STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2004
v	No. 245056 Saginaw Circuit Court
CHARLES ERIC JONES, Defendant-Appellant.	LC No. 00-019335-FC

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions for armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to 360 to 600 months' imprisonment for armed robbery, 60 to 120 months' imprisonment for felon in possession of a firearm, and a consecutive sentence of 24 months' imprisonment for felony-firearm. We affirm.

Defendant argues that his constitutional right to self-representation was violated. An individual has an implied right to self-representation under the Sixth Amendment and an explicit right to self-representation under the Michigan Constitution. *Faretta v California*, 422 US 806, 818-819; 95 S Ct 2525; 45 L Ed 2d 562 (1975); Const 1963, art 1, § 13. However, the right to self-representation is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). An unequivocal request for self-representation is a prerequisite to the court's obligation to conduct a further inquiry into that request. *Id*. at 367-368. "The defendant must exhibit 'an intentional relinquishment or abandonment' of the right to counsel, and the court should ' "indulge every reasonable presumption against waiver" ' of that right." *People v Adkins (After Remand)*, 452 Mich 702, 721; 551 NW2d 108 (1996), quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

In this case, defendant did not unequivocally express a desire to represent himself or to abandon his right to counsel. Although defendant moved to proceed in propria persona, in a subsequent letter to the trial judge, defendant asserted that the court was duty bound to appoint new counsel for him and also that he had an absolute right to conduct his own defense. A request for substitute counsel made at the same time as a request for self-representation is not an unequivocal waiver. *People v Ahumada*, 222 Mich App 612, 615; 564 NW2d 188 (1997). Thus,

defendant did not unequivocally assert his desire to represent himself or waive his right to counsel, and defendant's argument must fail.

Next, defendant claims his trial violated the 180-day rule. Under MCL 780.131, outstanding warrants, indictments, informations, and complaints against individuals in the custody of the Department of Corrections must be tried or disposed of within 180 days. However, this rule only applies to persons in state prison or in the custody of the Department of Corrections. MCL 780.131(1). The statute does not apply to persons confined in local county jails for parole violations unless their parole is revoked. *People v Von Everett*, 156 Mich App 615, 618; 402 NW2d 773 (1986). Defendant was confined in the Saginaw County jail on a parole violation and was not in the custody of the Department of Corrections. Therefore, the 180-day rule does not apply to defendant.

Likewise, defendant's constitutional right to a speedy trial was not violated. Although approximately twenty-four months elapsed between defendant's arrest and his trial, a long delay alone is not enough to conclude that defendant's constitutional rights were violated. *People v Classen*, 50 Mich App 122, 126; 212 NW2d 783 (1973). In this case, trial adjournments were granted from April 24, 2001, to February 12, 2002—a period of more than nine months—pursuant to requests by defendant and express waivers of his speedy trial rights. Further delay of approximately 6½ months can be attributed to defendant's motions for new counsel and a different judge. The only delay genuinely attributable to the prosecutor or the court is a three-month delay that occurred on February 12, 2002, because of a trial that ran overtime. When the prosecutor stands ready for trial, delaying motions by defendant do not bar trial. See *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). Therefore, defendant's claim must fail.

Next, defendant claims he was deprived of due process and a fair trial by the admission of identification evidence from a photographic lineup. Defendant claims the trial court erred in denying his request for a physical lineup. Our Supreme Court has held that photographic identifications should not be used "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). However, in this case, defendant's attorney actually *suggested* and *agreed* to a photographic lineup. A party may not stipulate a matter or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Therefore, this claim also must fail.

Next, defendant claims he was denied due process and a fair trial because the witnesses' identification of him at trial was tainted by the suggestive nature of the confrontation at the preliminary examination. Although defendant moved in the trial court to suppress the pretrial identifications, the argument made by defendant in the trial court was that the *photographic lineup* was suggestive, not that the preliminary examination was suggestive. To preserve an evidentiary objection for appeal, a party must assert the same grounds in the trial court that the party raises on appeal. *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003), citing MRE 103(a)(1); *Samuel D Begola Services v Wild Bros*, 210 Mich App 636, 642; 534 NW2d 217 (1995). Therefore, this issue is not preserved. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).

Additionally, we find no error in the trial court's failure to grant defendant a continuance to subpoena witnesses for his defense. Unlike the defendant in *People v Williams*, 386 Mich

565, 571-572; 194 NW2d 337 (1972), on which defendant relies, defendant was negligent in waiting until the eve of trial to inform his attorney of the names of six witnesses he wished to call. There was no bona fide dispute between defendant and his attorney to justify a continuance, as in *Williams*. Furthermore, the prosecutor's discovery request was filed nearly two years before, and trial was adjourned numerous times at defendant's request.

Nor do we find error in the trial court's refusal to dismiss the case based on the prosecutor's alleged failure to timely comply with discovery. The videotape of the robbery was made available to the defense on September 11, 2001, more than a year before trial. Any delay in turning over the tape was harmless. Defendant also claims the prosecution failed to disclose a lack of fingerprint evidence. However, under *United States v Bagley*, 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985), evidence must be *material* for a party to allege error based on nondisclosure. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 682. Defendant has not made this showing.

Next, defendant demands reversal of his conviction because there were no African Americans on his jury, despite the fact that they allegedly comprise 17.77 percent of Saginaw County's population. Although the underrepresentation was regrettable, we find no constitutional violation. "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that . . . the underrepresentation was the result of systematic exclusion of the [distinctive] group from the jury-selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Defendant's naked assertion that such underrepresentation "often happens in Saginaw" is not sufficient to prove systematic exclusion. Moreover, the juror selection process used by Saginaw County in this case was upheld by our Supreme Court in *Smith*, *supra* at 209.

Next, defendant claims ineffective assistance of counsel based on his attorney's failure to object to alleged prosecutorial misconduct at trial. This claim has no merit. To establish ineffective assistance of counsel, defendant must show that but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant has not made this showing. Given the overwhelming physical evidence against defendant, we are not convinced that any failing on the part of defendant's three attorneys affected the outcome of the trial. And, consequently, having found no error on any of defendant's claims, we also find no cumulative error.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald