STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY CARIGON,

Defendant-Appellant.

UNPUBLISHED
February 23, 1999

No. 204005
Ionia Circuit Court
LC No. 96-010626 FC

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his 1997 jury-trial conviction of felony-murder, MCL 750.316; MSA 28.548, arising from the 1980 arson of an occupied travel trailer, which killed one person. Defendant was sentenced to life in prison without possibility of parole. We affirm.

Defendant first argues that the sixteen-year delay between the fire and his arrest violated both his right to a speedy trial and his due process right to a fair trial. We disagree on both counts. We review these constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

We first note that defendant's right to a speedy trial right did not attach until *after* he was arrested. See *United States v Lovasco*, 431 US 783, 788-789; 97 S Ct 2044; 52 L Ed 2d 752 (1977); see also *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987). Thus, the sixteen-year delay preceding his arrest cannot support a claim of a speedy trial violation.

As to the due process claim, "defendant must initially demonstrate 'actual and substantial' prejudice to his right to a fair trial." *People v Adams*, 232 Mich App 128, 134; ___ NW2d ___ (1998) (quoting *People v Bisard*, 114 Mich App 784, 790; 319 NW2d 670 (1982)). "In this context . . . defendant must show not only 'actual prejudice, as opposed to mere speculative prejudice . . . but [must] also show that any actual prejudice was substantial -- [i.e.,] that he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.'" *Adams, supra*, 232 Mich App at 134-135 (quoting *Jones v Angelone*, 94 F3d 900, 907 (CA 4, 1996)). "[G]eneralized allegations" of prejudice are insufficient.

Adams, *supra*, 232 Mich App at 135. But, "once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted." *Adams*, *supra*, 232 Mich App at 133-134 (quoting *Bisard*, *supra*, 114 Mich App at 791).

Here, defendant alleged that he was prejudiced by the delay because the victim's bank records were missing, because the trailer's manufacturer went out of business, and because the witnesses' memories were allegedly impaired. However, we find that none of these allegations are sufficiently supported to rise above the level of speculation. Although there was evidence of large withdrawals of cash from the victim's account, defendant's claim that some unnamed person had a financial motive to kill the victim was unsupported by any competent evidence, making the absence of the victim's bank records harmless. Blueprints of the missing trailer were available. Further, a fire expert testified that trailers of that era were made of highly flammable materials. Lastly, defendant did not specify whose memories were impaired or to what extent. Thus, he failed to demonstrate actual and substantial prejudice due to the delay.

On the other hand, defendant succeeded in showing that he was actually and substantially prejudiced by the absence of the trailer itself. Trial testimony showed that there was a valid dispute between the prosecutor's and the defendant's experts regarding whether the fire started inside or outside the trailer. There was also evidence that, when firefighters responded to defendant's 911 call after he initially attempted to start a fire, no fire was detected. Thus, if defendant's expert could have had an opportunity to examine the burned-out trailer, he might have been able to determine whether the victim, who was allegedly a heavy but careless smoker and had numerous burn marks on his couch, had accidentally set the fire sometime after defendant left.

However, the prosecutor showed that there was initially insufficient evidence to charge defendant because his former girlfriend, the only other living eyewitness, had refused to cooperate with police because she was afraid of defendant. It was not until 1994, two years before defendant's arrest, that she revealed that defendant had poured gasoline all around the trailer and had at least tried to set it on fire before calling 911. There was no evidence showing that the trailer was still in existence when she came forward in 1994. We thus conclude that this was a permissible "investigative delay" rather than an impermissible delay calculated to obtain a "tactical advantage" over defendant. *Adams*, *supra*, 232 Mich App at 140 (quoting *Lovasco*, 431 US at 795-796). The Supreme Court has indicated that a prosecutor acts properly and abides by "elementary standards of 'fair play and decency'" when he "refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Adams*, *supra*, 232 Mich App at 140 (quoting *Lovasco*, 431 US at 795-796). We therefore conclude that the prosecution's reason for the delay sufficiently justified the prejudice resulting to defendant.

Next, defendant argues that the trial court erred in refusing to give a voluntary manslaughter instruction to the jury. We again disagree.

We review jury instructions as a whole. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Even if erroneous, reversal is not required if the instructions fairly presented the

issues to be tried and sufficiently protected the defendant's rights. *Moldenhauer*, *supra*, 210 Mich App at 159; *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989).

Voluntary manslaughter is not a necessarily included lesser offense of the charge of murder, and therefore a lesser included offense instruction is not automatically required. *People v Hughes*, 85 Mich App 8, 12; 270 NW2d 692 (1978). However, an instruction on a cognate lesser included offense is required if "the evidence adduced at trial would support a conviction of the . . . lesser offense," and an instruction is requested. *People v Beach*, 429 Mich 450, 463-464; 418 NW2d 861 (1988); *Hughes*, *supra*, 85 Mich App at 12.

The crime of voluntary manslaughter is defined as an intentional killing, done in the heat of passion caused by adequate provocation, before a reasonable time has passed "during which a reasonable person could control his passions." *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Although provocation is normally a question of fact, a judge may refuse to give a manslaughter instruction if no reasonable jury could have found adequate provocation on the facts presented. *Pouncey*, *supra*, 437 Mich at 389-392.

Here, defendant alleges that the elderly victim told him that he wanted to have sex with defendant's girlfriend. All three were intoxicated. Defendant was seventeen at the time; his girlfriend was sixteen. There was no evidence that the victim ever touched defendant's girlfriend or initiated any contact between himself and defendant. The victim apologized after defendant pushed him to the ground. Defendant and his girlfriend then left, but defendant poured gasoline on the outside of the trailer and at least tried to set it on fire before he left. We are convinced that no reasonable juror would have found that the victim's comments constituted "adequate provocation" justifying defendant's behavior. Therefore, the trial court did not err in refusing to give a voluntary manslaughter instruction in this case.

Lastly, defendant argues that the trial court should have granted his motion for a new trial based on juror misconduct during voir dire. We disagree.

Juror misconduct will entitle defendant to a new trial if it "affect[ed] the impartiality of the jury or disqualif[ied] them from exercising the powers of reason and judgment," and resulted in "substantial harm." *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998) (quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960)). Thus, defendant must show that his right to a fair trial was "affirmatively prejudiced" by the alleged misconduct. *Fetterley*, *supra*, 229 Mich App at 545. Because this issue bears on defendant's constitutional right to a fair trial, we review it de novo. *Pitts*, *supra*, 222 Mich App at 263.

Here, defendant claims that one of the jurors had coached the son of a defense witness, and that their relationship was strained, but that the juror was good friends with the witness' older brother. Defendant also claimed that he had been in an auto accident with another juror's ex-husband three years before trial, and that she knew and lived very close to the same defense witness, who was also a friend of her father and her uncle. Neither juror mentioned these potential problems during voir dire, allegedly because they had forgotten. Defendant himself did not remember the auto accident until after trial. Given the nature of these contacts, we believe that they were unlikely to hurt defendant and cannot

conclude that that they impaired the jury's

ability to make an impartial decision. Thus, we agree with the trial court that defendant has failed to show that he suffered any prejudice as a result of the jurors' alleged misconduct.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey