

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 23, 2014

v

TINA MARIE STOLL,

No. 316864  
Emmet Circuit Court  
LC No. 12-003717-FC

Defendant-Appellant.

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Before: MURPHY, C.J., and SAWYER and M.J. KELLY, JJ.

PER CURIAM.

Defendant was found guilty of armed robbery, MCL 750.529, and assault with intent to commit murder, MCL 750.83, following a jury trial. She was sentenced as a second habitual offender, MCL 769.10, to 20 to 40 years' imprisonment. Defendant appeals as of right. We affirm.

It is undisputed that on January 4, 2008, someone robbed a dollar store in Petoskey and assaulted the clerk, stabbing her in the chest with a knife and attempting to cut her throat. The perpetrator left a scarf at the store, which was sent to the Michigan State Police Laboratory. Two human hairs were found on the scarf. The laboratory determined that it could not perform traditional DNA testing on the hairs, but that the hairs could be tested for mitochondrial DNA at a private laboratory. One hair and a known sample from defendant were then tested by a private laboratory, which determined that defendant could not be excluded as the donor of the hair. However, according to the prosecution, that laboratory subsequently had problems with its accreditation. The prosecution asserted that it delayed bringing charges against defendant because it hoped that the laboratory would soon become accredited. A chief concern of the prosecution was that the store clerk was unable to identify defendant as the perpetrator, and defendant had suggested the possibility that another particular individual may have committed the crime, thereby explaining the importance of obtaining an untainted mitochondrial-DNA test result. The prosecution indicated that it was hesitant to submit the other hair sample from the crime scene to a different laboratory because any problems at a second lab would leave no hair samples left to test.

However, the prosecution observed that by 2012, after regularly checking with the laboratory, it determined that the lab was not going to become accredited in the near future. The second hair and a known sample from defendant were then sent to a second laboratory that was

accredited. This laboratory determined that defendant could not be excluded as the donor of the hair. It was also determined through statistical probability analysis that, although mitochondrial DNA cannot be used to uniquely identify a specific person as with regular DNA testing, 99.94% of individuals would fall into the exclusion group in this case, leaving 0.06% of individuals, including defendant, in the inclusion group. The prosecution thereafter brought charges against defendant in June 2012.

Before trial, defendant moved to dismiss the charges, arguing that the prearrest delay deprived her of due process. She asserted that her mother died between the offense and the initiation of the prosecution, and that her mother would have provided her with an alibi. The trial court denied the motion. It first concluded that defendant had failed to show that the delay actually and substantially prejudiced her because defendant did not indicate that other sources or witnesses were unavailable to establish an alibi. The trial court also determined that the prosecution's reasons for the delay were not improper because they were investigative.

On appeal, defendant argues that her due process rights were violated by the delay in charging her. We review de novo whether the prearrest delay violated defendant's right to due process. *People v Reid (On Remand)*, 292 Mich App 508, 511; 810 NW2d 391 (2011). We review a trial court's underlying factual determinations for clear error. *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003).

Due process, to a limited extent, protects defendants from undue delay between the commission of an offense and the initiation of a prosecution. *People v Adams*, 232 Mich App 128, 133; 591 NW2d 44 (1998). To establish a violation of due process because of prearrest delay, "a defendant must initially demonstrate 'actual and substantial' prejudice to his right to a fair trial." *Id.* at 134-135. "Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected." *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009). "A defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, even if the delay was an especially long one." *People v Woolfolk*, 304 Mich App 450, 454; 848 NW2d 169 (2014) (citations omitted). "The death or unavailability of an alibi witness is an important factor to be considered in determining whether defendant was unduly prejudiced[;] [h]owever, it is not always prejudicial[.]" *People v Fiorini (On Rehearing)*, 59 Mich App 243, 249; 229 NW2d 399 (1975).

If a defendant establishes prejudice, the burden shifts to the prosecution to persuade the court that the reason for the prearrest delay was sufficient to justify whatever prejudice may have resulted. *Adams*, 232 Mich App at 134. "[A]n investigative, as opposed to tactical, delay does not violate the Due Process Clause[.]" *Id.* at 140. In sum, "[a] pre-arrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process." *Woolfolk*, 304 Mich App at 454.

Here, defendant claimed that she awoke at approximately 9:00 a.m. on the morning of the robbery and then went directly to a courthouse with her mother, arriving there at about 9:30 a.m. As the trial court recognized, the important detail in defendant's story was that she was at her house at 9:00 a.m., the approximate time of the robbery. While defendant alleges that her mother would have corroborated her timeline and provided an alibi, defendant failed to assert that her

mother was the only person who saw her at 9:00 a.m. or shortly thereafter. As the trial court stated:

[Defendant] has not presented any testimony or evidence . . . to explain whether or not others may have observed her in her home departing on the morning in question or otherwise to show that the substance of the testimony that could have been obtained from her mother can't be supplied by testimony or evidence from other sources that can still be presented by her.

Because defendant has not shown, or even alleged, that her mother was the only person who could have provided an alibi, she has not established that the pre-arrest delay caused her actual and substantial prejudice.

Moreover, even were we to conclude that defendant suffered actual and substantial prejudice, there is no evidence that the prosecution delayed bringing charges in order to gain a tactical advantage. Instead, the delay was due to the struggle in obtaining mitochondrial-DNA test results from an accredited laboratory. Defendant argues that the prosecution could have proceeded with the results from the first laboratory, even though it was unaccredited, because the laboratory's accreditation status would have "merely provided fodder for cross-examination." While perhaps true, the prosecution's decision to seek evidence from an accredited laboratory as part of the investigation did not violate due process. In *United States v Lovasco*, 431 US 783, 795-796; 97 S Ct 2044; 52 L Ed 2d 752 (1977), the United States Supreme Court observed:

In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if 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. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed." This the Due Process Clause does not require. [Citations omitted.]

Given the victim's inability to identify defendant as the perpetrator, the suggestion of another possible suspect, who was excluded by the mitochondrial-DNA testing, and the first laboratory's problematic lack of accreditation, the prosecutor abided by elementary standards of fair play and decency in delaying defendant's arrest. The trial court did not err in its ruling. Defendant was not deprived of her right to due process.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Michael J. Kelly