STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO H. NOBLE,

Defendant-Appellant.

UNPUBLISHED
September 11, 1998

No. 196891
Oakland Circuit Court
LC No. 95-142076 FH

Before: MacKenzie, P.J., and Whitbeck and G. S. Allen, Jr.*, JJ.

PER CURIAM.

A jury convicted defendant of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). Defendant subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12(1)(a); MSA 28.1084(1)(a). The trial court sentenced defendant to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I. Factual Background

Alan Slate testified that he was working as a security officer at a Handy Andy store on October 17, 1995 and that he observed defendant place large quantities of tools into a shopping cart. According to Slate, he saw defendant push the cart outside the store building into a garden area that was attached to the store and eventually place the tools in a planter located next to a wrought-iron fence. Slate indicated that defendant tilted the planter toward the fence in a manner that would allow one to grab the tools from outside the fence. Thereafter, defendant walked through the store and past the cash registers without attempting to pay for the items. Slate stopped defendant, took defendant to his office and called the police. The police eventually arrested defendant. A store manager made a "register tape" of the items in question that apparently indicated that their total retail price was $160.56. Apparently, Slate placed the items in an evidence locker in his office, but the items were liquidated when the store went out of business prior to the trial.

II. Alleged Violation of the "180-Day Rule"

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant argues that his conviction must be dismissed because he was deprived of the benefits of the 180-day rule, MCL 781(1) *et seq.*; MSA 28.969(1)(1) *et seq.*; MCR 6.004(D). However, defendant has not established any violation of this rule. The record reflects that, after his arrest, defendant was held in the Oakland County Jail awaiting trial. There is no indication that, at the time, he was detained in the local facility because he was awaiting incarceration in a state prison on other charges. Accordingly, this 180-day rule was inapplicable. MCR 6.004(D)(1); *People v Taylor*, 185 Mich App 1, 4; 460 NW2d 582 (1990).

III. Right to A Speedy Trial

Defendant argues that the 223-day delay between his arraignment and trial deprived him of his constitutional right to a speedy trial. We disagree.

In determining whether defendant was denied a speedy trial, this Court considers the length of delay, the reason for delay, defendant's assertion of the right to a speedy trial, and any prejudice to defendant. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997), see generally *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). Where, as here, the delay was less than eighteen months, the burden is on the defendant to prove prejudice resulting from the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

Here, defendant was arraigned on November 13, 1995, and defendant's trial was held on June 6, 1996. Defendant claims that he was prejudiced as a result of the seven and one-half month delay because an allegedly essential witness, the officer who arrested defendant and prepared an incident report, was on vacation at the time of trial. The trial commenced five days before it was scheduled. However, at trial, defense counsel stipulated, with defendant's consent, to strike the officer from the witness list. The officer had not witnessed the alleged crime. The officer's testimony about the incident would have been cumulative of Slate's testimony and unlikely to have impeached Slate's testimony. Accordingly, we conclude that defendant has failed to establish that his right to a fair trial was impaired by the short delay between the institution of charges and trial. Therefore, we find that defendant was not deprived of his constitutional right to a speedy trial. *Daniel*, *supra* at 51.

IV. Alleged Ineffective Assistance of Counsel

Defendant also contends that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). There is a strong presumption that trial counsel's conduct constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that his trial counsel was ineffective because he demeaned the prosecution's key witness in closing argument. We disagree. A defendant must overcome a strong presumption that counsel's actions were strategic. Counsel's attempt to discredit the only witness who observed defendant's actions in their entirety and whose testimony provided a strong basis for finding

each element of the alleged crime was a strategic decision that we will not second-guess. *Stanaway, supra* at 687.

Defendant next argues that counsel was ineffective because he stipulated to strike a material witness. The decision whether to call a witness is presumed to be a matter of trial strategy. *Daniel, supra* at 58. In order to overcome that presumption, a defendant must show that counsel's failure to call the witness would have affected the outcome at trial. *Id.* Contrary to defendant's claim, counsel agreed to strike the officer who arrested defendant and prepared an incident report because the officer's involvement in the case was minimal and because his testimony would have been cumulative, as the other officer who accompanied the witness to the scene of the crime testified at trial. We do not find trial counsel's decision in this regard to have fallen below an objective standard of reasonableness. *Barclay, supra.* Indeed, trial counsel may have reasonably concluded that it was in defendant's interest to not have additional potentially incriminating testimony presented. Moreover, defendant has failed to show that, had the officer testified, the outcome of the trial would have been different. *Daniel supra* at 58.

In a related argument, defendant claims that counsel was ineffective because he failed to use a mug shot taken at the time of defendant's arrest. Defendant argues that the photograph showing that his head was bald would have impeached the testimony of the prosecution's key witness who testified that defendant had very short black hair on the day of the incident. Once again, defendant has failed to overcome the presumption that counsel's actions were in the realm of reasonable trial strategy. Decisions regarding what evidence to present are presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). In the present case, counsel could have reasonably believed that his use of two other documents, which indicated that defendant was bald, was far more advisable than placing defendant's mug shot before the jury. Therefore, defendant has not shown that counsel's failure to produce the mug shot was unreasonable. *Barclay, supra.*

Defendant also claims that counsel was ineffective for failing to secure the allegedly stolen merchandise for trial. However, defendant has not shown that counsel's failure to secure the items was unreasonable in light of the fact that the merchandise was liquidated after the store went out of business shortly after the incident or that this deprived him of a fair trial where the photographs of the actual items were admitted at trial. *Barclay, supra.*

Finally, defendant argues that counsel should have objected when the prosecutor commented during rebuttal argument on defendant's failure to produce witnesses in closing argument. We disagree. Trial counsel did not err by failing to object because the prosecutor's argument was proper as a reasonable response to earlier argument by the defense. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.