STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD GEORGE GILLIS,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 157075
LC No. 91-54862-FC
91-54864-FC

Before: Fitzgerald, P.J., and O'Connell and T.L Ludington,* JJ.

PER CURIAM.

In docket number 54862, defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and breaking and entering with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. He subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. In docket number 54684, defendant was also convicted by a jury of first-degree CSC, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and breaking and entering with intent to commit CSC, MCL 750.110; MSA 28.305. He subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced in each case to life imprisonment for the CSC convictions and twenty to thirty years for the breaking and entering convictions. The court ordered these sentences to run concurrently with respect to each other, but consecutively to a sentence imposed in 1986 for which defendant was on parole at the time he committed the present offenses. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court erred in denying his motion for dismissal premised on the prosecutor's violation of the 180-day rule, MCL 780.131; MSA 28.969(1). We disagree. The 180-day rule does not require that trial begin within 180 days. MCR 6.004(D); *People v Bell,* 209 Mich App 273, 278; 530 NW2d 167 (1995). Instead, if apparent good-faith action is taken within that period and the prosecutor proceeds promptly toward readying the case for trial, the rule is satisfied. *Id.*

* Circuit judge, sitting on the Court of Appeals by assignment.

If the prosecutor takes such good-faith action, jurisdiction is lost only if the initial action is followed by an inexcusable delay that reflects an intent not to bring the case to trial promptly. *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987).

Defendant recites that he was arrested for both cases on February 7, 1991. The record reflects that in case 54862 trial was originally set for August 20, 1991, but that the trial was adjourned on stipulation at *defendant's* request because defendant needed "more time to complete discovery as to DNA evidence and to conduct a Frye-Davis hearing." That fact alone can negate a 180-day rule violation. *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987). The court adjourned the trial a second time on stipulation at the prosecution's request because of the unavailability of an FBI expert witness. However, witness unavailability is a valid reason for delay. *People v Wilder*, 51 Mich App 280, 284; 214 NW2d 749 (1974). A third and very short adjournment occurred moving the trial from May 1992 to June 1992 only to accommodate defendant's trial in case 54864, which transpired in May 1992. A delay in conducting a trial is justified where it is caused by a defendant's unavailability for that trial because he is on trial with respect to other criminal charges. *See, e.g., People v Freeman*, 122 Mich App 260; 332 NW2d 460 (1982). Accordingly, there is no basis upon which to conclude that the prosecution did not attempt to move this case forward in a timely fashion. In fact, comments made by the prosecutor during a motion hearing indicate a desire to move forward efficiently by anticipating potential delays.

With regard to case 54864, trial was originally scheduled for October 14, 1991. The court adjourned trial to March 2, 1992. The court file bears no specific indication as to the cause for that adjournment; however, it appears to have been the product of defendant's request for new counsel. Defendant's first court-appointed attorney moved to withdraw, citing a breakdown in the attorney-client relationship, on October 9, 1991. The court granted that motion on October 11, 1991. The court appointed replacement counsel on October 19, 1991, and issued the notice of new trial date on October 29, 1991. Subsequently, the court adjourned trial a second time upon *defendant's* motion due to the defense expert's unavailability for trial. Thus, on this record, there is no evidence that the prosecutor failed to exercise reasonable diligence in moving this case forward to trial. The trial court did not err in denying defendant's motion for dismissal.

II

Defendant argues that the trial court erred by denying his motion to suppress blood and saliva samples obtained pursuant to a warrant based on an affidavit allegedly filled with false and misleading statements. We disagree.

In *People v Russo*, 439 Mich 584, 602-604; 487 NW2d 698 (1992), our Supreme Court resolved the split of authority that had previously existed as to the appropriate standard of review with respect to a magistrate's probable cause determination.

> [A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard . . . .

* * *

> In sum, a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a "fair probability that contraband or evidence of a crime will be found in a particular place." [*Id.*, 603-604.]

Probable cause for the issuance of a search warrant exists when the facts and circumstances contained in the affidavit would warrant a reasonably prudent person to believe that evidence of a crime is at the stated place. *People v Sundling*, 153 Mich App 277, 285-286; 395 NW2d 308 (1986). The magistrate's decision is entitled to great deference, *Id.* at 286, and a finding of probable cause is not defeated simply because "reasonable people could reasonably disagree with the assessment made by the magistrate," *Russo, supra* at 613.

> [I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. In order to prevail on a motion to suppress . . . the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. [*People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).]

This rule also applies to material omissions from affidavits. *Id.*.

Defendant avers that if all the false or misleading statements were stricken from the affidavit, only the following statements would remain:

> 1. Defendant was identified by Helen Schmidt after he broke and entered her home.
>
> 2. A man seen in the area of one of the rapes drove a red or maroon car with a loud exhaust; [d]efendant drove a red car (different make and model) with a loud exhaust.
>
> 3. Defendant wore a similar large, gold belt buckle as that worn by the suspect in one of the rapes.
>
> 4. Defendant had been convicted for breaking and entering and CSC 2 five years earlier.
>
> 5. Defendant lived within a block of two of the victims.

Defendant contends that these statements do not give rise to probable cause, employing the narrow focus of looking at each statement singly, as opposed to all the statements as a whole. However, facts which are innocent by themselves may gain evidentiary significance when viewed in the context of other information. *United States v Sokolow*, 490 US 1, 9-10; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

Other cases involving challenges to the sufficiency of information in affidavits reflect that, even assuming, as defendant contends, that the above-recited facts are the only legitimate ones, these facts are sufficient to support a finding of probable cause. Probable cause determinations have been upheld on far less compelling facts than the uncontested facts involved here. See, *e.g.*, *People v Schollaert*, 194 Mich App 158; 486 NW2d 312 (1992), and *People v Battle*, 161 Mich App 99; 409 NW2d 739 (1987).

III

Defendant argues that the trial court erred by granting the prosecutor's motion to amend the information after the preliminary examination to change the aggravating factor elevating the offense to first-degree CSC. We disagree.

The original information charged defendant with breaking and entering with intent to commit first-degree CSC, MCL 750.110; MSA 28.305, and with first-degree CSC on the allegation that defendant engaged in sexual penetration causing personal injury, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). On the first day of trial, before opening statements, the prosecution requested to amend the information to change the aggravating circumstance from subsection (f), personal injury, to subsection (c), that the penetration occurred under circumstances involving the commission of another felony, namely the breaking and entering, because the victim had since died and was unable to testify to personal injury.

MCL 767.76; MSA 28.1016 provides in part, "The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." A defendant is entitled to a reasonable continuance unless he has not been misled or prejudiced by the amendment. *Id.* An information may not be amended in derogation of a defendant's right to be fairly apprised of what it is he is called upon to defend; where the original information is sufficient to inform the defendant of the nature of the charges against him, he is not prejudiced by an amendment. *People v Newson*, 173 Mich App 160, 164; 433 NW2d 386 (1988). The amendment may even add a new charge. *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993).

Upon specific question from the trial court, defendant was unable to cite any prejudice that the amendment caused him, and we find can discern none. The original information charged defendant with breaking and entering with intent to commit first-degree CSC, and a review of the preliminary examination transcript reveals the examination focused on that charge (in addition to the CSC 1 charge). Defendant's defense was that he did not commit these crimes. There is no indication that the defense would be any different in light of the amendment. Defendant knew from the outset that he would have

to defend against the breaking and entering charge. *People v Sims*, 23 Mich App 194; 178 NW2d 667 (1970).

IV

Defendant argues that the trial court abused its discretion by denying his motion for a new trial based on his claim that the prosecutor improperly introduced testimony regarding a Silent Observer tip. We disagree. MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the testimony regarding the tip was not offered to prove the truth of the matter asserted. Rather, the testimony was offered simply to show why defendant was a suspect. The substance of the tip was not offered. Hence, the testimony was not hearsay.

Defendant also argues that this testimony was irrelevant. However, defendant failed to object on this basis at trial, and, therefore, this argument is waived. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

V

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial after a prosecution witness volunteered a statement that defendant had been in jail. We disagree.

While the prosecutor was questioning Audrey Piechocki, the following colloquy transpired:

Q: Was he [defendant] living with you on May 13, 1990?

A: As far as I know. When he got out of jail, whenever that was.

The prosecutor did not follow up or inquire further with respect to defendant's previous incarceration. Defendant concedes that this nonresponsive answer was not the fault of the prosecutor. The trial court denied defendant's motion for a mistrial, reasoning that the comment was unresponsive and unavoidable and that it did "not rise to the level of granting the motion." The court inquired whether defendant desired a curative instruction. Defendant opted to have a curative instruction given later with the final instructions, and the court followed through on that request.

The power to declare a mistrial should "be used with the greatest caution, only under urgent circumstances, and only for very plain and obvious causes." *People v Barker*, 161 Mich App 296, 305; 409 NW2d 813 (1987). Generally, unresponsive statements by prosecution witnesses are not grounds for declaring a mistrial. *Id.* at 305-306.

In sum, given the strenuous standard of review, the court's curative instruction, and the rather innocuous nature of the statement, it is clear that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

VI

Defendant argues that the trial court abused its discretion in failing to answer the jury's question, following the close of proofs, whether there had been any testimony that indicated defendant had been picked out of a lineup. Defendant failed to preserve this issue for review by his failure to object below. *People v Stanaway,* 446 Mich 643, 694; 521 NW2d 557 (1994). Nonetheless, although initially the trial court appeared to flatly refuse the jury's request, the court eventually made clear that it would honor, and even invited, a request for specific testimony to be read or transcribed. *People v Crowell,* 186 Mich App 505, 508; 465 NW2d 10 (1990).

The court did not abuse its discretion with respect to the way in which it dealt with the jury's note.

VII

Defendant argues that he was denied a fair trial by an alleged gross misstatement of probability by the prosecutor's DNA expert. Defendant failed to preserve this issue for review by his failure to object below. *Stanaway,* at 694; 521 NW2d 557 (1994). Nevertheless, defendant was not denied a fair trial by the prosecution expert's singular incorrect arithmetical answer in light of the repeated use of the correct ratio -- more than ten times -- which preceded the mistaken answer given on cross-examination.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Thomas L. Ludington