STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN MOHEAD,

Defendant-Appellant.

UNPUBLISHED
November 18, 2003

No. 243640
Calhoun Circuit Court
LC No. 01-004686

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for resisting and obstructing a police officer, MCL 750.479(b), and assault with a dangerous weapon, MCL 750.82. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to concurrent terms of sixteen months to two years' imprisonment for the resisting and obstructing a police officer conviction and forty months to fifteen years' imprisonment for the felonious assault conviction. We affirm.

Defendant's first issue on appeal is that his convictions must be reversed and dismissed because he was denied his state and federal constitutional right to a speedy trial when he was not brought to trial until nearly fourteen months after his arrest. We disagree.

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, sec 20; MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). To preserve a speedy trial issue for appeal, a defendant must make a formal demand for a speedy trial on the record. *Cain, supra* at 111. Defendant did not make a formal demand for a speedy trial on the record and, thus, the issue is not preserved for appeal. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich

272, 283; 262 NW2d 641 (1978); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). The defendant must prove prejudice when the delay is less than eighteen months. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Cain, supra* at 112. A delay of more than eighteen months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecutor. *Id.*

In assessing the reasons for the delays, each period of delay is examined and attributed to the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Unexplained delays are attributed to the prosecutor. *Id.* Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but should be given a neutral tint and only minimal weight. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Delays caused by the adjudication of defense motions are attributable to the defendant. *Id.* at 461. The time between dismissal and reinstatement of a charge is not counted against either party. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). The defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

Defendant was arrested on May 10, 2001, and his trial did not begin until July 9, 2002. In the present case, there was a delay of more than six months but less than eighteen months, and, as such, further investigation of the speedy trial issue has been triggered. See *Cain, supra* at 112. Because the delay is less than eighteen months, defendant must prove prejudice. See *Collins, supra* at 695; *Cain, supra* at 112. Defendant has not met his burden.

A defendant can experience two types of prejudice while awaiting trial. *Gilmore, supra* at 461-462. Prejudice to the person results when pretrial incarceration deprives an accused of many civil liberties, and prejudice to the defense occurs when the defense might be prejudiced by the delay. *Id.; People v Ovegian*, 106 Mich App 279, 285; 307 NW2d 472 (1981). The latter prejudice is the more crucial in assessing a speedy trial claim. *Id.* A general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, or financial burden, is insufficient to establish that a defendant was denied his right to a speedy trial. *Gilmore, supra* at 462*; People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987); *People v Wyngaard*, 151 Mich App 107, 111-112; 390 NW2d 694 (1986). Anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Gilmore, supra.*

The only prejudice defendant alleges is that he suffered general oppressive pretrial incarceration and that there was a problem with anxiety and concern. Defendant concedes that, factually, there is no showing that the defense was impaired by the delay in this case. There is no evidence suggesting that the defense was actually prejudiced by the delay. In addition, there is no indication or allegation that a potential witness favorable to defendant, or other exculpatory evidence, was lost due to the delay in bringing defendant to trial. See *Gilmore, supra* at 461-462. Further, defendant was not prejudiced by his continued incarceration awaiting trial because the record reflects that his pre-trial incarceration was less than eighteen months and that he was released a few months prior to his trial. And, there is no showing on the record that defendant's pre-trial incarceration was excessively oppressive. See *Ovegian, supra* at 285. General allegations of prejudice are insufficient to establish that a defendant was denied the right to a speedy trial. *Gilmore, supra* at 462. Moreover, defendant's general allegations of increased

anxiety and mental anguish while awaiting trial are also insufficient to show prejudice to his person. *Id*.

Presumably, some time prior to August 24, 2001, defense counsel filed a motion to withdraw as an order was entered on this day denying the motion to withdraw. On November 6, 2001, defendant filed a motion for an independent psychiatric examination. It appears that trial was set for November 20, 2001. Apparently, the prosecution was unable to proceed because material evidence was not available, but planned to reissue and, the trial court, upon a motion from the prosecution, issued an order of nolle prosequi on November 19, 2001.[1] On February 11, 2002, defense counsel filed a motion for a criminal responsibility and competency examination, and a notice of the defense of insanity/diminished capacity document. On March 7, 2002, the trial court denied the motion for criminal responsibility and competency examination. The lower court record reveals that a jury trial was originally scheduled for May 14, 2002, but that instead bond hearings were held on May 14, 2002 and May 16, 2002. On May 16, 2002, the trial court lowered bond to $15,000 personal recognizance. Around this time, defendant was released with certain conditions. On May 31, 2002, defendant filed a motion for initial review and consultation regarding DNA evidence and a DNA discovery demand. On June 13, 2002, the trial court granted defendant $1,500 for a DNA expert to review and consult with counsel regarding the prosecution's DNA evidence. On July 5, 2002, defendant filed a motion to suppress DNA evidence. On July 9, 2002, the trial began, defendant was found guilty on July 12, 2002, and was sentenced on August 12, 2002.

The most significant delay by the prosecution was causing the dismissal when material evidence was not available at the time of the original trial date. But, typically, these types of delays are not counted against either party. See *Wickham*, *supra* at 111. At the very least, one month of the delay can be attributed to defendant. Although some of the delay may, clearly, be attributed to the prosecution, other delays are attributed to defendant, and the period of delay was not so substantial or out of the ordinary to show prejudice to defendant. *Cain*, *supra* at 112-113.

The fact that the delay was just over a year and partly attributable to defendant, together with defendant's inability to prove prejudice and the fact that defendant did not assert the right to a speedy trial below, all weigh in favor of the prosecution. The reasons for the delay, not attributable to defendant or the prosecution, are not clear on the record before this Court. It is clear that defendant was filing motions and preparing for trial shortly before the trial began. Even assuming that the reason for the delay would favor defendant, the fact that the other three factors weigh heavily against him dictate that the balancing of all the factors results in a finding against defendant, i.e., that his right to a speedy trial was not violated. Therefore, balancing the

[1] We note that part of this procedural history was taken from the prosecution's brief on appeal as this Court was not provided the records from this case prior to when it was reissued by the prosecution. The procedural history is supported by documents attached to the prosecution's brief on appeal. We note that it is impermissible to expand the record on appeal. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). However, the information used from the prosecution's brief was supported by appendices which were court documents from the case prior to reissue and, thus, the prosecution was not expanding the record on appeal as this information was also before the trial court.

four applicable factors and based on the record available, we cannot conclude that defendant was deprived of his right to a speedy trial. See *Barker, supra* at 530; *Hill, supra* at 283; *Mackle, supra* at 602. Consequently, there was no violation of defendant's constitutional right to a speedy trial.[2]

Defendant's final issue on appeal is that his convictions must be reversed and dismissed where the district court judge relied on testimony contained in a prior preliminary examination transcript as the basis for his decision to bind over where the prosecution made no showing that witnesses were unavailable. We disagree.

A magistrate's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003); *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003); *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000). To warrant reversal, an error in a preliminary examination procedure must have affected the bindover and must have adversely affected the fairness or reliability of the trial. *People v McGee*, ___ Mich App ___; ___ NW2d ___ (Docket No. 241147, issued 10/2/03) slip op p 8. A magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Further, error due to improperly admitted evidence at a preliminary examination will not require that a later verdict be set aside unless, on the whole record, the error resulted in a miscarriage of justice. *People v Hall*, 435 Mich 599, 603-604, 613; 460 NW2d 520 (1990); *McGee*, *supra* at slip op pp 7-8.

To preserve for appeal a claim of errors or irregularities relating to the preliminary examination, a defendant must raise the issue before or during trial. *People v Missouri*, 100 Mich App 310, 347-348; 299 NW2d 346 (1980). Defendant never objected to the court's second preliminary examination based on the use of the testimony from the prior proceeding, but, rather, only objected based on his argument that res judicata should apply. *Id*. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

In Michigan, the right to a preliminary examination is solely a creation of the Legislature[3] and is not a procedure that is based on the constitution. *Hall*, *supra* at 603; *People v Jones*, 195

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[2] We note that the prosecution's brief on appeal attempts to characterize the issue as a 180-day rule issue. Although it does not appear that defendant has referenced the 180-day rule, MCL 780.131, this rule is inapplicable to the instant case because MCL 780.131 imposes the 180-day rule only when the defendant is sentenced to a state prison, the rule does not affect charges against inmates incarcerated in county jail while awaiting trial, *People v McLaughlin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234433, issued 9/25/03) slip op p 3, and there is no indication that defendant was so affected. See, generally, *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). Furthermore, defendant has framed his issue and analysis in terms of a violation of his right to a speedy trial.

[3] The right to a preliminary examination derives from MCL 767.42(1), which states in part:

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Mich App 65, 66-67; 489 NW2d 106 (1992). This Court in *McGee, supra* at slip op 6-7, recently provided the following with regard to preliminary examination and its purpose:

> An accused does not have a constitutional right to a preliminary examination, a procedure established by Legislature, MCL 766.1 et seq., and recognized by court rule, MCR 6.110(A).[4] *Hall, supra* at 603; *People v Johnson*, 427 Mich 98, 103-104; 398 NW2d 219 (1986). Where a criminal prosecution is initiated by the filing of an information rather than by indictment, the accused has a statutory right to a preliminary examination. MCL 766.1; [*People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001)]. The right to a preliminary examination is more than a matter of procedure. *Id*. at 282. The magistrate's bindover to circuit court after examination or defendant's waiver of examination, authorizes the prosecutor to file an information. MCL 767.42(1); *Hunt, supra* at 362. . . .
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> Although the preliminary examination may assist in fulfilling the constitutional requirement that the accused be informed of the nature of the charge, *Johnson, supra* at 104, the primary function of the preliminary examination "is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *Glass, supra* at 277. Thus, a preliminary examination "primarily serves the public policy of ceasing judicial proceedings where there is a lack of evidence that a crime was committed or that the defendant committed it." *Johnson, supra* at 104-105.

The original case against defendant was dismissed and the prosecution elected to reissue.[5] The following occurred at the second preliminary examination held on December 3, 2001:

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> An information shall not be filed against any person for a felony until such person has had a preliminary examination therefore, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination.

[4] MCR 6.110(A) provides the following, in part, with regard to a preliminary examination:

> The people and the defendant are entitled to a prompt preliminary examination. If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or indictment.

[5] Apparently, as stated in defendant's brief on appeal and not disputed by the prosecution, a preliminary examination was held on May 22, 2001, and defendant was bound over on charges of assault with intent to commit murder, MCL 750.83, three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and resisting and obstructing a police officer, MCL 750.479. The charges were dismissed in November 2001 without prejudice as the trial court granted the prosecution's motion for nolle prosequi. Then, the prosecution elected to reissue

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MR. COLEMAN: Your Honor, because this is a reissued matter and there was an exam conducted the first time, the People do not intend on calling any witnesses and would move the Court to bind over on the charges listed based on the transcript from the previous examination.

THE COURT: Mr. Downing?

MR. DOWNING: Object to the proceedings, your Honor. This matter has been dismissed. We hold res judicata would apply. Ask that the matter be dismissed again.

THE COURT: Well, there is a case on the situation that covers this. The state has the right to move based upon the prior testimony unless there is a distinct showing on the record that there would be new and different testimony produced by defendant if there was a preliminary examination. I find that's not the case on this record. So I'll grant the motion.

Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *Yost, supra* at 126. To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but he must present some evidence of each element. *Yost, supra*; *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

In the present case, no transcript was provided from the initial preliminary examination. The appellant must provide this Court with the lower court record. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). This Court will refuse to consider issues for which the appellant failed to produce the transcript. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987). As such, we refuse to consider any issue that relates to what evidence was produced at the initial preliminary hearing, and whether the evidence presented at the initial preliminary examination was sufficient to bindover to circuit court. Additionally, defendant does not even appear to argue that sufficient evidence was not produced at the initial preliminary hearing, but, rather, appears to only argue a procedural error exists.

In *Jones, supra*, the defendant moved to quash the information at a second preliminary examination unless the prosecution could produce new evidence showing probable cause to bind him over. *Id*. at 67. The district court decided that there was no reason to hold another preliminary examination because it was undisputed that the evidence to be offered was the same. *Id*. This Court determined that the defendant waived his right to a preliminary examination by his failure to dispute the fact that the evidence presented at the first preliminary examination was sufficient to determine probable cause to bind him over. *Id*. at 67-68.

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charging defendant with two counts of first-degree CSC, MCL 750.520b(1)(f), resisting and obstructing a police officer, MCL 750.479, and assault with a dangerous weapon, MCL 750.82.

Defendant did not, and does not on appeal, dispute that the evidence presented at the initial preliminary hearing was not sufficient to determine probable cause or bind him over; nor did defendant present the transcript of the original preliminary examination to this Court. See *Jones, supra* at 68; *Coons, supra* at 740. Moreover, as noted, defendant never objected to the second preliminary examination based on the use of the testimony from the prior preliminary examination. *Id.*; *Asevedo, supra* at 398. Defendant, similar to the defendant in *Jones, supra*, did not dispute whether the evidence from the prior hearing was sufficient to bind him over to circuit court. See *Jones, supra* at 68. Consequently, we find that defendant waived his right to a preliminary examination under MCL 767.42(1). See *id.*[6]

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[6] Even if there was error, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *Libbett, supra* at 357. Further, error due to improperly admitted evidence at a preliminary examination will not require that a later verdict be set aside unless, on the whole record, the error resulted in a miscarriage of justice. *Hall, supra* at 603-604; *McGee, supra* at slip op pp 7-8. In addition, "[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. Because defendant's conviction was based on proof beyond a reasonable doubt we can surmise that had a typical preliminary examination been conducted defendant would have been bound over to circuit court for trial because the examination utilizes the lesser standard of probable cause. See *McGee, supra.* No error exists with regard to defendant's preliminary examination that resulted in a miscarriage of justice.