STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD KEYS, a/k/a CHAD KEYES and LASHAWN GRAY,

Defendant-Appellant.

UNPUBLISHED
May 21, 1999

No. 205142
Genesee Circuit Court
LC No. 96-054718-FC

Before: Gage, P.J., and White, and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549,[1] and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and his bench trial conviction of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), all of which arose from a drive-by shooting which resulted in the death of a fourteen-year-old boy. The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of 40 to 60 years' imprisonment for the murder conviction and 80 to 120 months' imprisonment for the felon in possession of a firearm conviction, to run consecutive to a two-year sentence for the felony-firearm conviction. We affirm.

I

Defendant first argues that his waiver of a jury trial for the charge of felon in possession of a firearm was invalid because he did not sign a written waiver as required by statute. However, MCR 6.402(B) abolished the previous requirement of a signed waiver set forth in MCL 763.3; MSA 28.856 and replaced it with a requirement that the defendant make a knowing and intelligent waiver in open court. *People v Reddick*, 187 Mich App 547, 548-549; 468 NW2d 278 (1991). On this record, we conclude that the trial court properly ascertained that defendant understood his right to have a jury trial and that he voluntarily waived that right in open court. See MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Consequently, the trial court did not err in

determining that defendant validly waived his right to a jury. *People v Leonard*, 224 Mich App 569, 595; 596 NW2d 663 (1997).

II

Defendant next contends that the trial court abused its discretion in denying his request for a three-day adjournment in order to retain private counsel. We disagree.

A trial court's decision whether to grant or deny a motion for a continuance is subject to review for an abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995). In making such a determination, we consider whether "(1) the defendant was asserting a constitutional right; (2) he had a legitimate reasons for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion." *Id*., quoting *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990); *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976); *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972).

Claiming to be uncomfortable with a court-appointed attorney, defendant, on the day of trial, requested an adjournment to permit him to retain a lawyer. Defendant had ample time to accomplish this task in the four-month adjournment the court had already granted. Moreover, defendant proffered no support for his claim that his family recently obtained funds to pay for a retained attorney. Under these circumstances, the requested adjournment appears to have been a dilatory tactic to avoid trial. See *People v Flores*, 176 Mich App 610, 614; 440 NW2d 47 (1989). Furthermore, defendant has failed to show that he was prejudiced by the court's ruling. At no time did defendant allege that he was dissatisfied with appointed counsel's performance and the record is void of any evidence suggesting that she incompetently represented defendant's interests. *People v Van Sickle*, 116 Mich App 632, 635; 323 NW2d 314 (1982). Therefore, under the facts of this case, we find that the trial court did not abuse its discretion in denying defendant's request for an adjournment.

III

Third, defendant claims that the trial court reversibly erred in allowing the prosecutor to introduce Quinikia Badon's testimony that she told a police sergeant that fear inspired her initial refusal to cooperate in defendant's prosecution. Defendant contends that Badon's statement was inadmissible because the prosecutor failed to disclose the information prior to trial.

We find no abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). Although defense counsel apparently asked if there had been another interview and if there were any supplemental reports regarding any conversations the police had with the witness, the court concluded that the brief conversation was not an interview and that there was no obligation to issue a supplemental report. The prosecutor complied with MCR 6.201, which only requires production of written statements and exculpatory evidence. The statement at issue was neither written nor exculpatory. See *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Moreover, defendant's due process rights to discovery were not implicated because the statement was neither favorable to

defendant nor material and was not known to be false. See *id*., (delineating the three situations when a defendant's due process rights are implicated).

IV

Fourth, defendant argues that the trial court committed error requiring reversal by admitting Sergeant Elford's hearsay testimony that prosecution witness Clarence Smith told him that defendant stated "that one of the fools threw up [a gang symbol] on him and pulled, he went around the block, I think I got him, I unloaded my clip." We disagree.

We conclude that any error in admitting the testimony was harmless because Smith had already testified to the substance of the prior statement.

V

Finally, defendant argues that the prosecutorial comments made during defense counsel's opening argument and the prosecutor's closing argument denied him a fair trial. However, defendant either failed to object to the comments or request a curative instruction, or failed to timely and specifically object to the prosecutor's statements. Therefore, appellate review is precluded unless the misconduct was so egregious that no curative instruction could have eliminated the prejudice to defendant or unless manifest injustice would result from the failure to review the alleged misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After a contextual review of the prosecutor's comments, we find no impropriety. Moreover, any potentially prejudicial effects from the prosecutor's statements were cured by the court's instruction that the attorney's statements were not evidence and that the jurors should only accept the comments supported by the evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, manifest injustice will not result from our failure to review the alleged misconduct.

We affirm.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey

[1] Defendant was charged with open murder, MCL 750.316; MSA 28.548.