STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2015
v	No. 322868 Calhoun Circuit Court
JUSTIN DUANE HOWARD, Defendant-Appellant.	LC No. 2012-003518-FC

Before: Gadola, P.J., and Hoekstra and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); and felonious assault, MCL 750.82. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to 30 to 60 years' imprisonment for armed robbery, 10 to 30 years' imprisonment for first-degree home invasion, and three to six years' imprisonment for felonious assault. Defendant appeals as of right. Because defendant was not denied his right to a speedy trial, the prosecutor did not violate the 180-day rule, and the trial court did not clearly err by admitting identification evidence, we affirm.

In the early morning hours of October 27, 2012, defendant and Kenneth Skidmore broke into Pearlie Parker's home in Battle Creek, Michigan. Although Parker did not personally know defendant, at the time of the home invasion, Parker lived with a man named Shonder Sander, who had known defendant for approximately 20 years. Defendant, who is a plumber, went to Parker's home a day or two before the home invasion to look at the home's plumbing.

On the night of the home invasion, Parker was in the home when she saw two men wearing ski masks running up the driveway. She called the police, but before police arrived, the men entered the home. Parker ripped the ski mask off of one of the men, and she recognized him as defendant, the man who had recently been in the home looking at the plumbing. Parker was struck in the face with a gun, which caused her to bleed, and she was asked "where's the money?" Parker gave the men a large sum of cash, including $4,000 Sanders had in the house from the recent sale of his car. At some point, Parker heard police sirens, at which point defendant and Skidmore ran out of the house.

Police responding to the scene saw two men walking down the street, within 100 to 150 feet of Parker's house. After speaking with Parker, police began a canine search for the men and

set up a perimeter in the area. Police found a gun and a pair of gloves nearby, and a police officer stopped defendant and Skidmore, who were walking in the area and who fit Parker's description of the suspects. Police ran defendant and Skidmore through the Law Enforcement Information Network (LEIN), and discovered that they both had outstanding warrants. Parker was then transported to defendant's location for a show-up, at which time she positively identified defendant and she indicated that she recognized Skidmore as well based on his jeans.

At trial, the prosecution presented DNA evidence from the gloves found by the police, which established that Parker's blood was on the outside of the gloves and Skidmore's DNA had been found on a sample taken from inside the gloves. Parker also identified defendant at trial as one of the men who broke into her home. Defendant testified in his own defense, claiming that he had been walking alone that evening, on his way to buy cigars, when Skidmore, a man whom defendant had known as a teenager, came out of a side street and spoke to defendant. A jury convicted defendant as noted above. Defendant now appeals as of right.

On appeal, defendant first argues that he was denied his constitutional right to a speedy trial by the 17 month delay between his arrest on October 27, 2012 and the commencement of his trial on April 1, 2014. "The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The trial court's "factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo." *Id*.

The constitutional right to a speedy trial "guarantee[s] criminal defendants a speedy trial without reference to a fixed number of days." *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). "When a defendant claims a violation of this right, the trial court must consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) any prejudice to the defendant." *Id*. The date of defendant's arrest is when "[t]he time for judging whether the right to a speedy trial has been violated" begins to run. *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). "When the delay is more than 18 months, prejudice is presumed, and the prosecution must show that no injury occurred." *Id*. However, "[w]hen the delay is less than 18 months, the defendant must prove that he or she suffered prejudice." *Id*. With respect to prejudice, "we consider whether the delay prejudiced [defendant's] person or defense." *People v Cain*, 238 Mich App 95, 114; 605 NW2d 28 (1999).

Applying the four factors in this case, defendant was arrested on October 27, 2012, and his trial began on April 1, 2014. Thus, the delay between defendant's arrest and the start of trial was less than 18 months. Accordingly, prejudice cannot be presumed, and defendant must show that he suffered prejudice. See *Rivera*, 301 Mich App at 193.

Regarding the reasons for the delay, at least a portion of the delay is attributable to defendant and his request for new counsel, which the trial court granted in January of 2014, at a time when the prosecution was ready to proceed to trial. Cf. *Cain*, 238 Mich App at 113. After new counsel was appointed, proceedings were further delayed by the necessity of adjudicating motions filed by defense counsel, including a motion to suppress Parker's identification of defendant. Cf. *id.* Aside from defendant's request for counsel, a portion of the delay is attributable to the time taken to test the gloves and gun discovered near Parker's home for DNA.

Some delay to allow for DNA testing of evidence strikes us as a legitimate delay that served the interests of justice. See *People v Holtzer*, 255 Mich App 478, 494; 660 NW2d 405 (2003). Further, the record indicates that defendant in fact acquiesced in this delay insofar as his first defense attorney was in agreement with the prosecutor regarding the importance of obtaining DNA results in this case.[1] Aside from the issue of DNA and defendant's request for new counsel, some of the delay appears to be unexplained, and there were some court congestion and scheduling issues that contributed to the delay, including the reassignment of the case after the judge originally assigned to the case retired. While these administrative or unexplained delays are attributable to the prosecution, they are only minimally weighed against the prosecution. Cf. *id.*; *People v Lowenstein*, 118 Mich App 475, 488; 325 NW2d 462 (1982). On the whole, we cannot conclude that the reasons for the delay weigh substantially in defendant's favor. See *Cain*, 238 Mich App at 113.

In terms of defendant's assertion of his right to a speedy trial, on February 5, 2014, in a document entitled "Appearance, Demand for Jury Trial and Discovery Demand," defendant's newly appointed attorney indicated that defendant "[d]emands a speedy trial by jury" under Const. 1963, art. 1, § 20. On March 31, 2014, at a hearing on a motion for defendant's release on his own recognizance under MCR 6.004(C), defendant also personally argued that his right to a speedy trial had been violated and that such violation required dismissal of the charges. But, by the time defendant made this demand, the prosecutor had already indicated, as of January 2014, that it was ready for trial, and any continuing delay at that time was attributable to defendant's request for a new attorney. Given that defendant waited more than 15 months to assert his right to a speedy trial, and that defendant's demand came after the prosecution had indicated its readiness to proceed to trial, the "assertion of his right to a speedy trial came so late as to be devoid of any sincerity or conviction." See *Holtzer*, 255 Mich App at 495 (citation omitted).

Finally, with respect to prejudice, defendant generally argues that his ongoing incarceration for another offense during the delay caused prejudice. To the extent defendant's argument suggests that there was prejudice to his person, while incarceration for 17 months involves some level of personal hardship, the prejudice prong "may properly weigh against a defendant incarcerated for an even longer period if his defense is not prejudiced by the delay." *People v Williams*, 475 Mich 245, 264; 716 NW2d 208 (2006) (involving 19 month delay). And, in this case, there is no injury to defendant's defense. Defendant makes general assertions that his incarceration prevented him from participating in the preparation of his defense, prevented him from securing potential witnesses that he did not specifically identify on appeal, and prevented him from raising unspecified challenges to the admission of the DNA evidence. These

[1] Indeed, the DNA results were plainly favorable to defendant insofar as they produced a match to Skidmore rather than defendant, providing potential support for defendant's claim that he was not involved in the robbery and just happened upon Skidmore while walking that evening. Moreover, at a status conference in December of 2013, the prosecutor indicated that the DNA testing on the gun—which did not result in a match to defendant or Skidmore—prompted the prosecutor's office to agree to the dismissal of felony firearm charges against defendant.

types of general complaints about incarceration during the delay are insufficient to establish prejudice. Cf. *Rivera*, 301 Mich App at 194. Moreover, at least part of the delay was used to obtain DNA results, which were relatively favorable to defendant insofar as defendant's DNA could not be connected to either the gloves or the gun. Cf. *Cain*, 238 Mich App at 114 (finding the defendant was not prejudiced where she benefited from pre-trial preparation that necessitated delay). Consequently, defendant has not shown that he was prejudiced and there was no constitutional violation.

Apart from defendant's constitutional claim, defendant also asserts on appeal that he was entitled to dismissal of his case under the 180-day rule set forth in MCL 780.131 and MCL 780.133.

Under MCL 780.131(1), when an inmate has pending criminal charges, the Michigan Department of Corrections (MDOC) must deliver a notice to the prosecuting attorney of the county in which the charges are pending to inform the prosecutor of the place of imprisonment and to request a final disposition of the warrant, indictment, information, or complaint. *People v Williams*, 475 Mich 245, 256; 716 NW2d 208 (2006). Once the prosecutor receives notice, the inmate must be brought to trial within 180 days. MCL 780.131(1); MCR 6.004(D); *Williams*, 475 Mich at 259. If "action is not commenced" within the 180-day period, the trial court loses jurisdiction and must dismiss the matter with prejudice. MCL 780.133; *People v Lown*, 488 Mich 242, 256; 794 NW2d 9 (2011).

However, "to commence action within the 180–day period, a prosecutor need not ensure that the *trial* actually begins, or is completed, within that period." *Lown*, 488 Mich at 256-257. Instead, "the prosecutor must have undertaken action—or, put otherwise, begun proceedings—against the defendant on the charges (or the 'matter')." *Id*. at 257. Accordingly, " '[i]f . . . apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met.' " *Id.*, quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959) (alteration in *Lown*). Nevertheless, if the prosecutor's initial steps were "followed by inexcusable delay beyond the 180–day period and an evident intent not to bring the case to trial promptly," the good-faith action required by MCL 780.133 has not been satisfied. *Lown*, 488 Mich at 262-263 (citation and quotation marks omitted).

Here, defendant attached four letters from MDOC to his brief on appeal. They are addressed to the Calhoun County prosecutor and notify the prosecutor that defendant is serving a term of incarceration in the MDOC. The first letter is dated February 5, 2013. These letters are not part of the lower court record and, as such, they constitute an improper attempt to expand the record on appeal. See *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). Nonetheless, assuming that the prosecution received notice on February 5, 2013, the 180–day period began to run on February 6, 2013, *Lown*, 488 Mich at 255-256, and 180 days after that was August 5, 2013. Here, defendant's preliminary examination took place on November 7, 2012. Originally, the case was set for trial on January 15, 2013. The case was adjourned for DNA testing. Subsequently, the case was reassigned to a different judge because the previous judge retired. After the reassignment, the 180-day period was exceeded; however, the prosecution took apparent good-faith action well within the period and proceeded promptly in readying the case for trial. Much of the delay was attributable to waiting for the DNA results,

the first judge retiring, docket congestion, defendant's request for new counsel and defendant's subsequent motions. Because the prosecutor took good-faith action to commence proceedings well within the relevant time period, and any subsequent delay does not appear inexcusable under the facts of this case, "the condition of the statute for the court's retention of jurisdiction is met." *Id*. at 257, 260. Thus, defendant has not demonstrated a violation of the 180-day rule and he was not entitled to dismissal of the charges.

Finally, defendant argues that the trial court clearly erred by denying defendant's motion to suppress evidence of Parker's on-the-scene identification and for a *Wade*[2] hearing. In particular, defendant contends that, because he had been arrested in relation to an outstanding warrant, he was entitled to counsel at the time of Parker's show-up identification. Further, defendant maintains that the show-up procedure was unnecessary because defendant had been arrested and that the procedures employed were unduly suggestive.

A trial court's determination regarding the suppression of identification evidence will generally not be reversed unless clearly erroneous. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). Issues of law related to the motion to suppress are reviewed de novo. *Id*. A decision is clearly erroneous when "the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

"The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' " *People v Riggs*, 223 Mich App 662, 676; 568 NW2d 101 (1997). "The Sixth Amendment right, *which is offense-specific* and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated." *People v Smielewski*, 214 Mich App 55, 60; 542 NW2d 293 (1995) (emphasis added). "The remedy for a violation of the Sixth Amendment right to counsel is suppression of the evidence obtained in violation of the right." *Riggs*, 223 Mich App at 676. However, because "the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings," counsel is not required at "on-the-scene identification[s] . . . made before the initiation of any adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 610; 684 NW2d 267 (2004). Thus, such on the scene identifications do "not implicate any right to counsel under the Sixth Amendment." *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002).

Here, defendant acknowledges that adversarial judicial proceedings had not yet begun for the offenses in this case when the on-scene identification took place. However, he argues that he was entitled to counsel because he had been arrested on outstanding warrants for unrelated matters. This argument ignores black letter law that the Sixth Amendment right to counsel is offense specific. *Smielewski*, 214 Mich App at 60. Therefore, because adversarial judicial proceedings had not been initiated for the offenses in this case, defendant's right to counsel under the Sixth Amendment had not yet attached. *Id*. See also *Hickman*, 470 Mich at 610.

[2] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Moreover, the on-the-scene identification procedure was not impermissible merely because police had another basis on which to arrest defendant. See *Libbett*, 251 Mich App at 358-363.

While defendant did not have a Sixth Amendment right to counsel at the on-scene identifications, due process protects defendant against unnecessarily suggestive identification procedures. See *Hickman*, 470 Mich at 607. "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). When conducting this analysis, a court should consider various factors, including: (1) "the opportunity for the witness to view the criminal at the time of the crime," (2) "the witness' degree of attention," (3) "the accuracy of a prior description," (4) "the witness' level of certainty at the pretrial identification procedure," and (5) "the length of time between the crime and the confrontation." *People v Colon*, 233 Mich App 295, 305; 591 NW2d 692 (1998).

Here, Parker was able to see defendant's face when she pulled up his mask. There was light from the television and the fish tank, and Parker had a considerable amount of time to observe defendant at the time of the crime. Parker recognized defendant from a previous encounter when he came to her home to fix the plumbing. Moreover, the identification was made without hesitation, and the victim was adamant about her identification. Further, the length of time between the crime and the confrontation was not unreasonably long. Under the totality of the circumstances, we cannot say that the "identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302. Accordingly, defendant's due process rights were not violated, and he was not entitled to a *Wade* hearing. *Id*. See also *People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993) ("[W]here it is apparent to the court that the challenges are insufficient to raise a constitutional infirmity . . . no [*Wade*] hearing is required.").

Affirmed.

/s/ Michael F. Gadola
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly