

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CREAMUS P. HOWARD,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 205530

Recorder's Court

LC No. 96-007295

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for two counts of second-degree criminal sexual conduct, MCL 750. 520c(1)(a); MSA 28.788(3)(1)(a), involving an eight-year-old child. Defendant was sentenced to two concurrent terms of ten to fifteen years' imprisonment. Defendant raises several issues, both through counsel and in propria persona. We affirm.

First, defendant argues through counsel that his due process rights were violated because of pre-arrest delay. We disagree. The threshold test for determining whether a delay constitutes a denial of due process is whether the 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); *People v Loyer*, 169 Mich App 105, 120; 425 NW2d 714 (1988).

There is no evidence that defendant was prejudiced in this case. Defendant makes generalized assertions that the delay resulted in failed memories of both himself and the complainant, and infers an inability to obtain possible exculpatory witnesses. Defendant makes no showing of actual and substantial prejudice, and his assertions are insufficient to establish a due process violation based on pre-arrest delay. *People v Adams*, 232 Mich App 128, 135-136; 591 NW2d 44 (1998); *Loyer*, *supra* at 120. Moreover, defendant has offered no evidence suggesting that the delay was intended to secure a tactical advantage on the part of the prosecution. The trial court did not err in refusing to dismiss the case on this basis.

There is no merit to defendant's unsupported suggestion that the trial court abused its discretion

by limiting cross-examination.

There is no merit to defendant's claim that he was deprived of a fair trial because the trial court allowed the prosecutor to amend the information to expand the dates of the charged crimes. Generally, amendment of the information is permitted at any time so long as the defendant is not prejudiced. *People v Willett*, 110 Mich App 337, 343; 313 NW2d 117 (1981).

Defendant has not shown that he was prejudiced by the amendment. Where, as here, the original information is sufficient to inform a defendant of the nature of the charge against him, the defendant is not prejudiced by an amendment to cure a defect in the information. *People v Newson*, 173 Mich App 160, 164; 433 NW2d 386 (1988). When time is not of the essence of the offense charged, amendment of the date is proper, as long as the amended information does not introduce a new or different charge. *People v Lee*, 307 Mich 743, 748-749; 12 NW2d 418 (1943). Time is not of the essence in a criminal sexual conduct case involving a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). The amendment here did not introduce a new charge, and defendant had ample opportunity to prepare a defense. We find no abuse of discretion. *People v George*, 375 Mich 262, 264; 134 NW2d 222 (1965).

The remaining scattershot issues, none of which have merit, are raised by defendant in propria persona. There is no merit to defendant's claim that his right to a speedy trial was violated. To determine whether a defendant has been denied a speedy trial, this Court considers: (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 Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). In this case, since the delay was less than eighteen months, defendant was required to show prejudice. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant alleges no specific prejudice to his defense. Anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Gilmore, supra* at 462. Moreover, many of the delays and continuances in this case were attributable to defendant, including his numerous successful requests for change of counsel. On balance, we conclude that defendant's right to a speedy trial was not violated.

There is no merit to defendant's claim that he was deprived of a fair trial because of the introduction of other bad acts evidence, contrary to MRE 404(b). Because defendant failed to object to the admission of the evidence in question, appellate relief is precluded absent manifest injustice. *People v Burgess*, 153 Mich App 715, 722-723; 396 NW2d 814 (1986). In any event, the challenged evidence was relevant and appropriate on the circumstances of this case. See *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973); *People v Wright*, 161 Mich App 682, 687-688; 411 NW2d 826 (1987). Further, the trial court properly gave the jury a limiting instruction. We find no error.

There is no merit to any of defendant's numerous claims of ineffective assistance of counsel. Because defendant did not raise this issue in the trial court, this Court's review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must establish that counsel's performance fell

below an objective standard of reasonableness under prevailing professional norms. Defendant must also establish that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). We have reviewed the record and considered each of defendant's many claims of ineffective assistance. We conclude that defendant has failed to establish that counsel's performance was deficient, failed to overcome the presumption of sound trial strategy, and failed to establish prejudice from the alleged deficiencies.

Defendant also argues that the trial court erred in refusing to allow him to represent himself. Defendant has not provided this Court with the relevant transcript of the hearing at which this issue was addressed. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). The essence of defendant's claim, however, is that he should have been allowed to represent himself because his attorneys were ineffective, and we find this issue to be without merit. Defendant had five different appointed attorneys during the proceedings below and, as noted previously, none of defendant's claims of ineffective assistance are meritorious.

Defendant's claim of prosecutorial misconduct is also without merit. Defendant did not object to the alleged misconduct at trial. Absent an objection during trial, appellate review of improper conduct or arguments by the prosecutor is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction or failure to consider the issue would result in a miscarriage of justice. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), aff'd on other grounds 445 Mich 369; 518 NW2d 418 (1994). We have examined each of defendant's allegations and find no evidence of misconduct. It was not an abuse of the prosecutor's discretion to charge defendant with first-degree criminal sexual conduct where the eight-year-old victim reported several acts of anal penetration. The record simply does not support defendant's other claims, and we are satisfied that a cautionary instruction could have cured any alleged prejudice.

Finally, we find no merit to defendant's claim that the trial court failed to properly address his post-trial motion for a new trial, nor do we find any abuse of discretion in the trial court's decision to deny that motion. *People v LeGrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot