STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS KENNETH GROKE,

Defendant-Appellant.

UNPUBLISHED
September 29, 1998

No. 200620
Recorder's Court
LC No. 94-003793

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of breaking and entering with intent to commit a larceny, MCL 750.110; MSA 28.305, and receiving or concealing stolen property over $100, MCL 750.535; MSA 28.803. Defendant was sentenced to ten to fifteen years in prison for his breaking and entering conviction, and to a concurrent sentence of three years and four months to five years in prison for his receiving or concealing stolen property conviction. He now appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to a speedy trial. We disagree. Whether defendant was denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review a trial court's findings of fact under the clearly erroneous standard. *Gilmore*, *supra*, 222 Mich App 459. Questions of law are reviewed de novo. *Id.*

Defendant's right to a speedy trial is guaranteed by the federal and Michigan constitutions, and by statute. US Const, Am VI; Const 1963, art 1, sec 20; MCL 768.1; MSA 28.1024. To determine whether a defendant has been denied his right to a speedy trial, this Court must balance the following factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *Gilmore*, *supra*, 222 Mich App 459.

Defendant was arrested in mid-March, 1994. His trial on the instant charges began on September 11, 1996. Because the length of delay here was almost thirty months, prejudice is presumed and the prosecution bears the burden of proving that defendant was not prejudiced. *Id*. at 460; *People v Cooper*, 166 Mich App 638, 654; 421 NW2d 177 (1987). However, when we consider the

reasons for the delay, we conclude that the majority of the delay was caused by

defendant's trials in two other criminal cases, and is charged to defendant. *People v Lewandowski*, 102 Mich App 358, 366; 301 NW2d 860 (1980). Defendant caused further delay in the instant case by successfully seeking the recusal of the original trial judge and the removal of his original trial counsel. Time needed to adjudicate defense motions is charged to the defendant. *Gilmore, supra,* 222 Mich App 461. Our review of the record indicates that minimal delay was caused by the court system. We also note that defendant did not make a sincere assertion of his right to a speedy trial. He made no formal assertion of the right until he moved to dismiss the charges against him in mid-1996, just before trial, and continued to seek to have his trial delayed even after asserting his speedy trial right. We thus conclude that his assertion was insincere and weighs against his claim that his right to a speedy trial was denied. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Finally, we consider the prejudice caused by the delay. There are two types of prejudice: prejudice to the person and prejudice to the defense. *Gilmore, supra,* 222 Mich App 461-462. Defendant's incarceration between arrest and trial was due in part to his charges and convictions in other cases and, therefore, defendant did not suffer any significant personal prejudice. Furthermore, nothing in the record indicates that the defense was prejudiced by the delay. General allegations of prejudice are insufficient to establish a denial of a right to a speedy trial. *Id.* at 462. We therefore conclude that the presumption of prejudice has been overcome.

After balancing the factors, we conclude that defendant was not denied his right to a speedy trial. Although the thirty-month delay is presumed to be prejudicial, most of the delay is attributable to defendant, defendant did not make a sincere assertion of his speedy trial right, and the presumption of prejudice was overcome. *Gilmore, supra,* 222 Mich App 462; *Cooper, supra,* 166 Mich App 655.

Defendant's second argument on appeal is that his constitutional rights were violated when he was removed from the courtroom for a brief period during trial. We disagree. This issue presents a constitutional question, which we review de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be present in the courtroom at every stage of his trial and the right to a face-to-face meeting with the witnesses against him. *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991). However, those rights are not absolute and must be "'interpreted in the context of the necessities of trial and the adversary process.'" *Staffney, supra,* 187 Mich App 663, quoting *Maryland v Craig*, 497 US 836, 850; 110 S Ct 3157; 111 L Ed 2d 666 (1990). The administration of justice requires the maintenance of dignity, order, and decorum in the courtroom. *Staffney, supra,* 187 Mich App 666. The test to determine whether a defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Here, defendant has not shown any prejudice resulting from his absence from the courtroom during the testimony of the two witnesses who testified during his absence. Moreover, we cannot conclude that defendant was prejudiced by the waiver of prosecution witness Frank Sereiko during his absence where there is no indication in the record that the witness would have provided testimony favorable to the defense. Defendant also suggests that certain comments made by the trial court during his absence harmed him in the eyes of the jury. However, reversal is not required on this basis because the comments were not of

such a nature as to unduly influence the jury and deprive defendant of his right to a fair and impartial trial. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

Defendant next argues that the trial court erred by refusing to appoint substitute counsel. We disagree. We review a trial court's decision to grant or deny a request for substitute counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Mack, supra*, 190 Mich App 14. Good cause exists where there is a legitimate difference of opinion between a defendant and his appointed trial counsel with respect to a fundamental trial tactic. *Id.* Here, defendant has not shown good cause to warrant substitution. Defendant and his counsel apparently disagreed with respect to whether to file an interlocutory appeal from the trial court's denial of defendant's motion to dismiss based on an alleged violation of defendant's right to a speedy trial. Because the disagreement involved a decision to file an appeal from a pretrial motion, it did not constitute a legitimate disagreement with respect to a fundamental trial tactic. *Id.* We further note that defendant had already been provided with new counsel once before, and further substitution on the day trial was to begin would have disrupted the judicial process by delaying a case that had already been in the system for an extended period of time. *In re Conley*, 216 Mich App 41, 45-46; 549 NW2d 353 (1996). We therefore conclude that the trial court did not abuse its discretion in refusing to appoint substitute counsel.

Defendant also argues that the trial court erred in refusing to allow him to represent himself at trial. However, we will not address defendant's argument because, despite defendant's statement at the conclusion of the pretrial hearing on his motion to dismiss based on a violation of his right to a speedy trial, defendant indicated at the start of his trial that he did not wish to represent himself. A party cannot request a certain action of a trial court, and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Defendant next argues that the court erred in modifying a valid sentence after it was imposed. We disagree.

Initially, the court orally announced a sentence of seven and one-half to fifteen years' imprisonment for the breaking and entering conviction. In a belligerent outburst, defendant then told the judge that he would "be back." After a brief recess, the court announced a sentence of ten to fifteen years' imprisonment for the breaking and entering conviction, and entered a judgment of sentence. The trial court did not err in altering its initial oral pronouncement because defendant had not yet been remanded to jail to await execution of his sentence and a judgment of sentence had not yet been entered. *People v Wybrecht*, 222 Mich App 160, 174; 564 NW2d 903 (1997); *People v Bingaman*, 144 Mich App 152, 157-159; 375 NW2d 370 (1984).

Defendant next argues that his sentence violated the principle of proportionality. We disagree. We review sentencing decisions under the abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires that a sentence be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra*, 435 Mich 636.

Defendant argues that the court erred in exceeding the sentencing guidelines' recommendation of a minimum sentence of between one and four years' imprisonment. However, the sentencing guidelines do not convey substantive rights, but are merely a tool to assist the trial court in exercising its discretion. *People v Potts,* 436 Mich 295, 303; 461 NW2d 647 (1990). The trial court may exceed the guidelines when to do so would not violate the principle of proportionality. *Milbourn, supra,* 435 Mich 657-660. Here, throughout the trial and sentencing hearing, defendant behaved arrogantly, made several outbursts, and displayed a lack of respect for the judge and the legal process. The sentencing court may properly consider defendant's conduct during trial when imposing sentence. *People v Ahumada,* 222 Mich App 612, 617; 564 NW2d 188 (1997). The sentencing judge also considered defendant's aggressiveness, his pattern of blaming others for his own conduct, and his history of taking advantage of others, including children. Defendant's attitude toward his criminal behavior and defendant's criminal, social and personal history are factors the court may consider when imposing a sentence. *People v Ross,* 145 Mich App 483, 495; 378 NW2d 517 (1985). We conclude that defendant's sentence was proportionate to the offender and to the seriousness of the circumstances surrounding the offense. *Milbourn, supra,* 435 Mich 636. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Finally, defendant argues that the Recorder's Court did not have subject matter jurisdiction because his crimes were not committed in the City of Detroit. We disagree. Although this issue was not formally raised below, we will consider it because a challenge to the trial court's subject matter jurisdiction may be raised for the first time on appeal. *People v Boynton,* 185 Mich App 669, 670; 463 NW2d 174 (1990).

The Recorder's Court has jurisdiction only over crimes committed within the corporate limits of the City of Detroit. MCL 725.10a; MSA 27.3950(1); *People v Fleming,* 185 Mich App 270, 274; 460 NW2d 602 (1990). Defendant's offenses were committed in Wayne County, but outside the corporate limits of the City of Detroit. However, pursuant to Administrative Order (AO) 1986-1, effective October 13, 1986, the Michigan Supreme Court temporarily assigned all judges of the Recorder's Court as visiting judges of Wayne County Circuit Court. *Fleming, supra,* 185 Mich App 274. AO 1986-1 was rescinded by AO 1995-5, effective October, 10, 1995. However, the rescission of AO 1986-1 did not divest judges assigned as visiting judges pursuant to that order of their jurisdiction in specific cases to which they were assigned prior to October 10, 1995. Rather, AO 1995-5 merely rescinded the future designation of all judges of the Recorder's Court as visiting judges in Wayne County Circuit Court as of October 10, 1995, but had no effect on the jurisdiction of judges already assigned pursuant to AO 1986-1. Therefore, defendant was properly tried in Wayne County Circuit Court by a judge of the Recorder's Court assigned to the circuit court as a visiting judge pursuant to AO 1986-1. *Fleming, supra,* 185 Mich App 274-275.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff