

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSHON L. GRANDBERRY,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 193380

Recorder's Court

LC No. 94-013031

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony firearm conviction and six months' to four years' imprisonment for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an apparent family feud culminating in defendant's shooting at the complainant, defendant's brother-in-law.

Defendant first argues that the trial court erred in denying his motion to dismiss the charges against him because he was denied his right to due process by the ten-month delay between the time of the offenses and the time of his arrest.¹ We disagree.

The Due Process Clause plays a limited role in preventing unjustified prearrest delay. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). In determining whether dismissal is warranted by a delay, the defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage. *Id.* In this case, we agree with the trial court that defendant's assertion of prejudice was speculative. Moreover, defendant has not alleged that the prosecution intended the delay to gain a tactical advantage. Therefore, we conclude that the trial court did not err in denying defendant's motion to dismiss. *Id.* at 135.

Defendant next argues that the trial court erred in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We disagree.

To determine whether a verdict is against the great weight of the evidence a judge must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). It follows that a judge may grant a new trial after finding the testimony of the witnesses for the prevailing party not to be credible. *Id.* However, such an exercise of judicial power must be undertaken with great caution, "keeping in mind the special role accorded jurors under our constitutional system of justice." *Id.* This Court reviews a trial court's grant or denial of a motion for new trial for an abuse of discretion. *Id.*

In this case, the main issue at trial was the identification of defendant as the shooter. Although the credibility of the complainant's identification of defendant was called into question by his reluctance to identify defendant and by the timing of his eventual identification of defendant, the complainant's identification was corroborated by the testimony of his son and nephew who also witnessed the shooting. The trial judge, who had the opportunity to observe the demeanor of the witnesses, expressly stated that the testimony of the complainant's son and nephew was credible or, at least, was "not inherently incredible." Because competent testimony identifying defendant as the shooter was presented at trial, we can not find that the trial court's denial of defendant's motion for new trial constituted an abuse of discretion.

Finally, defendant argues that four instances of prosecutorial misconduct denied him a fair and impartial trial. However, defendant failed to timely object to the remarks that he now claims as error. Thus, our review is foreclosed unless a curative instruction could not have eliminated the prejudicial effect of the remarks or our failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

With respect to three of the four instances of prosecutorial misconduct alleged by defendant in this case either no error occurred or a cautionary instruction could have eliminated any prejudice that did occur. The fourth instance of prosecutorial misconduct alleged by defendant did constitute an improper, albeit brief, argument. However, a miscarriage of justice did not result where the prosecutor complied with the trial court's sua sponte directive to not continue that particular line of argument.

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

¹ In this case, defendant's offenses occurred in January, 1994. The complaint and warrant for defendant's arrest issued in May, 1994. Defendant was not arrested and the information was not filed until November, 1994.