STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 287142 Kent Circuit Court
ERIC JEROME LUSTER, Defendant-Appellant.	LC No. 07-002211-FH

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with the intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of marijuana, MCL 333.7402(2)(d). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 3 to 15 years' imprisonment for possession with the intent to deliver marijuana and was ordered to pay a $500 fine for possession of marijuana, his sentence for the instant offenses to run consecutively to the sentences for which defendant was on parole at the time these offenses were committed. We affirm.

Defendant argues on appeal that the prosecutor committed misconduct when he threatened defendant and Nicole DeVones with perjury charges if they testified at trial in a manner contrary to their previous statements to police. Defendant asserts that this misconduct denied him the right to present a defense, to due process, and to a fair trial. Defendant also argues that the prosecutor's comment during his opening statement that "[t]he evidence we have in this case is overwhelming, and you will see that and I will discuss it in a moment," was an improper argument that vouched for the credibility of the prosecutor's witnesses and thus was error requiring reversal. We disagree.

When defense counsel fails to object to the prosecutor's conduct, as was the case here, we review defendant's claim for plain error that affected his substantial rights.[1] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A defendant has a constitutional right to call witnesses in his defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 20. In addition,

[1] We note that defense counsel indicated that the witnesses were informed of potential perjury charges and that he therefore felt he could not call defendant or DeVones as witnesses. He did not, however, argue prosecutorial misconduct or claim improper threats were made.

there is no question that intimidation and threats by a prosecutor to a witness constitutes grounds for reversal because such actions usually deprive a defendant of his right to a fair trial. *People v Pena*, 383 Mich 402, 406; 175 NW2d 767 (1970). "However, a prosecutor may inform a witness that false testimony could result in a perjury charge." *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999). In this case, there is no evidence on the record that the prosecutor told defendant or DeVones in a strong, threatening manner that if they testified falsely they would be subject to perjury charges. And, "warnings to potential defense witnesses concerning self-incrimination or possible perjury charges have been held to be proper," when strong and threatening language was not used. *People v Robbins*, 131 Mich App 429, 440; 346 NW2d 333 (1984). In addition, the record suggests that the decisions by DeVones and defendant not to testify at trial were based on an accurate appraisal of their legal situation following consultation with counsel. *Id*. Based on the foregoing, we find that there was no plain error affecting defendant's substantial rights. *Id*.; *Callon*, 256 Mich App at 329.

With regard to the challenged comment during the prosecutor's opening statement, the comment had the proper purpose of informing the jury what the prosecutor intended to show and was a fair introduction to the evidence to be presented at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The comment also encompassed the argument that the evidence established defendant's guilt, which also was not improper. *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). The prosecutor did not imply that he possessed special knowledge of the guilt of defendant or special knowledge of the veracity of the prosecution's witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Moreover, the prosecutor did not impermissibly urge the jurors to suspend their judgment out of deference to his own, *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995), nor suggest that the jury decide the case on the authority of his office, *Swartz*, 171 Mich App at 370-371. Based on the foregoing, we find that the challenged comment was not improper. Thus, there was no plain error. *Callon*, 256 Mich App at 329. Further, any arguable prejudice flowing from the prosecutor's remark was mitigated by the jury instructions. *Bahoda*, 448 Mich at 281. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant next argues, relying on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), that the trial court erred by requiring him to pay costs and fees, which included a fine, without first determining his ability pay. Because defendant failed to challenge the imposition of costs and fees below, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In this case, unlike in *Dunbar*, the trial court did not order defendant to repay the costs of a court-appointed attorney. Rather, the trial court assessed a $500 fine, a $60 crime victim fee, and a $120 state minimum fee. The Court in *Dunbar*, 264 Mich App at 255, specifically stated that a defendant's ability to pay need not be considered when ordering fines and costs. Consequently, the trial court did not err in requiring defendant to pay a fine and costs without first assessing his ability to pay. *Id*.

Defendant also asserts that he should be granted credit toward his minimum sentence in this case for the time he was incarcerated between his arrest and sentencing, even though he was on parole, because no additional time was added to his prior sentence. Defendant's argument has no merit. MCL 768.7a(2) plainly provides that any sentence for a new offense must run consecutive to the uncompleted portion of any prior sentence for the offense for which defendant

was on parole. MCL 769.11b provides that jail credit shall be given when defendant spends time in jail before sentencing if, and only if, defendant was incarcerated because he was denied, or was unable to furnish, bond. In *People v Idziak*, 484 Mich 549, 552; 773 NW2d 616 (2009), the Court held that, under MCL 791.238(2), when a parolee is arrested for a new offense, he resumes serving the sentence for his previous offense, and "[a]s long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it." Thus, because the parolee is not in jail based on denial of bond or the lack of ability to furnish it, MCL 769.11b does not apply. *Id.*

Finally, defendant argues that he was in jail for 19 months awaiting trial, in violation of his right to a speedy trial and of the 180-day rule set forth in MCL 780.131. Consequently, defendant asserts, his trial counsel was ineffective for failing to move for a speedy trial. We review de novo the underlying issue of constitutional law regarding whether defendant was denied his right to a speedy trial. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). We also review de novo issues of statutory interpretation. *Id.* To establish ineffective assistance of counsel during trial, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

As a preliminary matter, MCL 780.131 sets forth the 180-day rule for inmates of the state prison system. It provides in part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The purpose of the statute is to dispose of untried charges against prison inmates so that sentences can run concurrently. *People v Woodruff*, 414 Mich 130, 136; 323 NW2d 923 (1982), overruled on other grounds *People v Smith*, 438 Mich 715; 475 NW2d 333 (1991), overruled in part on other grounds *Williams*, 475 Mich at 245; *People v Walker*, 276 Mich App 528, 535-536; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008).

Defendant argues that his trial was required to begin within 180 days of his lodging in the local jail pursuant to MCL 780.131. However, MCL 780.131 only applies to inmates in a state correctional facility; it does not apply to charges against inmates incarcerated in county jail while awaiting trial. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Therefore, the 180-day rule did not apply, and was not violated, in this case. *People v Metzler*, 193 Mich App 541, 544-545; 484 NW2d 695 (1992).

Beyond the 180-day rule for inmates in state correctional facilities, all criminal defendants are guaranteed the right to a speedy trial by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20, MCL 768.1; MCR 6.004(A); *Williams*, 475 Mich at 261. "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest. In contrast to the 180-day rule, a defendant's right to a speedy trial is not violated after a fixed number of days." *Id*. Rather, it requires that trial commence within a reasonable time under the circumstances. *People v Spalding*, 17 Mich App 73, 75; 169 NW2d 163 (1969). When determining whether a defendant has been denied a speedy trial, a court must weigh the conduct of the parties. *Williams*, 475 Mich at 261-262. Relevant factors include: (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) the prejudice to the defendant from the delay. *Id*. A delay of six months between the date of arrest and the commencement of trial is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *Walker*, 276 Mich App at 541; *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). When the delay is less than 18 months, the defendant is required to prove prejudice. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Walker*, 276 Mich App at 541. A delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecutor. *Williams*, 475 Mich at 262.

Defendant was arrested on December 30, 2006; his trial commenced on June 9, 2008, less than 18 months later. The record relating to the reasons for the delay is sparse, because no evidentiary hearing was held. However, the record does reflect one instance in which trial was adjourned due to the unavailability of the prosecutor's witnesses. Delays due to witness unavailability do not weigh against either party. *People v Cain*, 238 Mich App 95, 113; 605 NW2d 28 (1999). The record also reflects that trial was adjourned on three additional occasions due to the fact that the trial court was conducting a trial in another case. Because this was a scheduling delay or delay caused by the court system, it is attributed to the prosecutor, but is given a neutral tint and only minimal weight. *Williams*, 475 Mich at 263. In addition, the record reflects that there was an order for the substitution of defense counsel. Typically, a delay based on a defendant's request for substitution of counsel is attributable to a defendant. *People v Taylor*, 110 Mich App 823, 828-829; 314 NW2d 498 (1981). Based on the foregoing and when considered together, we find that there is no evidence that the prosecution was substantially to blame for the delays in this case or that the delays were unwarranted. *Cain*, 238 Mich App at 113. More importantly, because the delay was less than 18 months, defendant was required to show prejudice to his defense arising from the delay. *Collins*, 388 Mich at 695; *Walker*, 276 Mich App at 541. Defendant has not pointed to any instance of prejudice on the record and we find none. *Williams*, 475 Mich at 262; *Taylor*, 110 Mich App at 829. Therefore, we conclude that defendant was not denied his right to a speedy trial. Consequently, defense counsel was not ineffective for failing to file a speedy trial motion. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray