

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PARNELL MORRIS DICUS,

Defendant-Appellant.

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UNPUBLISHED

September 27, 2005

No. 256477

Washtenaw Circuit Court

LC No. 03-000150-FH

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction for aggravated stalking of his estranged wife, Verna Dicus, in violation of MCL 750.411i. We affirm.

Defendant raises a myriad of issues on appeal claiming that he was denied a fair trial because he did not receive a speedy trial and further, that he was denied a fair trial because his trial counsel was ineffective. Defendant also asserts that the trial court erred by allowing “other acts” into evidence.

We first address whether defendant was denied his right to a speedy trial. Defendant failed to preserve this issue for review, thus we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750 (1999). Defendant’s failure to promptly assert his right to a speedy trial also weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, sec 20, MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978).

An examination of these four factors reveals that defendant was not denied his right to a speedy trial because most of the delay is attributable to defendant. Defendant was arrested on January 22, 2003. A pretrial hearing was held on April 10, 2003, during which the trial court ordered a competency examination. Following the examination, defendant was found competent

to stand trial, and his competency was stipulated to on June 19, 2003. On that same date, defense counsel moved to withdraw because defendant refused to listen to his advice. Counsel's motion was granted. On June 26, 2003, another pretrial hearing was held and trial was scheduled for September 22, 2003 – only eight months after defendant's arrest. On September 22, 2003, trial was adjourned because defendant requested another competency hearing. On November 6, 2003, defendant's second attorney moved to withdraw because defendant had filed a request for an investigation of his attorney. On December 4, 2003, defense counsel's motion to withdraw was granted, new counsel was appointed, and the competency hearing was adjourned until December 18, 2003. On December 18, 2003, defendant was again found competent to stand trial. Defendant's trial began on April 19, 2004.

Because his delay was less than eighteen months, defendant has the burden of proving that he was prejudiced by the delay. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972). A defendant can experience two types of prejudice while awaiting trial: prejudice to the person and prejudice to the defense. Prejudice to the person results when pretrial incarceration deprives an accused of many civil liberties, and prejudice to the defense occurs when the defense might be prejudiced by the delay. *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997). Defendant asserts that the delay caused him needless anxiety and concern and that the delay resulted in problems with his memory. However, anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Id.* at 462. Moreover, a general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, is insufficient to establish that a defendant was denied his right to a speedy trial. *Id.* Furthermore, defendant testified at trial that “my memory may be slow, but it's still there” and he attributed his slow memory to the fact that he was heavily medicated. Defendant further testified that, because he was so heavily medicated, he kept a handwritten log of events from November 2002 until his arrest in January 2003, which he used to refresh his memory during trial. Thus, defendant has failed to sustain his burden of demonstrating prejudice resulting from the fifteen month delay between his arrest and trial.

Defendant next argues that the trial court improperly admitted “other acts” evidence. Defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights, i.e., errors that were outcome determinative. *Carines, supra* at 764, 774.

Defendant specifically objects to the admission of the following evidence: (1) evidence that defendant told Verna that he would get her fired if she hung up on him at work; (2) evidence that defendant left dead flowers on her desk at work; (3) evidence that Verna called the police during a confrontation between her and defendant; that the phone went dead when she tried to use it, that defendant rammed through a locked door and assaulted Verna in the presence of their children, and that Verna fled the home on foot to seek help from the fire department; (4) evidence that defendant forcibly had sex with Verna while she had Migraine headaches telling her that there is no such thing as rape when the parties are married; (5) evidence that defendant had previously been employed as a bounty hunter; (6) evidence that defendant sent Verna's parents a letter from jail stating that Verna is mentally ill; and (7) evidence that defendant used to be Verna's stepfather; that Verna became pregnant by defendant while he was still married to her mother who was also pregnant by defendant; that defendant bought Verna drinks while she was underage; and that he took her to a hotel to begin their sexual relationship.

Pursuant to MRE 402, “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.” “Relevant evidence” is defined by MRE 401 as “evidence having any tendency to make the existence of fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

The elements of aggravated stalking require the prosecution to prove, beyond a reasonable doubt, that the victim’s feelings of fear were reasonable. MCL 750.411i (1)(e). Therefore, the first five pieces of testimony were relevant and admissible to prove that Verna’s fear was reasonable.

The other two pieces of evidence were irrelevant to Verna’s state of mind and violated MRE 404(b)(1)’s general rule that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith” because the only conceivable purpose of such evidence was to demonstrate that defendant has a bad character. However, the admission of this evidence did not affect defendant’s substantial rights. Even excluding the irrelevant evidence, the prosecution presented more than sufficient evidence with which to convict defendant of aggravated stalking. Verna Dicus obtained a PPO against defendant in September 2002. In January 2003, defendant parked in a lot next door to SAFE House, a home for abused women, that Verna and her children moved into after Verna was assaulted by defendant. Defendant followed her from SAFE House to the police station parking lot. Shortly thereafter, defendant went to Verna’s work. The next day defendant waited outside of their child’s school because he knew that Verna would pick the child up after school. Although Verna picked him up early to avoid running into defendant, defendant was there. He followed her as she drove down random streets and blocked her into a driveway until she threatened to run him over if he did not move his car. While Verna was trapped in the driveway defendant banged on her car windows. This evidence, taken as a whole, is more than sufficient to sustain defendant’s conviction.

Defendant next argues that he received ineffective assistance of counsel. Before this Court will find that “a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “To find prejudice, a court must conclude that there is ‘a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.’” *Id.* at 312, quoting *Strickland v Washington*, 446 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defense counsel was not ineffective for failing to object to the other acts evidence. As discussed above, the majority of the evidence defendant now objects to as inadmissible was relevant to the victim’s state of mind and, thus, admissible. An attorney is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). The evidence that was irrelevant, and therefore inadmissible, did not affect defendant’s substantial rights because the prosecution presented more than sufficient evidence with which to convict defendant of aggravated stalking, even excluding the irrelevant evidence.

Defense counsel was not ineffective for failing to subpoena defendant's son and the Dicuses' "spiritual advisors," Floyd Johnson and Kevin Newman. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court does not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Dixon, supra* at 398. A substantial defense is one which might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). Defense counsel's decision not to subpoena defendant's son and the "spiritual advisors" did not deprive defendant of a substantial defense. Defendant's defense that his wife initiated the contact was presented by defense counsel through cross-examination of his wife. The jury chose not to accept that defense. That a strategy that does not work does not render ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defense counsel was not ineffective for failing to use a copy of defendant's cellular phone bill to impeach Verna's credibility. At trial, Verna testified that she did not go to work on January 15, 2003; defendant claims that she was at work that day and argues that his cellular phone bill can prove his claim. Defendant's phone bill shows that he placed a call to a particular telephone number on January 15, 2003, and talked for 32 minutes, but defendant has produced no evidence that the particular telephone number is Verna's work number or that the person he talked to at that number was Verna. Moreover, defendant has presented no evidence that he was prejudiced by counsel's failure to impeach Verna with the phone bill.

Defense counsel was not ineffective for failing to file a motion for speedy trial. As discussed above, the majority of the delays between defendant's arrest and trial were attributable to the defendant. An attorney is not ineffective for failing to bring a futile motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Finally, defense counsel was not ineffective for failing to file an interlocutory appeal with regard to defendant's bond and his failure to move for defendant's release pursuant to MCR 6.004(C). Defense counsel's decision not to file an interlocutory appeal of the trial court's decision not to reduce defendant's bond was a matter of trial strategy and, as noted above, this Court does not substitute its judgment for that of counsel regarding matters of trial strategy. An interlocutory appeal would have delayed trial and prolonged defendant's incarceration. Therefore, defense counsel's failure to file an interlocutory appeal was not unreasonable. Furthermore, defendant was not entitled to release pursuant to MCR 6.004(C) because most of the delays between arrest and trial were attributable to defendant. Therefore, his attorney was not ineffective for failing to move for his release. Again, counsel is not required to make a frivolous or meritless motion.

Defendant next argues that the trial court erred in refusing to reduce his bond. We will not entertain this issue because it is moot. "An issue becomes moot when an event which makes it impossible for this court to fashion a remedy." *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987). "The principal duty of this Court is to decide actual cases and controversies. To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before [this Court]. . . unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated*

*Publications v Lansing*, 47 Mich 98, 112; 649 NW2d 383 (2002). Because defendant is no longer subject to bond, we could not fashion a remedy to cure the trial court's abuse of discretion, even if we found that the trial court abused its discretion in refusing to reduce defendant's bond. Moreover, this issue is not one of public significance; it is a matter of significance only to defendant.

Defendant's final argument is that he is entitled to a new judge for his new trial. Because defendant is not entitled to a new trial we need not address this issue, except to note that defendant's arguments on this issue are completely frivolous.

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Talbot  
/s/ Stephen L. Borrello