# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER L. WHITEHORN, a/k/a HAKEEM MUHAMMAD,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 173601
LC No. 92-120578-FC

Before: Corrigan, P.J., and Taylor and D. A. Johnston,* JJ.

PER CURIAM.

Following a consolidated jury trial in which defendant[1] was tried along with a codefendant, John Getten, defendant was convicted of one count of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284; nine counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2); and eight counts of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to twenty to fifty years in prison for each of the robbery, assault, and conspiracy convictions, to be served consecutively to the concurrent two-year terms imposed on the felony-firearm convictions. We affirm.

This case arises from an armed robbery committed by defendant and six accomplices during a party held at a residence in Southfield. On appeal, defendant argues that the trial court abused its discretion in admitting into evidence threats made against Paul Zakar, a prosecution witness. Although defendant argues that evidence of threats was improperly admitted throughout trial, the only instance cited in his brief on appeal was the cross-examination of Zakar. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Further, defendant did not object to the admission of the allegedly prejudicial evidence, nor did he request a cautionary instruction. Therefore, this issue has not been preserved for appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Even assuming error in the admission of this evidence, we find it was harmless because the

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

witness did not claim defendant had made the threat. See *People v Mateo*, 453 Mich 203, 212-213; ___ NW2d ___ (1996).

Defendant contends that his trial counsel was ineffective in failing to object to the introduction of evidence of threats. We disagree. In order to establish that counsel was ineffective, defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, ___ Mich App ___ (Docket No. 169867, issued 9/17/96) slip op at 7.

Zakar's testimony was not introduced for the purpose of showing that defendant made the threats. Rather, it appears that counsel for codefendant John Getten elicited the testimony in order to create the implication that the robbery was committed by someone other than the seven individuals discovered inside the van. In light of the purpose for which this evidence was offered, we find that defense counsel's decision not to object to this line of questioning was a matter of trial strategy, which this Court will not second-guess on appeal. *People v Ferguson*, 208 Mich App 508, 513; 528 NW2d 825 (1995).

Next, defendant argues that the trial court erred in finding that the prosecutor exercised due diligence in attempting to locate missing witnesses. We disagree.

At trial, the parties stipulated to strike the names of Mike Yousif and Salam Jeberaeel from the information on the grounds that their testimony would be cumulative and would not assist the trier of fact. Accordingly, this issue is waived with regard to Yousif and Jeberaeel.

With regard to Bavel Shaya and Amid Asmaro, we find that that the prosecutor's efforts to locate the witnesses were reasonable under the circumstances. The incident giving rise to this case involved seven defendants, numerous witnesses, and at least two trials. Fifty-two individuals were listed on the information as witnesses. Detective Les Newsom received approximately seventy subpoenas for service. Thirty-one witnesses testified at trial. In light of the complicated nature of the case, it would have been difficult, if not impossible, for the prosecutor to have monitored the status and availability of all the witnesses between defendant's arrest and trial. Moreover, the fact that three of the missing witnesses were declared unavailable at the trial of Donjuell Chaney, a co-participant in the robbery, implies that there was at least some effort to locate those witnesses before trial in the instant case commenced. Finally, although Newsom himself did not begin looking for the missing witnesses until one week before trial, he testified that he was sick when the subpoenas arrived and that people in his office were already working on the case when he returned to the office approximately fifteen days before trial.

Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Newsom engaged in extensive efforts to locate the missing witnesses. He visited their last known addresses, checked their names on the Law Enforcement Information Network (LEIN) computer system, and interviewed friends and relatives. Material witness warrants were issued for Shaya and

Asmaro. Under the circumstances, we find that the trial court's finding of due diligence was not clearly erroneous. *People v Lawton*, 196 Mich App 341, 347-348; 492 NW2d 810 (1992).

Next, defendant contends that the trial court erred in refusing to allow a statement made by codefendant Chaney into evidence. A statement against interest offered under MRE 804(b) to exculpate a defendant is inadmissible unless the declarant in unavailable to testify. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). There is no evidence in the record suggesting that Chaney was unavailable. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to admit the confession.

Next, we find that defendant's convictions for eight counts of armed robbery were not barred by double jeopardy. The primary purpose of the armed robbery statute is the protection of the person assaulted. *People v Wakeford*, 418 Mich 95, 111-114; 341 NW2d 68 (1983). Therefore, the appropriate units of prosecution for armed robbery are the number of persons assaulted and robbed, regardless of whether the robberies occurred at the same time and place. *Id.* Here, defendant was properly charged with eight counts of armed robbery on the basis of the number of victims.

Defendant further argues that the trial court erred in failing to instruct the jury regarding the necessary included lesser offenses of armed robbery. We disagree.

Defendant did not request that the trial court instruct the jury with regard to lesser included offenses, nor did he object to the jury instructions. Failure to object waives error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Defendant did not deny that an armed robbery occurred. Rather, defendant's theory of the case was that he was asleep in the van when the robbery was committed and that he did not participate in the criminal activity. Under these circumstances, we find that defendant was not denied a fair trial by the court's alleged failure to instruct the jury regarding lesser included offenses.

Defendant next contends that the verdicts were against the great weight of the evidence and that the evidence is insufficient to support his convictions. We disagree.

We review a trial court's denial of a motion for a new trial for a clear abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In determining whether the prosecution has presented sufficient evidence, this Court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

In this case, the evidence established that a van drove past the house slowly with its headlights off. Thereafter, a group of masked gunmen rushed into the house. Communicating with each other by code, the men robbed at least fourteen partygoers of money, jewelry, and other items. Several of the partygoers were physically assaulted or threatened. Shortly after the men left the house, a van was stopped by police approximately one-half mile from the site of the robbery. The van was the only vehicle in the area. Seven individuals, including defendant, were discovered inside wearing dark

clothing. Also found in the van was a large amount of cash, jewelry, ski masks, baseball caps, nylon stocking, gloves, and seven handguns. Items confiscated from the van were identified by the victims after the robbery as belonging to them. From these facts, we find that the verdict was not against the great weight of the evidence, nor was the evidence insufficient to support defendant's convictions.

Defendant next argues that the trial court erred in instructing the jury regarding the unanimous verdict requirement. We disagree.

Defendant's failure to object to the jury instructions precludes review absent manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). Here, the trial court instructed the jury in accordance with CJI2d 2.25 and 3.32. The court told the jury that each count was a separate crime and that each crime must be considered separately in light of all of the evidence. After explaining the elements of each of the charged offenses, the court instructed the jury that its verdict must be unanimous. The verdict form given to the jurors listed each of the nineteen counts separately with the name of each victim individually delineated. When the verdicts were read in open court, each count was read separately. Thereafter, the jurors were polled regarding the verdicts. There is no evidence suggesting that the jurors were confused or mislead with regard to their obligation to reach a unanimous verdict on each count. Under these circumstances, we find no manifest injustice.

Finally, defendant argues that the fourteen-month delay between arraignment and trial violated the 180-day rule and deprived him of his right to a speedy trial. We disagree.

Under the 180-day rule, a prisoner charged with a crime in this state must be brought to trial within 180 days of the time that the Department of Corrections is notified of the pending charge and informs the prosecutor in question of the prisoner's location. MCL 780.131(1); MSA 28.969(1)(1); MCR 6.004(D). The purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently. *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). In the instant case, there is no indication that defendant was incarcerated in a state prison before trial.

Defendant's speedy trial claim is also without merit. To determine whether a defendant has been denied a speedy trial, this Court must balance the following factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant as a result of the delay. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994); *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). See also MCR 6.004.

Concerning the length of the delay, defendant was arraigned on November 9, 1992. Trial commenced on January 18, 1994. This fourteen-month delay was sufficient to trigger an investigation into the speedy trial claim. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

In assessing the reason for a delay in bringing the defendant to trial, each period of delay is examined and attributed to either the prosecution or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Where a delay is unexplained, it is attributed to the prosecutor.

*People v Patterson*, 170 Mich App 162, 167; 427 NW2d 601 (1988). In the instant case, there is no evidence in the record explaining why there was a fourteen-month delay between arraignment and trial. We do note, however, that the robbery for which defendant was prosecuted involved seven offenders and many witnesses. Where a case is complex or involves numerous defendants, more delay is tolerated. *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987).

With regard to the third factor, defendant's failure to assert his right to a speedy trial below weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

Lastly, we examine whether defendant was prejudiced by the delay. Because the delay was less than eighteen months, the burden is on defendant to establish prejudice. *Daniel*, *supra* at 207. Here, defendant offers no explanation regarding how he was prejudiced by the delay. Although it appears that defendant was incarcerated for the entire fourteen-month period, anxiety resulting from pretrial incarceration is insufficient, by itself, to establish a violation of the right to a speedy trial. *People v Jackson*, 171 Mich App 191, 201; 429 NW2d 849 (1988). Accordingly, we find that defendant is not entitled to any relief. *Daniel*, *supra* at 207.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

[1] The judgment of sentence lists defendant's name as Christopher L. Whitehorn. The PSIR, however, states that defendant's real name is Kevin Michael Shannon. At sentencing, defendant indicated he was also known as Hakeem Muhammad.