STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 248948 Chippewa Circuit Court
CURTIS JERMAINE FULLER, Defendant-Appellant.	LC No. 00-007006-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to life imprisonment on the assault with intent to commit murder conviction and six to ten years' imprisonment on the assault with intent to do great bodily harm conviction.[1] We affirm.

Defendant first argues that he was denied his right to a speedy trial. We disagree. A defendant's right to a speedy trial is guaranteed by the United States and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. A claim that a defendant has been denied his right to a speedy trial raises a constitutional issue that we review de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Four factors must be balanced to determine whether a defendant was denied a speedy trial: (1) length of the delay; (2) reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant because of the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978).

The delay in this case was over eighteen months, so it is presumed prejudicial. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). The "presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id*. at

[1] At the time of the incident giving rise to this prosecution, defendant was an inmate at the Chippewa Correctional Facility. The sentences imposed for the convictions at hand are to be served consecutive to the sentences imposed on the prior prosecution.

109-110. Here, approximately eight and one-half months of the delay are attributable to defendant's stipulations to adjourn the trial date. Moreover, there were various motions filed by defendant and a substitution of defense counsel, both of which weigh against defendant. *Cain, supra* at 113. Further, defendant never asserted his right to a speedy trial in the lower court. Defendant's failure to timely assert his right to a speedy trial "weighs against a finding that he was denied a speedy trial." *Id*. at 112. As for the issue of prejudice, we note that defendant was not incarcerated in anticipation of this trial; rather, he was already in prison for unrelated offenses when the events surrounding the present prosecution occurred, and he continued to serve the sentence imposed in the prior matter thereafter. In addition, the record does not show that any evidence was lost or that his defense suffered at trial because of the delay. *Id.* (observing that prejudice can be to a defendant's person and to a defendant's defense). Defendant argues that it is probable that the delay resulted in the trial witnesses becoming entrenched in their beliefs regarding the identities of the assailants, thereby increasing the likelihood of conviction. However, general allegations of possible prejudice are insufficient to establish a denial of the right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). After balancing the four factors, we determine that defendant was not denied his right to a speedy trial.

Defendant next argues that the trial court should have granted his motion for additional peremptory challenges and his motion for a change of venue. We disagree. We review a denial of motions for additional peremptory challenges and for a change of venue for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997); *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

Defendant claims that he was denied a fair trial because after exhausting all of his peremptory challenges, he was forced to be judged by a jury taken from a community with a close affiliation to the corrections system. A trial court may grant additional peremptory challenges on a showing of good cause. MCR 6.412(E)(2). The trial court excused for cause from the venire all potential jurors with demonstrated bias or prejudice towards defendant. Defendant has not shown that anyone placed on the jury was actually biased or prejudiced toward defendant before trial began. For example, one of the seated jurors stated that he knew one of the proposed witnesses and that he would believe the witness above others. However, the juror then acknowledged that if the witness' testimony was contradicted, the juror could look at the testimony objectively. In addition, the juror stated that he did not have any preconceived notions and could sit as an impartial juror. Similarly, another juror whose brother worked at Kinross Correctional Facility and who himself worked at a store that corrections officers frequented, stated that he could be impartial in this case. These two jurors were not challenged for cause. Defendant has failed to show good cause warranting additional peremptory challenges, and minimally there was no abuse of discretion.

We also reject defendant's claim that the court erred in denying his motion for a change of venue. "It is the general rule that defendants must be tried in the county where the crime is committed. An exception to the rule provides that the court may, in special circumstances where justice demands or statute provides, change venue to another county." *People v Jendrzejewski*, 455 Mich 495, 499-500; 566 NW2d 530 (1997). "[T]o be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when

exposed to it," or "that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992), overruled on other grounds by conflict panel in *People v Bigelow,* 229 Mich App 218; 581 NW2d 744 (1998). Defendant does not argue that there was extensive pretrial publicity in the instant case. Additionally, there was not a high percentage of members of the venire who admitted to disqualifying prejudice in this case. *DeLisle, supra* at 669. Of the jurors excused for cause, only one stated that he already had preconceived notions regarding defendant. While several others had connections with the Department of Corrections, they were excused not because they expressed that they were biased, but because they expressed concern on how their relationships would be impacted following the trial's conclusion. Because defendant has failed to show a strong community feeling against him or that the jury was actually prejudiced against him, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a change of venue.

Defendant next argues that the trial court erred in admitting photographs of injuries to officers he was not charged with assaulting. We review a trial court's admission of photographic evidence for an abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). "All relevant evidence is admissible, except as otherwise provided" by law. MRE 402. Relevant evidence "means evidence having 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." MRE 401. Arguably, the photographs in issue helped the jury better understand the circumstances surrounding the incident, including the planned nature of the attacks. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Considering the great deference given to the trial court on evidentiary issues, we conclude that the court did not abuse its discretion in failing to find that the photographs' probative value was substantially outweighed by the danger of unfair prejudice. Moreover, assuming error, the error was harmless as it did not undermine the reliability of the verdict, nor result in a miscarriage of justice. MCL 769.26; *People v Lukity,* 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant also claims that the prosecutor exaggerated the evidence against defendant and argued facts not in evidence. We review these unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte, supra* at 721. Despite defendant's claims, the prosecutor's arguments were supported with testimony at trial, either by direct eyewitness testimony and reasonable inferences arising therefrom or testimony related to review of the surveillance video by witnesses with knowledge of those involved in the altercation. Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. However, as we have just concluded, the prosecutor's closing argument was proper and supported by the evidence. Therefore, counsel was not ineffective because an attorney is not

obligated to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Finally, we reject defendant's argument that the court abused its discretion in denying his motion for a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 512; 603 NW2d 802 (1999). Defendant argues that a mistrial should have been granted because the court erred in admitting a statement he made as he was being placed in the prison's segregation unit. Specifically, defendant argues that because the statement was nothing but propensity evidence, it was admitted in violation of MRE 401, 402, 403, and 404(b). Testimony was presented that as defendant was being taken to the segregation unit, he yelled, "I'm in for killing a cop." While MRE 404(b)(1) prevents the use of propensity evidence, the prosecutor here was not introducing evidence of other crimes, wrongs, or acts. Defendant was not incarcerated for killing a cop but was in prison for assault with intent to do great bodily harm less than murder, felonious assault, and felony-firearm. Thus, the statement did not reference defendant's previous conviction, but more likely the incident that gave rise to the present prosecution. Further, the trial court instructed the jury that defendant was not in prison for killing anyone, let alone a police officer. The trial court did not abuse its discretion by denying defendant's motion for mistrial.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey