STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABDUL J. SANDERS,

Defendant-Appellant.

UNPUBLISHED
December 2, 2003

No. 243622
Wayne Circuit Court
LC No. 01-004697-01

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and felony-firearm, MCL 750.227b. He appeals as of right, asserting prosecutorial misconduct and denial of the right to a speedy trial. We affirm.

I. FACTS

At trial, Cassondra McIntosh testified that at approximately 2:00 a.m. on March 3, 2001 she was sitting in a van in a hotel parking lot in Detroit with her fiancé Otis Parks. McIntosh stated that she was sitting on the passenger side of the van listening to music with Parks when her door got "snatched open" and defendant bent over into the van and put a gun to her chest. McIntosh further testified that defendant asked her if she had any money, whose wife she was, and who was paying for the room. McIntosh stated that she told defendant she did not have any money, that he checked her pockets, and then reached over her and put the gun to Parks' head. McIntosh testified that defendant told Parks to take his pants off, took $800 from them, threw them on the ground, and then told McIntosh and Parks to get in the back of the van and count to thirty with their backs turned. Parks also testified to these facts. Both McIntosh and Parks stated that the episode lasted approximately ten minutes and that they were able to see defendant's face the whole time.

At the conclusion of the trial, defendant was found guilty on all charges, and received sentences of 12 to 20 years for the armed robbery conviction and 12 to 20 years for the assault with intent to rob while armed conviction. The sentences for these convictions are to be served concurrently, but consecutive to a two year sentence for the felony firearm conviction. Defendant appeals as of right.

II. PROSECUTORIAL CONDUCT

Defendant argues that he was denied a fair trial due to prosecutorial misconduct, alleging the prosecutor argued facts not in evidence by telling the jurors during closing arguments defendant was linked to the present robbery after being arrested for another crime because he fit a similar description of a pattern of robberies the police had found, and also that the prosecutor told the jurors that the complainant witnesses were one-hundred percent sure and had no doubts in their minds defendant was the robber when they had testified that they were ninety-nine percent sure. We disagree.

A. Standard of Review

Defendant failed to object to the prosecutor's conduct during trial. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

B. Analysis

The test for prosecutorial misconduct is whether defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte, supra*, 721, citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *Noble, supra*, 660. "No error requiring reversal will be found if the prosecutor's comments could have been cured by a timely instruction, *Schutte, supra*, 721-722, and, absent an objection, a trial judge's instruction to the jurors that arguments of attorneys are not evidence will dispel any prejudice. *Id*., 721-722, quoting *Bahoda, supra*, 281.

Here, we believe any error could have been cured by an instruction to the jurors had defendant objected during the prosecution's closing arguments. Furthermore, we believe any prejudice was dispelled by the trial court's instruction that statements by attorneys are not evidence. *Schutte, supra*, 721-722.

We also conclude that defendant's assertion that he was denied his presumption of innocence and right to a fair trial because the prosecutor stated complainant McIntosh was one-hundred percent sure and never had a doubt in her mind is without merit. Although defendant correctly asserts that McIntosh did not testify at trial that she *never* had a doubt in her mind, she did testify that there was no doubt in her mind defendant was the robber after hearing him speak and seeing his eyes at the line-up. She also stated she had previously identified defendant at the preliminary examination on August 20, 2001, and stated there was no doubt in her mind as she sat at trial that defendant was the robber.

We also note defendant is correct in his assertion that neither McIntosh nor complainant Parks ever stated they were one-hundred percent sure defendant was the robber. However, McIntosh did testify that she was ninety-nine percent sure, had no doubt in her mind, and would not have wanted to testify if she even had a little doubt. Parks also testified that he was ninety-

nine percent sure. Therefore, we conclude that the prosecution's statements did not affect defendant's substantial rights and did not affect the outcome of the trial. Moreover, we do not believe the prosecution's comments "resulted in the conviction of an actually innocent defendant" or "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of defendant's innocence." *Carines*, *supra*, 763-764 (citations omitted).

III. SPEEDY TRIAL

Next, defendant argues that his right to a speedy trial was violated. We disagree.

A. Standard of Review

"A defendant must make a 'formal demand on the record' to preserve a speedy trial issue for appeal." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999) (citation omitted). Because defendant did not make a formal demand on the record, our review is limited to whether plain error occurred that affected defendant's substantial rights. *Carines*, *supra*, Mich 763-764. No such plain error occurred.

B. Analysis

Criminal defendants have the right to a speedy trial under the federal and Michigan constitutions, Michigan statute, and the Michigan Court Rules. US Const, Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). "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." *Mackle*, *supra*, 602. "A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice." *Cain*, *supra*, 112.

The first factor to be considered is the length of the delay. In *Cain*, *supra*, 111-112, this Court reviewed a 27-month delay between defendant's arrest and trial and found that it was not substantial enough to show prejudice. In the present case, defendant was arrested on April 2, 2001 and was tried on March 25, 2002. Thus, the delay between arrest and trial was less than twelve months; less than half the delay reviewed in *Cain*. Moreover, we note that defendant was arrested on April 2, 2001 for a different crime, that the police did not notice a connection between defendant and the March 3, 2001 robbery until conducting further investigation, and that defendant was not placed in a line-up and identified as the culprit in the March 3, 2001 robbery until April 10, 2001. Therefore, the length of delay in the present case, as in *Cain*, was not substantial enough to show prejudice.

The second factor is the reason for the delay. The reasons for the delay in the present case were not unreasonable. Defendant argues that scheduling caused much of the delay and therefore, much of the delay must be attributed to the state. However, such delays "are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Moreover, defendant's argument on this point is even less persuasive because the prosecution was burdened with preparing for and scheduling two different cases involving defendant.

Defendant also asserts his first court-appointed attorney's withdrawal three days before the first trial date as a reason that should be attributed to the prosecution, arguing that no evidentiary hearing was held on the motion, that he was not given adequate notice, and that no documentation was supplied to support the motion, leaving the substance of the motion to mere speculation. Defendant grossly misstates the facts to this Court on this argument. Defendant himself wrote a letter to the trial court stating he believed his counsel was untrustworthy and that defendant no longer desired his representation. Defendant also filed a grievance against his counsel and testified at the November 2, 2001 pretrial conference that he believed his counsel was untrustworthy and no longer wanted his representation. Thus, defendant himself was responsible for some of the delay, as the trial court was forced to find defendant new court-appointed private counsel and grant defendant's new counsel time to review defendant's case and prepare for trial.

The third factor to be considered is whether defendant asserted his right to a speedy trial. Defendant did not do so, and this Court has held that a "defendant's failure to assert timely his right in this case weighs against a finding that he was denied a speedy trial." *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

The fourth factor requires the delay to have prejudiced defendant. "[T]here are two types of prejudice, prejudice to the person and prejudice to the defense." *Wickham, supra*, 112. "Of the two types of prejudice the defendant may experience while awaiting trial, prejudice to his defense is considered the more crucial." *People v Ovegian*, 106 Mich App 279, 284-285; 307 NW2d 472 (1981). Moreover, with respect to prejudice to defendant's person, defendant in *Ovegian* was incarcerated for approximately 29 months before trial. This Court found there to be no substantial prejudice to defendant's person, stating "[p]retrial incarceration is always 'prejudicial' in that the accused is denied many of his civil liberties. Defendant asserts that his pretrial incarceration was excessively oppressive. However, this allegation has not been supported in the record." *Id*., 284 (citation omitted). In the present case, defendant has not alleged any specific harm resulting from his incarceration other than enjoyment of his lifestyle, and we find no evidence of oppression in the record.

Defendant alleges his defense was prejudiced because "[a]s time went on the two witnesses moved from being confused and unsure, to being 99 percent sure the robber had been Mr. Sanders." Defendant also states "apparently, Mr. Sanders' alibi was undermined." However, with respect to defendant's allegation that his alibi was undermined, the record reflects defendant's alibi witness was present to testify at trial on March 25, 2002, but that defendant chose not to put on a defense.

Regarding his allegations that McIntosh and Parks' memories were affected, defendant cites the following language from our Supreme Court's holding in *People v Grimmett*, 388 Mich 590, 606; 202 NW2d 278 (1972), overruled on other grounds by *People v White*, 390 Mich 245; 212 NW2d 222 (1973), quoting *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972): "There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. *Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.*" (Emphasis by *Grimmett* Court). First, we note that *Grimmett* refers to loss of memory by defense witnesses. In the present case, defendant presented no witnesses; McIntosh and Parks were called by the prosecution. Moreover, we do not believe the record shows that McIntosh and Parks' memories were affected by the delay.

McIntosh testified there was no doubt in her mind at the time of the line-up that defendant was the robber, and that she was ninety-five percent sure. The officer in charge also testified that McIntosh was very sure defendant was the robber after hearing him speak at the line-up. Furthermore, Parks testified he was ninety-nine percent sure at the time of the line-up, and the officer in charge testified Parks mentioned he was sure defendant was the robber after the line-up. Therefore, defendant has not shown prejudice or that plain error occurred.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White