STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 248657 Oakland Circuit Court
THOMAS ERVIN HAWTHORNE, Defendant-Appellant.	LC No. 02-186567-FH

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and second-degree criminal sexual conduct, MCL 750.520c(1)(f). Defendant was sentenced as a fourth habitual offender to concurrent terms of seven to thirty years' imprisonment for each conviction with 158 days credit for time served. We affirm.

Defendant first claims he was denied his constitutional right to a speedy trial when the prosecution delayed defendant's trial for nine years. We disagree.

Whether a defendant was denied a speedy trial is a constitutional question that is reviewed de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). A criminal defendant has a right to a speedy trial under both the United States Constitution and Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 20; *People v Hickman*, 470 Mich 602, 607 n 3, 608; 684 NW2d 267 (2004). To determine whether a pretrial delay violated a defendant's right to a speedy trial, Michigan courts have adopted the four-part balancing test in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). The test requires a court to balance (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant invoked his right to a speedy trial, and (4) any prejudice to the defendant from the delay. *Id.*

The first factor to be considered is the length of the delay. In this case, defendant was arrested on January 24, 1993, and his trial commenced on December 9, 2002. The total time between defendant's arrest and the trial date was over nine years. A delay of eighteen months or more is presumptively prejudicial, and the prosecution must rebut the presumption. *Cain*, *supra* at 112. Moreover, a presumption of prejudice triggers review of the other factors to determine if a defendant was denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 459;

564 NW2d 158 (1997). Although the delay in this case of over nine years was substantial, the length of delay alone is insufficient to necessitate dismissal. *Cain, supra* at 112.[1]

The second factor requires consideration of the reasons for the delay. In assessing the reasons for the delay, we must examine and attribute each period of delay to either the prosecution or the defendant. See *Gilmore, supra* at 460-461; *Cain, supra* at 113. The record indicates that the ten-month period between the first scheduled preliminary examination and the second scheduled preliminary examination was in part due to the victim's failure to appear at the first proceeding. A witness' unavailability does not weigh against either the defendant or the prosecution. *Cain, supra* at 113. However, a portion of this period of delay was partially attributable to the prosecution because a postponement of ten months is suggestive of docket congestion, which weighs minimally against the prosecution. *Id*.

Although the preliminary examination was rescheduled for December 2, 1993, neither defendant nor defense counsel appeared at the second scheduled hearing. Defendant claims that his failure to appear was attributable to the prosecution because defendant was incarcerated in a different county on an unrelated charge on the date of the scheduled hearing. However, a delay resulting from prosecuting a defendant on another charge, when there is no evidence that he demanded a trial or was prejudiced by the delay, may be attributable to the defendant. See *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978).

On appeal, neither party offers an explanation for the delay between the rescheduled preliminary examination and the prosecution's filing of a detainer that resulted in defendant's return to Michigan for trial in this matter. The prosecution obtained a bench warrant for defendant's arrest on or about January 31, 1994. However, the prosecution offers no reasonable explanation for its failure to take necessary steps to locate defendant. Although defendant claims that he believed the charges were dropped because no hold was placed on him after his release from jail in an unrelated matter, we conclude that defendant had knowledge of the underlying charges and left the state without requesting a speedy trial. Therefore, we conclude that the time period was attributable to defendant because he had knowledge of the charges in this matter, had reason to know of the potential warrant for his arrest, and left the jurisdiction. See *Doggett v United States*, 505 US 647, 650, 652-653; 112 S Ct 2686; 120 L Ed 2d 520 (1992).[2]

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[1] Indeed, this Court has upheld convictions after delays of fifty-four months, *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994), thirty-one months, *People v Missouri*, 100 Mich App 310, 319-320; 299 NW2d 346 (1980), thirty-seven months, *People v Cutler*, 86 Mich App 118; 272 NW2d 206 (1978), and nineteen years, *People v Smith*, 57 Mich App 556; 226 NW2d 673 (1975), rev'd on other grounds 405 Mich 418 (1979). *People v Cain*, 238 Mich App 95, 112-113; 605 NW2d 28 (1999).

[2] Although the United States Supreme Court's finding – that Doggett's right to a speedy trial had been violated by the 8½-year-delay between the indictment and his arrest – initially appears to support instant defendant's claim, we find that *Doggett v United States*, 505 US 647; 112 S Ct 2686; 120 L Ed 2d 520 (1992), is distinguishable. The United States Supreme Court specifically found no evidence that Doggett was aware of the charges against him, *id.*, at 653, while instant defendant was clearly aware of the charges – he had been arrested, he had attended one pretrial

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The third consideration is whether defendant asserted his right to a speedy trial. A defendant's failure to promptly invoke his right to a speedy trial weighs against his later claim that he was denied the right. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). Despite his knowledge of the pending charges, defendant failed to assert his right to a speedy trial until 2002, when he learned that the prosecution filed a detainer seeking his return to Michigan.

Prejudice is the fourth factor to consider in determining if a defendant was denied his right to a speedy trial. Michigan courts recognize two forms of prejudice: 1) prejudice to the person, and 2) prejudice to the defense. *Gilmore*, *supra* at 461-462. Prejudice to the person consists of the deprivation of a defendant's civil liberties, and prejudice to the defense consists of harm to a defense resulting from the delay. *Id.* Defendant is mistaken in his claim that he was prejudiced because he was not afforded the opportunity to serve his sentences for offenses in Michigan and Ohio concurrently. Under MCL 768.7b, defendant was not entitled to concurrent sentencing because he committed the felony in Ohio pending the disposition of the instant felony charge and was thus subject to the imposition of consecutive sentencing. See *People v Nantelle*, 215 Mich App 77, 80-81; 544 NW2d 667 (1996).

No prejudice to the person is found where a defendant is not incarcerated during the delay between his arrest and trial. *Gilmore*, *supra*, at 462. Although defendant was incarcerated during most of the delay, the presentence investigation report indicates that the majority of his incarceration was on unrelated matters. MCL 769.11b "'neither requires nor permits sentence credit' in cases where a defendant is incarcerated 'as a result of charges arising out of an unrelated offense or circumstance'" and later requests credit in another case for the unrelated period of incarceration. *People v Ovalle*, 222 Mich App 463, 468-469; 564 NW2d 147 (1997), quoting *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985). Moreover, the provision does not apply to unrelated periods of incarceration outside this state. Because a defendant is entitled to credit for the time he is imprisoned for the specific offense and not for time of incarceration on unrelated offenses or incarceration out-of-state, we conclude that defendant's claim of prejudice to his person is without merit.

"Prejudice in the ability to defend is the most important consideration in determining if the constitutional right to a speedy trial has been violated." *People v Grandberry*, 102 Mich App 769, 774; 302 NW2d 573 (1980). Prejudice to a defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). We hold that there was no proof that the defense was hampered by the delay. Defendant's general assertions of prejudice to his opportunity to investigate and disprove the victim's allegations are insufficient to show that his defense was affected. See *Gilmore*, *supra* at 462.

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hearing, and he had been represented by counsel at a second hearing. The United States Supreme Court noted that if Doggett had been aware of the charges against him, his failure to invoke his right to a speedy trial would have weighed heavily against him. *Id.* Moreover, instant defendant left the state while aware of the charges against him. And the United States Supreme Court mentioned that pretrial delay is justifiable to track down a defendant that goes into hiding. *Id.* at 656.

Defendant failed to show that any potential witness favorable to his case, any memory of the events, or any exculpatory evidence was lost due to the delay. Therefore, we conclude that defendant's claim of prejudice to his defense lacks merit. Although the delay was substantial, we conclude that most of the delay was attributable to defendant's actions. Moreover, because defendant failed to timely assert his right to a speedy trial, and there is no indication that his defense was prejudiced by the delay, we hold that defendant was not denied his constitutional right to a speedy trial.

Defendant next argues that the trial court should have excluded evidence that defendant's family attempted to threaten and bribe the victim. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999). A ruling on a close evidentiary question is not generally considered an abuse of discretion. *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003).

Pursuant to MRE 607, any party is permitted to attack the credibility of a witness. *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). However, a witness who is impeached by a prior inconsistent statement must be afforded the opportunity to explain or deny the statement. MRE 613(b). In his opening statement to the jury, defense counsel read the victim's written statement to the prosecution and emphasized its inconsistency with her prior statements to the police and medical personnel. The victim later explained that defendant's family members' harassment and bribery caused her to write a statement that was inconsistent with her prior verbal statements. The trial court permitted testimony of the family's threats and bribes for the purpose of rebutting defense counsel's attempt to impeach the victim's testimony. The evidence was probative because defendant placed the witness's credibility at issue. All probative evidence is inherently prejudicial to some extent. It is only when the probative value of evidence is substantially outweighed by unfair prejudice that the evidence should be excluded. MRE 403. A determination of the prejudicial effect of evidence should be left to the trial court. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

Defendant further claims that the victim's testimony implied that defendant had a criminal history. Defendant refers to his wife's phone conversation with the victim in which his wife stated, "Please don't put my husband back in jail." However, defense counsel failed to challenge the evidence on the grounds that it introduced defendant's prior bad acts. See MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Therefore, this claim was not properly preserved for review, and we review the claim for plain error affecting a defendant's substantial rights. See *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Defendant has failed to show that the jury relied on the brief reference to an unspecified prior period defendant spent in jail to find defendant guilty in the instant case. Therefore, we hold that the admission of the evidence does not warrant reversal.

Defendant next argues that the trial court erred in sentencing defendant as a fourth offense habitual offender. In addition, defendant argues that counsel was ineffective for failing to challenge the habitual offender charge. We disagree.

Pursuant to MCL 769.13(5), a prior conviction may be established by information in the presentence report, a judgment of conviction, or a defendant's admission. A defendant bears the

burden of presenting a prima facie showing of inaccuracy or invalidity; once a defendant has satisfied this burden, the prosecution must establish the accuracy or validity of the prior conviction by a preponderance of the evidence. MCL 769.13(6). "[D]ue process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information." *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996).

At the conclusion of the trial, defendant acknowledged his 1974 conviction of assault with intent to rob while armed. After the prosecutor offered a copy of defendant's 1958 conviction for larceny in a building, defendant admitted to the conviction at sentencing. However, defendant challenged the remaining 1960 conviction for armed robbery cited by the prosecutor in the notice to seek enhancement as an habitual offender, fourth offense.[3] Although information contained in a presentence report is presumed accurate, when this presumption is challenged by a defendant, the presentence report alone will be insufficient to meet the prosecution's burden of persuasion. *People v Walker,* 428 Mich 261, 268; 407 NW2d 367 (1987), citing 3 ABA Standards for Criminal Justice (2d ed), Standard 18-6.4(c). Depending on the nature of the disputed matter, a flat denial may be sufficient to mount an effective challenge to a prior conviction. See *People v Callon,* 256 Mich App 312, 334; 662 NW2d 501 (2003), citing *Walker, supra* at 268.

The trial court responded that defendant's presentence report contained six prior felonies, and indicated that one of the other felonies could be substituted for the 1960 conviction. And the sentence for one of the felonies enumerated in the presentence report – the 1995 Ohio conviction for attempted rape – was the basis for which defendant claimed he was denied a timely trial in the instant case. Therefore, we find that defendant admitted the 1995 Ohio conviction. When a notice to seek habitual enhancement is timely, the untimely substitution of one underlying offense for another is permissible as long as it does not increase the defendant's potential sentence. *People v Hornsby,* 251 Mich App 462, 471-473; 650 NW2d 700 (2002). This is because the untimely amendment does not affect the purpose of providing timely notice, "'to provide a defendant with notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense.'" *Id.* at 472, quoting *People v Manning,* 163 Mich App 641, 644; 415 NW2d 1 (1987).

Because we find that the trial court properly sentenced defendant as a fourth habitual offender, we find it unnecessary to address defendant's corresponding claim that he was denied the effective assistance of counsel when counsel failed to challenge the prior convictions listed on the prosecution's notice of intent to seek enhancement. Counsel was not required to make a futile challenge. *Callon, supra* at 335. And defendant is unable to demonstrate prejudice. *People v Zinn,* 217 Mich App 340, 350; 551 NW2d 704 (1996).

[3] Defendant challenged both the 1958 and the 1960 convictions at the conclusion of the trial, and the court instructed the prosecutor to address the challenges at sentencing. Although the prosecutor presented a copy of the 1958 conviction, the prosecutor did not present any additional evidence to support the 1960 conviction.

Affirmed.

/s/ Kurt T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens