

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DEJANERIO DORCH,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 166089
LC No. 92-047585

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.834; MSA 28.287, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for first-degree murder, ten to twenty years' imprisonment for assault with intent to commit murder, to be served consecutive to a term of two-years' imprisonment for felony-firearm. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to grant his motion to dismiss based on prearrest delay. Defendant argues that his due process rights were violated by prearrest delay between June 22, 1990, the time he was identified in a photograph as the perpetrator, and September 14, 1992, the time he was arrested.

The United States Supreme Court has recognized that the Due Process Clause plays a limited role in preventing unjustified preindictment or prearrest delay. *People v White*, 208 Mich App 126; 527 NW2d 34 (1994). In determining whether dismissal is warranted by a delay, a defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage. *Id.* Once the defendant has shown prejudice, the burden of persuasion shifts to the prosecution to show that the reasons for delay were sufficient to justify the prejudice. *People v Reddish*, 181 Mich App 625; 450 NW2d 16 (1989). The trial court's finding that no undue prejudice

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

resulted will be reviewed for clear error. *People v Anderson*, 88 Mich App 513; 276 NW2d 924 (1979).

First, the length of delay, twenty-seven months, without more, does not establish that defendant was prejudiced. *People v Loyer*, 169 Mich App 105; 425 NW2d 714 (1988). Moreover, because defendant actually presented several alibi witnesses, we find that he was not prejudiced by the delay. Finally, defendant has failed to show that the prosecution delayed his arrest in order to gain a tactical advantage. *White, supra* at 134. There was evidence that charges were not immediately brought against defendant because the FBI had control of the case and the State could not pursue the charges. Therefore, we find that the trial court properly denied defendant's motion.

Next, defendant claims that the trial court erred in finding that the photographic line-up was unduly suggestive, in violation of his right to due process. We disagree.

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; 505 NW2d 528 (1993). The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Defendant argues that the lineup was tainted because he was the only individual with identifiable facial hair. This Court has held that the mere fact that a defendant was the only person with a goatee (facial hair) in a lineup did not make the lineup unduly suggestive. *People v Hughes*, 24 Mich App 223; 180 NW2d 66 (1970). Thus, defendant's argument is without merit.

Defendant next argues that he was denied the effective assistance of counsel. A defendant who claims he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), adopting standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy and must prove that, but for counsel's error, the outcome of the trial court would have been different. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

First defendant claims that trial counsel was deficient because he failed to present expert testimony from a witness to challenge Coffey's photographic identification of defendant. The decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47; 523 NW2d 830 (1994). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call the witness deprived him of a substantial defense that would have affected the outcome of the proceeding. *Id.* Defendant was not deprived of a substantial defense since he presented several witnesses who testified as to his whereabouts on the weekend of the incident in

question. Moreover, trial counsel cross-examined Coffey regarding his photographic identification of defendant and elicited that Coffey's description of defendant's hair on the night of the incident in question was different than defendant's hair in the photographic lineup. Thus, we find that counsel was not ineffective on this basis.

Defendant also argues that his counsel was deficient by failing to renew his motion to dismiss the case based upon prearrest delay. A claim of ineffective assistance of counsel based on defense counsel's failure to make motions that could not have affected defendant's chances for acquittal is without merit. *People v Lyles*, 148 Mich App 583; 385 NW2d 676 (1986). At the time the trial court denied the motion to dismiss, the officer in charge of the case testified that she did not have enough information to charge defendant until September 1992. Defendant claims that the officer in charge misled the court because she did not reveal that she conducted a photographic lineup and that defendant was identified on June 22, 1990, which would have given the police officer enough information at that time to charge defendant. Defendant contends that his trial counsel should have renewed the motion to dismiss based upon prearrest delay because this new information revealed that the police officer could have charged defendant on June 22, 1990, instead of waiting until September 1992. Merely because defendant was identified in a photographic lineup on June 22, 1990, does not mean that Sergeant Green possessed enough information to charge defendant at that point in time. Thus, trial counsel's renewed motion would not have affected defendant's chances for acquittal.

Next, defendant argues that the trial court abused its discretion by allowing the prosecution to endorse Windrick Taylor as a witness less than thirty days prior to trial. A trial court's decision to allow a late endorsement is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550; 496 NW2d 336 (1992). The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon *leave of court and for good cause shown*. MCL 767.40a(4); MSA 28.980(1)(4). Here, the prosecutor demonstrated "good cause" to endorse Taylor as a witness. Taylor was defendant's cell mate and gave a statement to Sergeant Green regarding a conversation he had with defendant.

The prosecutor explained that because Taylor was scheduled to move to another part of the jail, she did not endorse him as a witness until the move occurred. Taylor was endorsed twenty days before trial. We find that based upon the foregoing reasons, the prosecutor demonstrated "good cause" for failing to call Taylor less than thirty days prior to trial.

Defendant next argues that he was denied a fair trial due to prosecutorial misconduct. Because defendant failed to object, consideration of the alleged instances of misconduct is limited to whether our failure to review would result in a miscarriage of justice. *Stanaway, supra* at 687. Because any possible prejudice could have been cured by a timely instruction, we find no miscarriage of justice. *Id.*

Finally, defendant claims that the trial court erred in instructing the jury regarding the order of consideration of the charges of first-degree and second-degree murder. Because defendant failed to object to the trial court's instructions, we decline to review the issue. *People v*

Handley, 415 Mich 356; 329 NW2d 710 (1982). Moreover, we find no error in the court's instructions.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ Michael J. Matuzak