STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 244653 Ionia Circuit Court
DONALD RUSSELL LUKE, JR, Defendant-Appellant.	LC No. 02-012094-FH

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of prison escape, MCL 750.193. Defendant was sentenced as an habitual offender, MCL 769.11, to 5 to 10 years in prison. We affirm.

First, defendant argues that the prosecution violated MCL 780.131 by not bringing him to trial within 180 days of his return to a Michigan prison. We disagree. Compliance with the statutory speedy trial requirement presents a question of law that we review de novo. See *People v Mackle*, 241 Mich App 583, 590; 617 NW2d 339 (2000).

The statue requiring a speedy trial specifically exempts criminal offenses committed by an inmate while incarcerated in a state correctional facility. MCL 780.131(2)(a). Because defendant committed the offense of prison escape while incarcerated, the speedy trial requirement does not apply. See *People v Smith*, 438 Mich 715, 717-719; 475 NW2d 333 (1991).

Second, defendant asserts that the prosecution violated the Interstate Agreement on Detainers Act, MCL 780.601, by not bringing him to trial within 120 days of his extradition to Michigan from Tennessee. We disagree. Compliance with the detainers act presents an issue of statutory interpretation that we review de novo as a question of law. *Mackle, supra* at 590.

The act governs the extradition of prisoners between states. MCL 780.601. Defendant contends the prosecution violated Article IV of the act, which provides for extradition of a prisoner from one state to another state in which charges are *pending*. When a prisoner is transferred to Michigan under that provision, Article IV(c) of the act requires the prisoner be brought to trial on *pending* charges within 120 days. No indictment, information, or complaint for prison escape was filed against defendant before his return to Michigan. Defendant was

extradited to Michigan to complete the original sentence he was serving when he escaped. Accordingly, defendant was not entitled to trial on those charges within 120 days of his return. Furthermore, the trial court also predicated its ruling on the lack of pending escape charges, and defendant does not voice a single argument on appeal as to why that ruling was incorrect. We shall not search for authority contrary to the court's ruling, nor make defendant's arguments for him. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002)(issues insufficiently briefed are deemed abandoned on appeal).

Third, defendant contends that he was denied due process by the delay in his arrest after he returned to Michigan. We disagree. A pre-arrest delay challenge implicates constitutional due process issues, which we review de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

To determine whether a pre-arrest delay requires reversal of a defendant's conviction under due process principles, Michigan courts apply a two-step balancing test: (1) the defendant must demonstrate actual prejudice, as opposed to mere speculative prejudice, by demonstrating his ability to defend against the charges was meaningfully impaired to such an extent that the disposition of the criminal proceedings was likely affected, and (2) if a defendant meets this burden, the burden shifts to the prosecutor to persuade the court that the reason for the delay was sufficient to justify any resulting prejudice. *People v Herndon*, 246 Mich App 371, 390; 633 NW2d 376 (2001); *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *People v Adams*, 232 Mich App 128, 138-139; 591 NW2d 44 (1998).

Defendant failed to satisfy the first prong of this test. Defendant did not establish that any prejudice to him arose from the several-month delay between his return to Michigan and his arrest rather than the twenty years he evaded Michigan authorities. Similarly, defendant did not indicate he would have better recalled witness names or the details of his escape if Michigan had arrested him while he was in custody in Tennessee in 1991. Defendant also failed to show that Michigan knew or should have known he was in custody at that time.

Fourth, defendant argues that the six-year statute of limitations, MCL 767.24(4), expired before the prosecution filed an indictment against him for prison escape. We disagree. Statutory interpretation presents a question of law that we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). Factual disputes involving the statute of limitations are properly submitted to the jury. *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996).

The limitations period is tolled for "[a]ny period during which the party charged did not usually and publicly reside within this state. . . ." MCL 767.24(5). The tolling provision applies only when a suspect is no longer a resident of Michigan, not just when the suspect is absent from this state. *Crear, supra* at 165. Defendant's testimony established that during the twenty years between his escape and his return to Michigan, he resided in Tennessee and held employment and owned a van there. Because defendant did not openly and publicly reside in Michigan, the limitations period was tolled. Further, because defendant did not present any evidence indicating he spent time in Michigan, the trial court did not err in failing to submit the issue to the jury.

Fifth, defendant asserts that the trial court erred in admitting a statement defendant gave to a state police trooper while incarcerated in a state prison. We disagree. We review decisions to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, because this issue implicates the protection against self-incrimination afforded by the state and federal constitutions, it raises constitutional issues that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The federal and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. An accused's statements made during custodial interrogation may not be admitted unless the accused voluntarily, knowingly, and intelligently waived his rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

However, there must also be a connection between the defendant's custody and the subject of the interrogation. *Herndon, supra* at 396. Defendant's incarceration on an unrelated offense did not render him in custody for determining *Miranda*'s applicability. *Id.* Further, the evidence does not otherwise establish defendant was in custody when he gave the statement. The record demonstrates that the officer informed defendant he did not have to make a statement, that he was free to leave or to end the questioning at any time, and that the door was closed only for privacy and was not locked. Therefore, the trial court did not err in admitting the statement.

Sixth, defendant contends that the trial court erred in admitting his prison records where the witness who authenticated the documents did not work at the facility where defendant was incarcerated. We disagree. We review decisions to admit evidence for an abuse of discretion, *Katt, supra* at 278, but when the decision involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, the issue is reviewed do novo, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless they fall under a specific exception provided by the rules of evidence. MRE 802. MRE 803(6) provides that records of regularly conducted activity (so-called business records) are not excluded by the hearsay rule, even if the declarant is available as a witness. The court rule clearly indicates the record custodian need not testify for a record to be admissible. MRE 803(6). Instead, an "other qualified witness" may provide the foundation for a record's admission. *Id*.

Even though the prosecution's witness did not create the documents or have personal knowledge of their creation, she demonstrated her familiarity with the department's record-keeping procedures and was therefore a qualified witness. Moreover, we find that, assuming error in allowing introduction of the evidence, it was harmless, where defendant himself testified that he escaped from prison, and where defendant made out of court statements to that effect. MCL 769.26; *Lukity, supra* at 495.

Seventh, defendant argues that the trial court erred in denying his request to instruct the jury on the defense of duress. We disagree. We review de novo a defendant's claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, the trial court's determination whether an instruction is applicable based on the evidence or facts presented lies within the sound discretion of the court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

MCL 768.21b provides a duress defense to a charge of prison escape. When a defendant requests a jury instruction on a defense that is supported by evidence, the trial court must give it. *People v Mary Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). In raising a duress defense, the defendant bears the burden of producing some evidence from which the jury can conclude that the essential elements of duress are present. *Id.* at 246, quoting CJI2d 7.6, *commentary.* A defendant successfully carries that burden where he introduces some evidence from which the jury could conclude the following:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm. [*Lemons*, *supra* at 246-247, citing *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

Defendant failed to meet this burden because he provided no evidence of threatening conduct sufficient to create a reasonable fear of serious bodily harm or death. The record does not support defendant's assertion on appeal that "he was faced with specific threats of physical attack." Defendant did not testify that anyone threatened him, only that he feared harm from other prisoners for reporting an assault on a fellow inmate. We additionally note that defendant did not immediately report any alleged threat after reaching a point of safety. MCL 768.21b(4)(f). Because the evidence did not support a duress instruction, the trial court did not abuse its discretion in declining to provide it.

Next, defendant asserts that the trial court erred in allowing the late endorsement of a prosecution witness. We disagree. A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998).

MCL 767.40a(3) requires the prosecutor to inform a defendant at least thirty days before trial of the witnesses the prosecution plans to call. The statute also allows the prosecutor to amend the witness list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). The statute's underlying purpose is to provide notice to the accused of potential witnesses. *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003).

Although the record supports defendant's claim that he had no notice that the witness would testify, defendant failed to demonstrate the court's ruling prejudiced him. Defendant

contends he might have called witnesses in response to the testimony, but he does not identify those potential witnesses or indicate how they might have countered the unexpected testimony. Additionally, defendant did not request a continuance. Moreover, we fail to see any prejudice by introduction of the fingerprint evidence where, once again, defendant acknowledged that he was once imprisoned and escaped. MCL 769.26. There is no basis for reversal.

Finally, defendant contends the trial court erred in sentencing him as an habitual offender where the matter was not presented at trial, and where the 180-day rule prohibits prosecution.

Initially, we find that this issue has been insufficiently briefed; it is cursory with no analysis or detail with respect to the applicable statute. Therefore, the issue is deemed abandoned on appeal. *Van Tubbergen, supra* at 365. Further, because defendant failed to preserve this issue for appeal by raising the issue before the trial court, our review is limited to determining whether plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Here, we find no error affecting defendant's substantial rights. The presentence investigation report (PSIR) reflected that defendant had two prior felony convictions. Indeed, one of the convictions was regarding the crime for which he was serving time when he escaped. Defendant makes absolutely no claim or argument on appeal that he did not have two prior felony convictions, nor that he was not the same person listed in the PSIR. There was no prejudice.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot