STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENO EDWARD WALLS,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 199362
Macomb Circuit Court
LC No. 96-000675-FH

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of heroin, second offense, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), MCL 333.7413(2); MSA 14.15(7413)(2), conspiracy to deliver less than fifty grams of heroin, second offense, MCL 750.157a; MSA 28.354(1), MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), MCL 333.7413(2); MSA 14.15(7413)(2), malicious destruction of police property, MCL 750.377b; MSA 28.609(2), fleeing and eluding the police, MCL 257.602a; MSA 9.2302(1), and two counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277. Defendant was sentenced to ten to forty years' imprisonment for the delivery of heroin conviction, three to forty years' imprisonment for the conspiracy conviction, two to four years' imprisonment for the malicious destruction of police property conviction, two to four years' imprisonment for each assault conviction and 287 days' imprisonment for the fleeing and eluding conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the in-court identifications by police officers Joseph Guzdoil and Michael Byrne were tainted and should have been suppressed. He contends that the trial court erred in declining to hold a *Wade*[1] hearing. We disagree.

First, we note that defendant never raised this issue below as to Officer Byrne. Defendant raised this issue as to Officer Guzdoil in a motion in limine, arguing that a *Wade* hearing was necessary to determine whether his rights were violated when Guzdoil viewed his mug shot. Defendant was attempting to bar any in-court identification by the officer. The trial court held that the officer acted properly in obtaining the mug shot, and declined to hold a *Wade* hearing. Officers Guzdoil and Byrne subsequently identified defendant in court without further objection.

We agree with the trial court that there was no need for a *Wade* hearing in this case. At the preliminary exam, Officer Guzdoil testified regarding his use of the photograph and was subject to cross-examination. We agree with the trial court that a police officer investigating a case may obtain and view a photograph of a suspect without violating the suspect's rights. The officer is not required to view the photograph as part of a photo line-up. In the course of investigation, police officers necessarily seek out evidence that might include or exclude a particular suspect. We recognize that, in cases where an investigating officer is also a witness, such information could influence the officer's in-court identification of a defendant. However, where the officer has an independent basis for the identification, the question of the reliability of the officer's identification testimony is for the jury. *People v Johnson*, 202 Mich App 281, 286-287; 508 NW2d 509 (1993). Under these circumstances, a *Wade* hearing is unnecessary:

> We do not believe that a defendant is entitled to an evidentiary hearing where the defendant fails to support the allegation of impropriety with factual support or where it is clear from the record that such a hearing would be futile in light of substantial evidence that there exists an independent basis for the identification. [*Id.* at 287.]

Thus, an officer's exposure to evidence during an investigation is a proper subject for cross-examination, but does not bar otherwise relevant identification testimony. In this case, the testimony during the preliminary exam made it clear that Officer Guzdoil had an independent basis for his identification of defendant, and his testimony was properly admitted. Similarly, Officer Byrne's testimony at trial made it clear that he also had an independent basis for his identification. Thus, even had defendant requested a *Wade* hearing regarding Byrne's in-court identification, he was not entitled to one.

Next, defendant argues that the information should have been quashed because the thirty-month delay between the offense and his arrest denied him due process. We disagree. To a limited extent, a defendant is protected by procedural due process guarantees from delays between the commission of an offense and arrest for that offense. *US v Lovasco*, 431 US 783, 798; 97 S Ct 2044; 52 L Ed 2d 752, 758 (1977); *People v Bisard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). The test to determine whether a delay between the offense and the arrest denied due process is whether defendant was prejudiced. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). The defendant must show substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Once the defendant establishes prejudice, the prosecutor bears the burden of persuasion and must show that the reasons for the delay were sufficient to justify the prejudice. *Reddish*, *supra* at 627.

In this case, defendant failed to show either prejudice to his right to a fair trial or any intent by the prosecution to gain a tactical advantage by delaying his arrest. The only prejudice defendant alleges was an unsupported statement by his counsel that defendant could not recall where he was on July 28, 1993. An unsupported assertion of prejudice by defense counsel is inadequate. *People v Williams*, 114 Mich App 186, 202-203; 318 NW2d 671 (1982). In addition, the prosecution showed that the police took several reasonable steps to locate defendant but were unable to do so until 30 months after the issuance of the warrant. Officer Guzdoil testified that he staked out defendant's last known address for three or four days. Guzdoil also contacted defendant's parole officer and advised him to detain

defendant for questioning if defendant reported as required. However, because defendant violated the terms of his parole by failing to report to his parole officer and by failing to advise him when he changed addresses, the police were unable to locate him. If defendant had abided by the terms of his parole, he would have been arrested for this offense within weeks of the issuance of the warrant. In addition, Guzdoil took the following other steps in an attempt to locate defendant: contacted the Michigan State Police Fugitive Team, took out an advertisement in the Macomb Daily requesting information regarding defendant's whereabouts, put out a state-wide LEIN broadcast, and placed defendant on the "parole absconders" list. Under these circumstances, it is clear that the delay in the arrest was attributable solely to defendant. Thus, defendant could not show an intent by the prosecutor to gain a tactical advantage, and defendant's due process rights were not violated.

Next, defendant argues that the trial court erred in limiting defense counsel's closing argument. We disagree. We review a trial court's ruling regarding control of closing argument for an abuse of discretion. *People v Grace*, 50 Mich App 604, 607; 213 NW2d 853 (1973). If a litigant fails to produce non-privileged evidence that is under his control, the trier of fact may infer that the evidence, if produced, would be unfavorable.[2] This rule applies to the defendant in a criminal case as well as to other litigants. *People v Fields*, 450 Mich 94, 105; 538 NW2d 356 (1995); *People v Williams*, 42 Mich App 278, 281; 201 NW2d 286 (1972). In closing arguments, reasonable inferences from the testimony may be drawn by counsel. *Heintz v Akbar*, 161 Mich App 533, 539; 411 NW2d 736 (1987).

Defendant contends that the trial court erred in prohibiting his attorney from arguing that the prosecution would have submitted the photograph of defendant to the jury if it had been consistent with the prosecution's theory. We disagree. First, defendant's argument is not entirely consistent with the record. During closing argument, defense counsel broached this issue:

> I think that is consistent with what you would have seen in the picture, and even if you didn't see it because Reno Walls look [sic] the same then as he does now.
>
> [*Prosecutor*]: Your Honor, I am going to object. Counsel is arguing something that is not evidence and we should have a side bar conference.
>
> (Whereupon there was a conference at the bench).
>
> *The Court*: The jury will completely disregard the statement by counsel that the reference to the photograph could have been admitted. Okay. You may proceed from there.
>
> [*Defense Counsel*]: Just for the record, I take exception, respectfully, to the Court's ruling.

On this record, it is not clear that the trial court completely prohibited argument on this point. It is clear, however, that defense counsel's statement regarding what he thought the picture would show, and his statement that defendant looked the same in 1993 as he did at trial, were improper. While defense

counsel could properly draw inferences from the evidence, he could not testify regarding the contents of a picture that was not admitted as evidence. Thus, the prosecutor's objection was properly sustained.

We also conclude that the trial court's instruction regarding the admissibility of the photograph was proper. Before trial, defense counsel specifically moved to prohibit any reference to a "mug shot" on the ground that it would be prejudicial to defendant. The prosecutor agreed, on the record, not to make any such references. Obviously, the prosecutor could not have introduced the mug shot without violating this agreement.[3] Under these circumstances, the trial court properly limited defense counsel's argument in this area. If defense counsel wanted to argue regarding defendant's appearance in the photograph, he should have offered it into evidence himself.

Finally, defendant argues that there was insufficient evidence to support the conspiracy count and it should have been quashed at the preliminary examination. We disagree. A decision to bind over a defendant is reviewed for an abuse of discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A defendant must be bound over for trial if evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

In order to establish the crime of conspiracy, the prosecutor must prove a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner. MCL 750.157a; MSA 28.354(1); *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995). The agreement may be established by circumstantial evidence. *People v Barajas*, 198 Mich App 551, 554; 499 NW2d 396 (1993). However, the evidence of knowledge must be clear and unequivocal. *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). It is not necessary to a conviction for conspiracy that each defendant have knowledge of all of its ramifications. *Meredith, supra* at 412.

Here, the prosecution argued that defendant had entered into a conspiracy with Dana Parham to deliver less than fifty grams of heroin. During the preliminary examination, Officer Guzdoil testified that Parham was present in defendant's car when defendant advised Guzdoil that he had only 95 bundles of heroin and not the previously agreed 100 bundles. Guzdoil did not object to the disparity and agreed to consummate the transaction for the heroin. He also testified that Parham participated in the exchange of the heroin for money. Defendant handed the package of heroin to Parham. Parham then delivered the package to Guzdoil and received the money for the heroin. We believe that this evidence was sufficient to establish probable cause that Parham and defendant conspired to deliver heroin. Accordingly, we hold that the magistrate did not abuse its discretion in binding defendant over on the conspiracy count.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[2] We interpret this rule to apply only where the unproduced evidence is within the sole possession and control of one party. Where, as here, the same evidence is available to the other party, we see no reason for its application. However, in the absence of clear authority, and because the parties did not address this issue in any depth, we decline to rest our holding on this interpretation.

[3] A mug shot is obviously distinct, and no juror would be likely to mistake it for a family photo. Had the prosecutor attempted to admit the mug shot, we have no doubt that defendant would have strenuously objected.