STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2007
v	No. 273815 Wayne Circuit Court
RAMONE DUSHAWN JONES, Defendant-Appellant.	LC No. 05-011451-01

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of 30 months to ten years for the CCW and felon in possession convictions and to a consecutive two-year term for the felony-firearm conviction. We affirm.

At the jury trial, evidence was received that defendant was approached on the street by undercover police after they were alerted by a complainant that defendant may have a gun. Defendant fled the scene and, as he ran, he kept his right hand either in his pocket or his waistband as though he were carrying a weapon. Police gave chase and apprehended defendant when he fell and a gun became dislodged from his grasp. At least three police officers saw the gun in defendant's hand as he fell.

Defendant first challenges the admission of a police officer's testimony that the complainant told him that "some guys" behind the complainant were trying to kill him and one of the guys had a gun. Defendant argued at trial that the testimony was inadmissible hearsay. He argues on appeal that it is also a violation of his rights under the Confrontation Clause, US Const, Am VI. Because defendant's counsel failed to raise the Confrontation Clause issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). To the extent defendant challenges the testimony as inadmissible hearsay, our review is for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

The Confrontation Clause bars the admission of testimonial statements of witnesses absent from trial unless the declaring witness was unavailable and the defendant had a prior opportunity to cross-examine the declaring witness. *Crawford v Washington*, 541 US 36, 59; 124

S Ct 1354; 158 L Ed 2d 177 (2004). This rule applies only to out-of-court testimonial statements offered to establish the truth of the matter asserted, *id.* at 59 n 9, and to "testimonial statements" made by a witness. *Davis v Washington*, 547 US 813; 126 S Ct 2266, 2273; 165 L Ed 2d 224 (2006). The Supreme Court provided the following distinction between nontestimonial and testimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis, supra* at 2273-2274.]

If a statement is nontestimonial, the Confrontation Clause does not apply. *Davis, supra* at 2273. In this case, the complainant's statements were clearly a plea for assistance from the police that were made in the context on an ongoing emergency. As such, the statements were nontestimonial in nature, and the Confrontation Clause was not implicated.

With regard to defendant's hearsay challenge, the out-of-court statement that defendant had a gun went directly to the heart of the charges against defendant and was clearly offered for the truth of the matter asserted. Therefore it was inadmissible unless a specific hearsay exception applied. MRE 801(c); MRE 802. No foundation for any exception was made, so the admission of this hearsay testimony was an abuse of the trial court's discretion. However, the error was harmless in light of the other evidence that overwhelmingly established the charges against defendant. MCL 769.26.

Defendant next challenges the trial court's refusal to allow the jury to be present during the good cause hearing, under MCL 767.40a, addressing the efforts made by police to locate the missing witness, the complainant. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

At trial, defendant's attorney voiced his opinion that, had the complainant testified at trial, his version of the incident would have contradicted the police officers' testimony, and consequently the police had not wanted to locate the complainant. However, when the court asked whether defendant's attorney had ever spoken to the complainant, defendant's attorney answered in the negative.

The trial court did not abuse its discretion in refusing to allow the jury to hear the evidence concerning the efforts of the police to locate the complainant. The discrepancies between the police reports and trial testimonies were minor, and defense attorney's theory about the complainant's possible testimony was complete speculation. See *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006) (it is not enough for the defendant to show a mere possibility of assistance from the requested witness). Moreover, MCL 767.40a(4) provides that the addition or deletion of witnesses may occur upon leave of the court for good cause shown. Thus, the determination presents a legal issue for the trial court, not an issue for jury resolution.

Next, defendant argues that he was denied his constitutional right to a speedy trial. Because he did not raise this issue at the trial level, we review this unpreserved constitutional claim of error for plain error affecting defendant's substantial rights. *Carines, supra* at 763-765. Unlike application of the 180-day rule, criminal defendants are guaranteed a speedy trial without reference to a fixed number of days. *People v McLaughlin*, 258 Mich App 635, 643-644; 672 NW2d 860 (2003). But a delay of six months is necessary to trigger an investigation into defendant's claim of denial of his right to a speedy trial. *People v O'Quinn*, 185 Mich App 40, 47; 460 NW2d 264 (1990), overruled in part on other grounds, *People v Koonce*, 466 Mich 515; 648 NW2d 153 (2002). In this case, the trial started about six months and four days after defendant's arrest. However, the trial had been rescheduled from its original February 28, 2006, date to May 3, 2006, due to the adjudication of defendant's motion to adjourn the trial and two motions seeking the withdrawal of defendant's first two attorneys.[1] Further exacerbating the delay, defendant sought the removal of his attorney at the start of the May 3, 2006, trial, but the trial court refused to allow the attorney to withdraw. Therefore, approximately two months of the pretrial delay was attributable to adjudication of motions brought by defendant, and defendant's constitutional right to a speedy trial was not violated.

Defendant also maintains there was a violation of the 180-day rule. Before his sentencing, defendant urged his attorney to file a motion for a new trial based on this alleged violation, but the attorney refused on the ground that such a motion would be frivolous. On appeal, defendant argues that he was provided ineffective assistance of counsel and that he should receive a new trial based on the violation of the 180-day rule.

The 180-day rule requires the prosecutor to bring a prison inmate who has a pending criminal charge to trial within 180 days after the Department of Corrections delivers notice to the prosecutor of the inmate's imprisonment and requests disposition of the pending charge. MCL 780.131(1); see also MCR 6.004(D)(1). "[T]he statute applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *McLaughlin, supra* at 643. In this case, defendant was arrested on October 29, 2005, but apparently released on personal bond sometime thereafter despite the fact that he was on parole. Sometime between December 12, 2005, and January 3, 2006, defendant's parole officer violated defendant, which resulted in defendant's arrest and incarceration at the one of the penal institutions operated by the Michigan Department of Corrections. Since December 12, 2005, was the earliest date that the Department of Corrections could have sent a notice to the prosecutor, less than 180 days elapsed before the May 3, 2006 start of the jury trial. As such, there was no violation of the 180-day rule.

Finally, because a motion for a new trial based on the 180-day rule would have been futile, defendant was not deprived of the effective assistance of counsel. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

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[1] It should be noted that defendant apparently opposed the motion to adjourn, but this fact does not change the analysis of defendant's speedy trial claim since delays caused by the adjudication of defense motions are attributable to the defendant.
564 NW2d 158 (1997).

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood