

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NOLAN HALL,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 253627

Calhoun Circuit Court

LC No. 2003-002425-FC

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

In December, 2003, defendant was convicted by a jury of second-degree murder, MCL 750.317, for the March 6, 1982, shooting death of Philbert Galliard. Defendant was sentenced as a fourth habitual offender to 40 to 60 years' imprisonment. He appeals as of right. We affirm defendant's murder conviction but remand for resentencing consistent with this opinion.

I. Basic Facts and Procedure

At trial, no forensic evidence was presented to tie defendant to Galliard's murder. Evidence established, though, that defendant was the last person with Galliard before his murder. The prosecution also presented defendant's admissions to his brother, niece and former girlfriend that he killed Galliard. Defendant denied making any such statements. Defendant testified that he was giving Galliard a ride home on the morning of the murder when Galliard asked defendant to flag down a car that Galliard recognized. Defendant further testified that there were two male occupants whom defendant did not know in the car. Defendant testified that Galliard decided to travel with the two unidentified men.

On appeal, defendant makes the argument that he was denied a fair trial because of several alleged due-process violations: that the trial court erred in denying his pretrial motion to dismiss the murder charge because of the pre-arrest delay; that the lower court wrongfully denied his motion for a mistrial, based on the prosecution's closing argument implicating defendant's prior arrest for a gun charge; that he was not allowed to admit statements by a dead witness; and that he was denied effective assistance of counsel. We find no merit in any of these claims.

II. Analysis

A. Defendant's Due Process Claims

A challenge to the length of prearrest delay implicates constitutional due process rights that this Court reviews de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). To warrant reversal of defendant's conviction, the prearrest delay must have resulted in actual and substantial prejudice to his right to a fair trial and the prosecution must have intended to gain a tactical advantage as a result of the delay. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To constitute actual and substantial prejudice, the prearrest delay must have meaningfully impaired defendant's ability to defend himself from the charges against him such that the outcome of his trial likely was affected. *Id.* An unsupported statement of prejudice by defense counsel is not enough to establish actual and substantial prejudice. *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982), nor are vague claims of a loss of physical evidence or witness memory, or of the death of witnesses. *Crear, supra* at 166; *People v Adams*, 232 Mich App 128, 137-138; 591 NW2d 44 (1998); *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988).

If a defendant establishes actual and substantial prejudice, the prosecution then bears the burden of establishing that the reason for the delay was sufficient to justify that prejudice. *People v Herndon*, 246 Mich App 371, 390; 633 NW2d 376 (2001). "In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate or done with intent to gain a tactical advantage, and whether undue prejudice attached to the defendant." *Id.* The need for further investigation is a proper reason for delay, and the prosecution is not required to proceed with a case before it has sufficient evidence to convict. *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *Adams, supra* at 134, 140.

Defendant argues that he was denied his right to a fair trial by the prosecution's approximate 20-year delay in arresting and charging him with Galliard's murder. Defendant asserts that his defense was prejudiced by a loss of physical evidence, as well as by the lost or false memories of witnesses. More specifically, defendant claims that his defense was hindered by the inability to determine to whom a license plate, an imprint of which was present in a snow bank near Galliard's body, was registered in 1982, and by the loss of two cigarette butts – and the DNA on them – collected at the scene.

Testimony at trial indicated that the license plate imprint could not have been made contemporaneous with Galliard's murder, because any vehicle leaving the imprint would have had to drive over Galliard's body as it left the scene, and that there was no indication whatsoever that Galliard's body had been driven over. Further, the cigarette butts were examined for their evidentiary value and DNA tests were conducted on them before they were lost. Defendant does not indicate how the absence of the butts themselves, their evidentiary value already examined and preserved, hindered his defense.

As for the impact of the delay on witness testimony, defendant does not specify what details each witness had difficulty remembering, nor how the absence of any such details hindered his defense. Three prosecution witnesses testified unequivocally that defendant told them that he committed the instant murder and each was subject to rigorous cross-examination. Defendant seems to assert essentially that each changed his or her story over time to the detriment of defendant in order to serve other purposes, and not from memory loss prejudicial to the defense. Here, as in *Cain, supra* at 109:

[defendant's] argument with respect to prejudice is simply too speculative to justify reversing [his] conviction. Although testimony at trial indicated that some witnesses could not give [specific information about what] they remembered, [defendant] has not suggested how this slight memory failure worked to [his] disadvantage or why [that information was] critical to [his] defense. In essence, without allegations that these witnesses forgot specific evidence helpful to [defendant's] defense, we cannot conclude that the absence of the evidence was prejudicial.

Defendant also points to the death of the cab driver who picked him up from his mother's house and took him to his girlfriend's house within a half hour of Galliard's murder as significantly hindering his defense. However, given that there is no indication that the cab driver would have testified in a manner helpful to defendant's defense, defendant has not established that the prearrest delay resulted in actual and substantial prejudice, which likely affected the outcome of his trial.

Even if defendant could establish that he was hindered by the delay, the trial court properly concluded that the delay was explainable by the prosecution's need for additional investigation. As noted above, the prosecution is not required to proceed with a case before it has sufficient evidence to convict. *Adams, supra* at 134, 140; *Lovasco, supra*, at 790. There is nothing in the record to indicate that the pre-arrest delay in this case was intended to gain a tactical advantage for the prosecution; rather the delay in arresting defendant stemmed from 'investigative rather than tactical concerns' and did not deprive defendant of his due process right to a fair trial. *Adams, supra* at 144.

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial based on comments made by the prosecution during its closing argument. We disagree. As this Court explained in *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997), "[t]he grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. An abuse of that discretion will be found only where the trial court's denial of the motion has deprived the defendant of a fair and impartial trial." See also, *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). ("A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial," quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).)

Before trial, defense counsel and the prosecution agreed that, while defendant did not have any convictions that could be used for impeachment under MRE 609, defendant's arrest on a federal weapons charge would necessarily come up at trial as it related to defendant's assertion that the charge provided a motive for defendant's niece to fabricate her testimony that defendant told her he murdered Galliard. Defendant's federal weapons charge did come up in the manner anticipated by counsel and, defendant does not complain that the weapons charge should not have been referred to in this manner. Rather, defendant challenges the prosecution's statement in its closing argument that the charge could be used to decide defendant's credibility, asserting that this comment was improper and that the trial court's refusal to grant him a mistrial on this basis denied him a fair trial. However, defendant mischaracterizes the prosecution's argument. Contrary to defendant's assertion, considered in context, the prosecution's comment did not invite the jury to consider that defendant had been arrested on a federal weapons charge as indicative of his credibility; rather, the prosecution suggested that the jury could consider the

circumstances of that offense – that defendant purportedly lied to police, telling them that the gun found in his niece’s car was hers and not his – as indicative of his credibility. Because the prosecution highlighted defendant’s lie to police – not his arrest or the charge – the prosecutor’s closing argument was not improper.

Further, to the extent that defendant frames the issue as one of prosecutorial misconduct, the prosecution’s comments are to be examined in context, considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial, to determine whether they deprived defendant of a fair and impartial trial. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). In the context of defendant’s argument that the charge provided his niece with a motive to fabricate her testimony against him, and of the evidence admitted at trial, the argument of the prosecution that the circumstances surrounding the federal gun charge were relevant to defendant’s credibility was proper.¹ Therefore, the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

Defendant also argues that he was denied his constitutional right to present a defense by the trial court’s exclusion of hearsay testimony from a police officer regarding the statement given by the since-deceased cab driver who picked defendant up at his mother’s house shortly after Galliard’s murder. According to defendant, the police report pertaining to the cab driver’s interview indicates that defendant told the cab driver that he had been out partying all night and that he was going over to his girlfriend’s house to get some sleep. Defendant asserts that the cab driver’s statement to police was “reliable enough” given that it supported the defense, and therefore, that the trial court abused its discretion in excluding testimony as to its content. We disagree.

The decision whether to admit evidence is discretionary with the trial court and this Court reviews such decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673, 675 (1998). An abuse of discretion occurs only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2000). An error regarding the admission of evidence is not ground for reversal unless, after reviewing the entire record, it affirmatively appears that it is more probable than not that such error was outcome determinative. *Lukity, supra*, at 496.

MRE 801(c) defines hearsay as a declarant’s out of court statement offered to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is inadmissible as substantive evidence unless one of the enumerated hearsay exceptions applies. MRE 802. There is no dispute that the statement that the cab driver provided to police

¹ Given the evidence against defendant – including testimony from two family members and defendant’s then-girlfriend that he told them that he had committed the instant murder – defendant would not be able to establish that the outcome of his trial was impacted by the prosecutor’s comment even if we assumed that the prosecutor’s closing argument were improper.

in 1982, which defendant wished to offer for the truth of its content, was hearsay. However, defendant asserts that given the driver's unavailability at the time of trial, the reliability of his statement and its alleged importance to defendant, it should have been admitted. Defendant does not direct this Court, and did not direct the trial court to any applicable exception permitting introduction of the driver's statement. Arguably, though, defendant suggests that the statement comes within MRE 803(24) and/or MRE 804(7), both of which provide for an exception to the hearsay rule of:

[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.

"[C]ourts should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *People v Katt*, 468 Mich 272, 291; 662 NW2d 12 (2003). Factors to be considered in evaluating the totality of the circumstances include (1) the spontaneity of the statement, (2) the consistency of the statement, (3) lack of motive to fabricate, (4) the reason the declarant cannot testify, (5) the voluntariness of the statement, (6) the declarant's personal knowledge of the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statement was made. *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).

Defendant asserts that the statement bears sufficient indicia of reliability to be admissible because the driver was an unbiased witness giving a statement to a police officer near the time of the events in question and had no motive to lie. We agree that under the circumstances and in the time-frame it was given, the driver's statement bore sufficient indicia of trustworthiness. However, such merely addresses the threshold question presented by MRE 803(24) and 804(7); to establish admissibility, defendant also had to show that the statement was offered as evidence of a material point and was the best available evidence of that point. Defendant has not met this burden. Whether defendant had been out all night and was going to his girlfriend's house to sleep was not material to the determination whether he killed Galliard. Indeed, this information was consistent with both the prosecution's and defendant's theory of the case. Further, to the extent that the statement might have been offered to refute testimony that defendant was upset and agitated at his girlfriend's house, the statement was not the most probative evidence reasonably available on this point. Thus, the statement constituted inadmissible hearsay and the trial court did not abuse its discretion in excluding testimony regarding its content.²

² Again, even if this Court were to determine that the trial court abused its discretion in excluding the statement, reversal would not be warranted. Given the evidence presented against defendant, including the testimony of three witnesses that defendant admitted the instant offense to each on separate occasions, it cannot be said that it affirmatively appears that it is more probable than not that exclusion of the driver's statement to police was outcome determinative. *Lukity, supra*, at (continued...)

Defendant argues that he was denied the effective assistance of counsel by his counsel's failure to interview and call certain witnesses at trial. To prevail on this claim, defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, and that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish deficient performance, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers, supra* at 715. Decisions as to what evidence to present and whether to call a particular witness are presumed to be matters of trial strategy and the failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant complains that his trial counsel did not interview potential defense witnesses or call witnesses that defendant wished to have testify on his behalf. However, defendant does not indicate what these witnesses would have testified to, nor how their testimony would have benefited his defense. Further, comments made by defendant during his sentencing make it clear that defense counsel was aware of at least one of the witnesses mentioned by defendant and advised defendant against calling that witness at trial. In the absence of more detail as to what testimony defendant's witnesses might have given, there is no basis for this Court to conclude that defense counsel was inappropriately prepared for trial or that his decision not to call additional witnesses was not sound trial strategy.

B. Conviction and Sentencing

Defendant points out that the trial court erred in convicting him of being, and sentencing him as, a fourth habitual offender where the prosecution and trial court did not adhere to the requirements for such conviction and sentencing in effect at the time of the commission of the instant offense. The prosecution concedes that it failed to proceed as required under the applicable version of the habitual offender statute and, thus, that defendant is entitled to resentencing on this basis.

At the time of Galliard's murder in 1982, MCL 769.13 entitled defendant to a separate information and proceeding on the habitual offender charge; he was not afforded such separate proceeding. Therefore, because the trial court sentenced defendant as an habitual fourth offender, for which he had not been properly convicted, defendant's sentence is invalid and he is entitled to resentencing. On remand, the trial court is to impose a sentence that is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because we find that defendant is entitled to resentencing on this basis, we need not reach the issues whether defendant received ineffective

(...continued)

assistance at sentencing and whether the trial court's imposition of a minimum sentence of forty years otherwise constituted an abuse of discretion.

Defendant's conviction for second-degree murder is affirmed. Defendant nonetheless is entitled to re-sentencing because he was improperly sentenced as a habitual offender. We remand for re-sentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly