STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON DALE KAGE,

Defendant-Appellant.

UNPUBLISHED
November 12, 1996

No. 181840
LC Nos. 89-091891-FH;
89-091892-FH
AFTER REMAND

Before: MacKenzie, P.J., and Jansen and T.R. Thomas,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), MCL 750.157a; MSA 28.354(1). Defendant was sentenced to consecutive terms of four to twenty years' imprisonment on the delivery conviction and five to twenty years' imprisonment on the conspiracy conviction.

Defendant's convictions were reversed by this Court and the case was remanded for a new trial. *People v Kage*, 193 Mich App 49, 57; 483 NW2d 424 (1992). Specifically, this Court determined that defendant would have had grounds to challenge a juror if the juror had truthfully responded to a voir dire question. *Id.* at 53. This Court also determined that an evidentiary hearing on the issue of entrapment should have been held prior to trial, and that the trial court should have held an in-camera hearing, outside of defendant's presence, to determine whether the informant's testimony would have been helpful to his entrapment claim. *Id.* at 55-57.

However, the Supreme Court vacated this Court's decision and remanded to this Court for further proceedings. *People v Kage*, 439 Mich 1022; 486 NW2d 667 (1992). The Supreme Court held that it was improper to grant a new trial based on issues raised in a juror's affidavit when no hearing had taken place on the matters raised in the affidavit. *Id.* The Supreme Court further held that

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

defendant's claim of entrapment did not warrant a new trial and, at most, would require a hearing on this issue and, if appropriate, an order directing the prosecutor to assist defendant in securing the presence of the alleged informant. *Id.*

This Court, on remand, in an unpublished opinion, affirmed defendant's convictions and remanded the case for a hearing on the issues of juror misconduct and entrapment. *People v Kage (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 1992 (Docket No. 153265). This Court directed the prosecutor "to assist the defendant in securing the presence of alleged informant." *Id.*, slip op, p 1.

The trial court, on remand from this Court, denied defendant's motions for entrapment and juror misconduct. Defendant now appeals by leave granted. We affirm.

I.

Defendant first argues that the trial court erred in denying his motion to quash due to the length of time that he had to wait on remand before receiving a hearing on the entrapment and juror misconduct issues. Defendant argues that the delay violated his right to a speedy trial and the 180-day rule. Defendant further argues that adjournments of these hearings should not have been granted.

A defendant is entitled to a speedy resolution of all matters before a court. MCR 6.004(A). In determining whether a defendant had been denied the right to a speedy resolution of an issue, this Court considers: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy [trial or resolution of the matter], and (4) any prejudice to the defendant." *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). Here, the case was remanded to the trial court on July 16, 1992, for an entrapment hearing and a hearing on the matters raised in the juror's affidavit. These issues were resolved by the trial court on August 29, 1994. This constituted a delay of approximately two years from the date of remand to the date of resolution of the matter.

Although there was a lengthy delay, we find that defendant was not denied his right to a speedy resolution of the matter. Defendant argues that he was prejudiced by the delay because the confidential informant did not testify and was no longer available to testify. However, because the trial court stated that it would accept that the confidential informant's testimony would have been consistent with defendant's testimony, the failure of the informant to testify did not prejudice defendant. Further, we note that at least two of the delays were caused by defendant's inability to secure the juror's presence.

Defendant argues that the delay in holding the hearings violated the 180-day rule. The 180-day rule, in general, provides that when there is an untried charge pending against an inmate of a State of Michigan correctional facility, the inmate must 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." MCL 780.131(1); MSA 28.969(1). The rule applies to inmates who are incarcerated as a result of a conviction other than the untried information in question. *People v Chambers*, 439 Mich 111, 116;

479 NW2d 346 (1992). Here, defendant was awaiting a hearing on a charge of which his guilt had previously been determined. There was no untried charge and no different charge on which defendant was awaiting a trial or hearing. Thus, because the hearings for which defendant was waiting pertained to an issue of which defendant's guilt had been determined, the 180-day rule is inapplicable.

Defendant also argues that the trial court erred in granting adjournments in this case because there was no good reason presented for the adjournments. An adjournment may be granted to promote the cause of justice. MCR 2.503(D)(1). A motion or stipulation for adjournment may be made in writing or open court based on good cause. MCR 2.503(B)(1). Because the record does not indicate that defendant contested the adjournments, and because at least two adjournments were requested by defendant, we find that defendant has not demonstrated that the trial court erred in granting the adjournments.

II.

Defendant next argues that the prosecution's failure to present the confidential informant and a coconspirator for the entrapment hearing in violation of this Court's July 16, 1993, order, denied him a fair hearing. Defendant has abandoned this issue on appeal by failing to refer this Court to any authority supporting his position. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, the record does not support defendant's contention that the prosecution violated this Court's previous order.

Defendant also argues that he was denied a fair hearing because his presence was not secured by the prosecution for some of the hearings. Contrary to defendant's argument, the record indicates that defendant was present at a number of hearings and waived his presence at other hearings.

III.

Next, defendant argues that the trial court erred when it denied his motion for a new trial based on juror misconduct.

Defendant moved for a new trial based on allegations contained in a juror affidavit. The affidavit stated that: (1) the jury foreman had informed the jurors that they would have to deliberate for three days before the court would accept a hung jury; (2) the jury had attempted to bargain among themselves for guilty and not guilty verdicts; (3) the jury had discussed the possible penalty defendant may receive; and (4) during a break, a juror had revealed that her son had spent three years in an institution "as a vegetable from drugs" and during deliberations this same juror stated that because the juror who had filed the affidavit did not have children "she did not know what it was like." Defense counsel filed an affidavit stating that he would have challenged the juror for cause if he had been appraised of her family history.

At the hearing on remand, the juror testified that she had been informed by the jury foreman that the verdict had to be unanimous and that a hung jury was out of the question. The juror testified that the

other jurors had pressured her into voting guilty, and that if she had not been told that they had to reach a unanimous verdict, she would have continued to vote not guilty.

In denying defendant's motion, the court found that the juror had been voluntarily persuaded by her fellow jurors to change her verdict to not guilty. Regarding the juror's testimony that she had been informed that a hung jury was not allowed, the court found that the juror had erroneously heard this and that there was no evidence in the record to support her testimony. Additionally, the court found that the claim that another juror had a son who had abused drugs was not substantiated by the record.

Misconduct on the part of a juror will not automatically require a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Unless the juror misconduct affected the impartiality of the jury, a new trial will not be granted. *Id.* In order for an affidavit to be relied upon, it may not be generalized, ambiguous, or vague. *People v Graham*, 84 Mich App 663, 665; 270 NW2d 672 (1978). A new trial will not be granted where the misconduct of jurors has not affected their impartiality. *People v Rohrer*, 174 Mich App 732, 740; 436 NW2d 188 (1989).

Defendant contends that he had proven that the juror who stated that she had a son in an institution for three years due to drugs was prejudiced against him, and accordingly, he did not receive an impartial jury. However, because the identity of the juror was never shown, the trial court properly found that this allegation was not substantiated by the record. See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 64; 454 NW2d 188 (1990).

Defendant also argues that error resulted because the juror had intentionally failed to disclose her family history information during voir dire. This argument is without merit. In weighing the affidavit, it was irrelevant whether the concealment of the answers on voir dire was intentional or otherwise because even after an unintentional concealment, the bias of the juror will still be present during deliberations. *Graham*, *supra*, p 667.

Next, defendant argues that juror misconduct occurred when the jury discussed punishment, the jury foreman told the jury that they had to be unanimous, and a juror failed to disclose that her son had been institutionalized due to drugs. We agree with the trial court's finding that the juror who submitted the affidavit was attempting to impeach her verdict.

In general, a juror may not impeach her verdict by affidavit. *Graham*, *supra*, p 665. However, affidavits or testimony to impeach the verdict may be properly received when they concern overt acts that are accessible to the knowledge of all jurors. *Id.*, p 666. A new trial may be properly granted when a juror affidavit demonstrates that matters concealed or denied on voir dire would have led a party to challenge the juror and when the affidavit is not offered to impeach the verdict. *Id.*, pp 666-667. Here, the juror's testimony demonstrated that she wished to impeach her verdict, and had improperly submitted the affidavit for that reason.

IV.

Last, defendant argues that the trial court erred in denying his entrapment motion.

At an entrapment hearing, a defendant must prove entrapment by a preponderance of the evidence. *People v Moore*, 180 Mich App 301, 309; 446 NW2d 834 (1989). Entrapment occurs when the police have engaged in impermissible conduct that would induce an otherwise law-abiding person, who is similarly situated as the defendant, to commit the crime. *People v Fabiano*, 192 Mich App 523, 526; 482 NW2d 467 (1992). Entrapment can also occur when the police have engaged in conduct that is so reprehensible that it cannot be tolerated. *Id*. Under the first prong, the following factors are analyzed to determine whether the government conduct would induce the criminal conduct:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he had been charged; (3) whether there were any long time lapses between he investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed any sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over the informant; and (12) whether the investigation is targeted. [*People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992).]

These facts are examined in order to determine whether the governmental activity would induce a hypothetical person that was not ready and willing to commit the crime to engage in the criminal activity. *Id.*, p 662. Under the second prong, it must be determined whether the police conduct runs afoul of the basic fairness required under due process. *Id.*, p 663.

The trial court did not err in ruling that defendant was not entrapped into delivering the ounce of cocaine to the undercover officer. Defendant claimed he sold an ounce of cocaine to the officer because the officer was "bugging" him to sell him an ounce of cocaine. This occurred after defendant had already sold the officer an "eight-ball" through the informant. Defendant testified that he sold the officer the ounce of cocaine because he was "inconvenienced." We find that these actions do not amount to conduct that is so reprehensible that it can not be tolerated and would not induce an otherwise law-abiding person to sell cocaine. Thus, entrapment was not established as to the delivery of less than fifty grams of cocaine conviction.

Defendant was also convicted of conspiracy to deliver between 50 and 224 grams of cocaine. With respect to this crime, we do not find that the government's conduct would induce a law-abiding, similarly situated person to commit this crime or that the conduct was so reprehensible it can not be tolerated. Defendant claimed he became frightened after the informant told him that the officer carried a gun. Defendant believed that the officer might hurt him, even though he had never threatened or flashed a gun at defendant. Although defendant believed that the officer might hurt him if he did not sell drugs to him, he also believed that if he refused to sell drugs to him that the officer would purchase the cocaine elsewhere. Thus, although, a similarly situated person may have felt somewhat scared, we do not

believe that the police conduct in this case would have induced a similarly situated person to arrange a cocaine transaction. Moreover, the actions of the police officer did not constitute reprehensible police conduct that cannot be tolerated.

Defendant also contends that the trial court's finding on entrapment must be reversed because he did not have any mens rea. However, a claim of entrapment is distinct from a defense of lack of specific intent. *People v White*, 411 Mich 366, 387; 308 NW2d 128 (1981). A claim of entrapment does not involve a defendant's guilt or innocence, but instead expresses a policy that the defendant should not be prosecuted. *Id.* Thus, defendant's mens rea in committing the crimes is not relevant to his claim of entrapment.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Kathleen Jansen
/s/ Terrence R. Thomas