STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY EUGENE BUCKINES,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 196420
Recorder's Court
LC No. 95-013840

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of imprisonment of ten to fifteen years for murder and two years for felony-firearm. We affirm, but remand for a determination and award of credit for time served before sentencing.

This case arises from the June 18, 1995, slaying of Nadine Cooper, defendant's live-in girlfriend. Defendant's fourteen-year-old neighbor observed him chase the victim down the street, put a gun to her neck, and fire one shot. The witness saw the victim fall to the ground before retreating to his grandmother's house. Another neighbor, Sylvia Looney, also observed a man chase a woman down the street. Looney heard a gunshot while phoning the police in response to the victim's plea for help. After the police arrived, Looney saw the victim slumped against a house, motionless.

On June 27, 1995, the prosecution charged defendant with first-degree murder, MCL 750.316; MSA 28.548. The district court bound defendant over to circuit court as charged. The trial court, however, granted defendant's motion to quash, reducing the charge to second-degree murder. One week before trial, the prosecutor moved for remand to the district court to present additional eyewitness testimony to support a first-degree murder charge. The trial court denied the remand motion, but invited the prosecutor to pursue other remedies. On the prosecutor's motion, the trial court then dismissed the information without prejudice on November 22, 1995. On that same day, the prosecutor initiated a new prosecution, charging defendant with first-degree murder and felony-firearm. Defendant's fourteen-year-old neighbor testified at the second preliminary examination. The district court bound

defendant over as charged. Defendant's trial commenced on March 4, 1996, before a different judge from the judge who dismissed the first prosecution.

I

Defendant first contends that he was denied his right to a speedy trial because the prosecutor dismissed the second-degree murder charge one week before trial to initiate a new prosecution for first-degree murder. We disagree. Whether a defendant's right to a speedy trial was violated is a mixed question of law and fact. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews a trial court's findings of fact for clear error and considers questions of law de novo. *Id.*

Four factors determine whether a delay violates a defendant's right to a speedy trial: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *Id.* The prosecutor bears the burden of proving a lack of prejudice. *Id.*

In this case, the delay was less than eighteen months, negating a presumption of prejudice. *Id.* The nine-month delay, however, requires investigation regarding prejudice. *People v Kilgore*, 103 Mich App 812, 815; 304 NW2d 7 (1981). The prosecutor's charging decisions caused some delay, but defendant's substitution of attorneys and requests for adjournment also delayed the proceedings. Therefore, we cannot conclude that the delay was solely the prosecutor's fault. Further, defendant did not genuinely assert his right to a speedy trial. On January 5, 1996, after the trial court denied defendant's motion for release on his own recognizance, defense counsel stated, "I don't care if we don't go to trial now until '98." Apparently, time was not a concern if defendant was not released prior to trial. Defendant's request for an adjournment during the month preceding trial confirms our view.

Finally, this Court must consider whether the delay prejudiced defendant. Two types of prejudice exist—prejudice to the person and prejudice to the defense. *Gilmore*, *supra* at 462. Here, defendant remained incarcerated from his arrest on June 19, 1995, through trial, beginning March 4, 1996. Although defendant's pretrial detention was lengthy, he continually sought to delay his trial, rebutting any notion that the continued confinement prejudiced his person. Defendant's assertion that the delay prejudiced his defense because prosecution witness Looney was unable to testify at trial is likewise without merit. The record reveals that Detective Douglas Potts unsuccessfully attempted to locate Looney before defendant's scheduled trial in November 1995. Further, defendant fails to explain how the delay resulting from the prosecutor's decision to recharge him prejudiced his defense. Accordingly, we conclude that defendant's right to a speedy trial was not violated.

II

Defendant next contends that this Court should reverse his convictions because the prosecution engaged in "judge-shopping." We disagree. Whether a prosecutor engages in judge-shopping through repeated prosecutions, thereby violating a defendant's right to due process, is a

question of law that this Court reviews de novo. See *People v Stafford*, 168 Mich App 247, 251; 423 NW2d 634 (1988), aff'd 434 Mich 125 (1990); *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

In this case, the prosecutor initially moved for remand to present the additional evidence. If the trial court had granted the motion, the case would have been tried before the same judge who ordered the remand. The trial court, however, denied the motion, resulting in the prosecutor's dismissal of the information and issuance of a new warrant and information charging first-degree murder. The trial court, therefore, rejected the prosecutor's good faith attempt to retain the same trial judge.

Further, one critical factor in determining whether the prosecutor engaged in impermissible judge-shopping is whether the prosecutor recharged the defendant without offering additional evidence from that presented at the first preliminary examination. *Stafford, supra* at 251. Here, the prosecutor proffered two additional witnesses at defendant's second preliminary examination to support the charge of first-degree murder. We reject defendant's argument that the witnesses' testimony was not additional evidence because the police took a statement from one witness on the night of the shooting. The prosecutor need only present *additional* evidence at the second preliminary examination, not necessarily *new* evidence. *People v Robbins*, 223 Mich App 355, 361; 566 NW2d 49 (1997). Therefore, we conclude that the prosecution did not engage in judge-shopping, and defendant was not denied due process.

III

Defendant next argues that the prosecution suppressed evidence favorable to him, violating his right to due process. We disagree. This Court reviews de novo whether defendant's due process rights were violated. See *Houstina, supra* at 73.

The prosecution's failure to disclose evidence favorable to the accused is constitutional error if a reasonable probability exists that the outcome would have been different if the evidence had been disclosed. *Kyles v Whitley*, 514 US 419, 432-435; 115 S Ct 1555; 131 L Ed 2d 490 (1995); *People v Fink*, 456 Mich 449, 459; 574 NW2d 28 (1998). A reasonable probability of a different result exists when the evidence puts the entire case in such a different light that it undermines this Court's confidence in the outcome of trial. *Kyles, supra* at 435; *Fink, supra* at 459.

In this case, the prosecution disclosed a letter to defense counsel on the third day of trial. The letter, written by the eyewitness' grandmother, stated that her grandson did not actually witness the shooting. Defendant argues that the prosecution suppressed the evidence because the letter was dated November 9, 1995, but was not disclosed until March 6, 1996. The prosecution contends that it did not receive the letter until March 5, 1996. Even assuming that the prosecution did not timely disclose the letter, however, the trial court correctly determined that the evidence was unfavorable to defendant because the letter writer described him as abusive toward the victim and their young daughter. Defense counsel, in fact, chose not to call the eyewitness' grandmother to testify because her testimony would have damaged the defense. Accordingly, *Kyles* and *Fink* do not apply.

Defendant further argues that the prosecutor should not have allowed the eyewitness to perjure himself. Although the prosecutor may not rely on perjured testimony, the letter writer's representations regarding the eyewitness' observations do not establish that he committed perjury. *People v Cassell*, 63 Mich App 226, 228-229; 234 NW2d 460 (1975). Therefore, the prosecutor did not rely on perjured testimony.

IV

Defendant next argues that he was denied the effective assistance of counsel. To support this claim, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that the outcome would have been different but for counsel's performance. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). Defendant also bears the burden of overcoming the strong presumption that the challenged action constituted sound trial strategy. *Id.*

Although defendant contends that counsel made numerous errors, only one merits discussion. Defendant argues that his attorney's failure to subpoena witnesses, including the eyewitness' grandmother, constituted ineffective assistance. Decisions whether to call witnesses are matters of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A difference of opinion regarding trial tactics does not amount to ineffective assistance of counsel. *People v Penn*, 70 Mich App 638, 648; 247 NW2d 575 (1976). Counsel decided not to subpoena the eyewitness' grandmother because her testimony would have been damaging to the defense. We will not second-guess counsel's strategic decision in this case.

V

Defendant next argues that the trial court erred in denying defendant's in propria persona motion for a mistrial on the ground that counsel's neglect of his defense and conduct at trial constituted ineffective assistance.[1] This Court reviews a trial court's ruling on a motion for mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion exists only where the denial of the motion deprived the defendant of a fair and impartial trial. *Id.*

In this case, the alleged errors did not deny defendant a fair trial. Defendant identifies no prejudice resulting from his attorney's failure to conduct an in-depth meeting with him until one week before trial. Further, the record reflects that counsel was interested in defendant's case and provided an adequate defense. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant further argues that the trial court erred in denying his motion for substitute counsel. We disagree. This Court reviews a trial court's decision whether to allow substitute counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). On a showing of good cause, the trial court should permit the substitution of counsel if it will not unreasonably disrupt the judicial process. *Id.* Here, the trial court properly denied defendant's motion because the trial had

already proceeded to closing arguments. Granting the motion would have disrupted the judicial process. Accordingly, the trial court did not abuse its discretion in denying the motion.

VI

Defendant next contends that the trial court's misleading jury instructions regarding his defense theory denied him a fair trial. This issue, however, is not preserved because defendant did not object to the jury instruction. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Accordingly, this Court will review this issue only if necessary to avoid manifest injustice. *Id.* No manifest injustice would result from our failure to review in this case because the trial court properly instructed the jury on the defense of accident.

VII

Finally, defendant asserts that the trial court failed to award him credit for time served. The prosecution concedes that defendant is entitled to credit for time served from the date of his arrest, not the date of the second warrant and information. We therefore remand for a determination and award of credit for time served.

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] Although the trial court properly considered defendant's request for substitute counsel, the court should not have entertained defendant's in propria persona motion for a mistrial because counsel represented defendant at trial. See *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994).