a speedy trial was made on the record, we review this issue for a plain error affecting defendant's substantial rights. *Id.*; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999).

The right to a speedy trial is guaranteed to criminal defendants by the United States and Michigan constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *Cain, supra* at 111. A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). The defendant must prove prejudice when the delay is less than eighteen months. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Cain*, *supra* at 112. In determining whether a defendant has been denied a speedy trial, a reviewing court considers the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his speedy trial right; and (4) prejudice against the defendant resulting from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

A warrant for defendant's arrest was issued on July 3, 2000. Defendant's trial commenced on January 29, 2001. There was a less than seven-month delay between the issuance of the arrest warrant and the commencement of defendant's trial. This delay was less than one month longer than the six-month period of delay that is generally required to trigger judicial review of a speedy trial claim. *Daniel, supra* at 51. A panel of this Court has held that such a short delay is insufficient to trigger an investigation into defendant's claim that he has been denied a speedy trial. *People v Anderson*, 112 Mich App 640, 652; 317 NW2d 205 (1981).

However, even if this Court were to further analyze defendant's claim, we would find no violation of defendant's right to a speedy trial. In the instant case, the reasons for the delay are not fully apparent from the record. A portion of the delay was attributable to two pretrial conferences and is assigned to the prosecutor, but it should be given a neutral tint and only minimal weight. *People v Gilmore,* 222 Mich App 442, 460; 564 NW2d 158 (1997). Moreover, defendant did move for reduction of bond, which was the entire substance of the final conference and attributable to defendant. *Id.* at 461.

Also, defendant did not assert his right to a speedy trial in the trial court. 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 was incarcerated during the delay between arrest and trial and alleges to have suffered anxiety and pretrial incarceration, which is sufficient to establish prejudice to the person. However, prejudice to the defense is more crucial in assessing a speedy trial claim. *People v Ovegian,* 106 Mich App 279, 284-285; 307 NW2d 472 (1981). As to prejudice to his

defense, defendant claims that the deaths of two witnesses caused him prejudice. We disagree. The first potential witness, Maurice Pugh, died on March 14, 2000, which was over three months prior to the date the warrant was issued for defendant's arrest. Accordingly, no prejudice can be attributed to the delay. Second, we conclude that the death of a potential trial witness, William Maxwell, a weekend before trial is also insufficient to establish actual and substantial prejudice. The death of a potential witness could demonstrate the requisite prejudice if exculpatory evidence is lost. *People v Adams,* 232 Mich App 128, 136; 591 NW2d 44 (1999). Here, however, Maxwell testified at the preliminary examination as an eyewitness for the prosecution, and there is no claim that exculpatory evidence was lost. Moreover, Maxwell's preliminary examination testimony did not provide any exculpatory evidence for defendant, so there was no reason to believe that any testimony he would have given at trial would have exculpated defendant. Defendant's speculation that Maxwell's testimony may have been helpful does not provide sufficient basis to find actual and substantial prejudice. In sum, upon considering and balancing the applicable factors, we find no plain violation of defendant's right to a speedy trial.

Defendant last claims he was denied effective assistance of counsel. Since defendant did not move for an evidentiary hearing or a new trial before the trial court, this Court will only consider mistakes that are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first argues that defense counsel's failure to object with respect to the two previously addressed issues, voir dire and speedy trial, constituted ineffective assistance of counsel. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). As to the failure of defense counsel to object to the trial court's conduct during voir dire, defendant failed to show that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. As previously noted, defense counsel effectively used peremptory challenges, and defendant cannot show that the resultant proceedings were fundamentally unfair or unreliable as a result of counsel's failure to object to the trial court's conduct. *Rodgers, supra* at 714. With regard to defense counsel's failure to assert defendant's right to a speedy trial, we note that counsel was not ineffective for failing to make a frivolous or meritless motion. *People v Knapp,* 244 Mich App 361, 386; 624 NW2d 227 (2001).

Last, defendant argues that defense counsel's alleged lack of understanding and misapplication of the Michigan Rules of Evidence constituted ineffective assistance of counsel. The record does not support this claim. Indeed, defendant has not shown that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Toma, supra* at 302. Moreover, in no instance that defendant cites as demonstrating ineffective assistance of counsel was admissible evidence not admitted, or vice versa. Because the same evidence likely would have been placed before the jury regardless of any deficiency, defendant has not shown that he was prejudiced as a result of counsel's performance. *Id.* at 302-303.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter