

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LEWIS,

Defendant-Appellant.

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UNPUBLISHED

May 7, 2009

No. 277505

Kent Circuit Court

LC No. 01-002471-FC

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

A jury convicted of second-degree murder, MCL 750.317; carrying a concealed weapon (CCW), MCL 750.227; and possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> The trial court sentenced him to 35 to 55 years' imprisonment for his murder conviction, 3 to 5 years' imprisonment for his CCW conviction, and 2 years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Claims Related to Evidence of Jailhouse Telephone Call

On appeal, defendant first asserts that the trial court erroneously admitted a recording of a jailhouse telephone call by defendant to Angela Cross, defendant's alleged heroin dealer. Defendant also challenges the admission of his testimony from the previous trial, and the prosecutor's use at trial of biased version of the jailhouse telephone call transcript.

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<sup>1</sup> Defendant was previously convicted of these charges, and sentenced on August 21, 2002. We affirmed his convictions. *People v Lewis*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 31, 2004 (Docket No. 244589). Our Supreme Court reversed and remanded this case for a new trial, concluding that "[d]efendant was prejudiced by the erroneous admission of a poor quality tape recording of a conversation to which he was a party," because "[t]he jurors were allowed to use a transcript of the recording that had been prepared by the police but not reviewed for accuracy by the trial court and not made part of the record." *People v Lewis*, 474 Mich 1056; 708 NW2d 445 (2006).

### A. Standard of Review

No objections were lodged to preserve any of the above claims at trial, and thus review is for plain error affecting defendant's substantial rights. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004).

### B. Analysis

"Sound recordings, if relating to otherwise competent evidence, are admissible provided a foundation is laid for their admission." *People v Frison*, 25 Mich App 146, 147; 181 NW2d 75 (1970). As a threshold matter, defendant does not object to the authenticity of the recording. Nevertheless, on the record the audio recording was sufficiently authenticated. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991).

On appeal, defendant argues that the trial court erred in admitting the audio recording, because it "was largely inaudible, indecipherable and useless"; and that the jury would be required to speculate as to the contents of the audio recording. An audio recording is not inadmissible, because part of it was unintelligible or inaudible. See *People v Karalla*, 35 Mich App 541, 546; 192 NW2d 676 (1971). The admissibility of an audio recording is left to the sound discretion of the trial court, and an audio recording is admissible unless the unintelligible portions of it are so substantial as to render the audio recording as a whole untrustworthy. *Id.*

The entire audio recording lasts approximately 12 minutes, and Cross was a speaker on the audio recording for approximately five minutes. The audio recording is muddled, and often indecipherable. Nevertheless, after the three-way connection takes place, defendant appears to ask to speak to "Poochie," Cross' nickname, and he then clearly identifies himself as "Patrick." Later during the course of the conversation Cross gives defendant her address, where she also states her name "Angela Cross." The audio recording provides a clear exchange between defendant and Cross, where defendant asks Cross about "that package." She responds that "it's gone . . . it's been gone . . . it's gone gone." Defendant then asks if she read an "ad" about a gun or a firearm, to which Cross responded "ain't no firearm." The audio recording was offered for a limited purpose to demonstrate that defendant asked Cross to dispose of a mask and weapon used in the instant offenses. The audible portion of the audio recording supports a reasonable inference that such a scenario occurred (even the worst version of the audio recording provides as much). The audio recording was also probative as to Cross' credibility with respect to whether defendant left a package at her residence and whether she allegedly disposed of the mask and weapon. The audio recording was admissible pursuant to MRE 401 and 402, subject to MRE 403. On this record, nothing supports that the evidence was given undue or preemptive weight by the jury, or that it would have been inequitable to allow use of the evidence, such that it should have been precluded under MRE 403. See *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). We conclude that the unintelligible portions of audio recording of jailhouse telephone calls were not so substantial as to render the audio recording as a whole untrustworthy, and audio recording was properly admitted to show that Cross disposed of the purported items, after foundational requirements were met. See generally *People v Parker*, 76 Mich App 432, 444-445; 257 NW2d 109 (1977).

Defendant also contends that the admission of the audio recording violated the law of the case doctrine, asserting that our Supreme Court held that the use of the tape and transcript was reversible error. Whether a trial court failed in following an appellate court ruling on remand is a question of law that this Court reviews de novo. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998). "It is the duty of the lower court . . . on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v General Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). However, the law of the case does not apply where the facts do not remain materially the same." *South Macomb Disposal Authority v. American Ins. Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

Here, the record indicates that on remand the instant audio recording had been enhanced and played to the jury on a superior speaker system. Before the audio recording was admitted into evidence, Crime Scene Technician Richard Litts was questioned at length in regard to his efforts to enhance the quality of the audio recording. Litts testified that he contacted the Michigan State Police crime lab to assist to enhancing the quality of the audio recording. He testified that, at the crime lab, he sought to eliminate background noise and keep human voices. "He testified that "[t]he audiotape was sampled, which means converted, to a digital format at a very high level so that all of the noises on that tape possible could be extracted from the tape and put into a computer format." Litts testified that two filters were then used to eliminate the background noise from the digitally converted audio recording.

Litts was also questioned at length in regard to his efforts to make portions of the audio recording audible for the jury. He testified that before trial he tested whether the jury would be able to hear the audio recording with the courtroom's audio system. Litts testified he could not hear the audio recording on the courtroom's audio system. Litts believed the courtroom's speakers "are not made to cover the full spectrum of sound we needed to produce" from the audio file. Litts testified that he contacted a sound consultant who supplied him with speakers and an amplifier that would ensure more clarity. Litts admitted that, "while the one your listening to is still poor quality, it is – it's far, far superior to what the original tape was." Defense counsel cross-examined Litts at length, and then stated "my feeling is the tape can be admitted, the CD can be admitted for purposes the jury might want to draw from it." Here, the audio recording was enhanced and thus, the material facts are not the same. Accordingly, the law of the case doctrine did not require the trial court to exclude the audio recording from evidence.

Further, the Supreme Court's order indicates:

Defendant was prejudiced by the erroneous admission of a poor quality tape recording of a conversation to which he was a party. The jurors were allowed to use a transcript of the recording that had been prepared by the police but not reviewed for accuracy by the trial court and not made part of the record. [*People v Lewis*, 474 Mich 1056; 708 NW2d 445 (2006).]

On remand, the corresponding transcript was not made part of the record or reviewed for accuracy. It is settled that a trial court abuses its discretion by allowing a jury to review a transcript of an audio recording, where the accuracy of the transcript has not been established by stipulation of the parties or independent review by the trial court. *People v Lester*, 172 Mich App 769, 774-776; 432 NW2d 433 (1988). Here, however, the jury was not provided with a

transcript of the audio recording. We reject defendant's claim that the trial court violated the law of the case. *Houston, supra* at 466.

Next, defendant contends that the trial court erroneously admitted his testimony from the previous trial. "Generally, testimony given by a defendant at a prior trial is admissible upon retrial." *People v Gardner*, 122 Mich App 20, 22; 329 NW2d 518 (1982). A party's admissions are excluded from the rule against hearsay, and such admissions are admissible as substantive evidence, as well as for impeachment under MRE 801(d)(2). *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). At trial, the prosecutor, defense counsel, and another individual, who played the part of defendant, read to the jury defendant's testimony from the previous trial. During the testimony, there were subtle references to the audio recording transcript, which the Supreme Court ruled was prejudicial because it was not part of the record or reviewed for accuracy at that trial. While these references should have been redacted or omitted on the rereading of the testimony, there is no indication that the jury found such references significant. As noted previously, the jury at this trial was not given the transcript of the audio recording. Ultimately, defendant has not demonstrated plain error affecting his substantial rights regarding this allegation of evidentiary error. *Houston, supra* at 466.

Last, we note that defendant also argues that the prosecution engaged in misconduct by introducing the audio recording as evidence at trial, and by presenting his own version of what the recording says, i.e., referencing a transcript of the audio recording at trial during questioning of witnesses, during opening statements, and final arguments. These claims were not presented in defendant's statement of the issues; as such, we need not review this claim. See MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, defendant's allegations of prosecutorial misconduct lack merit. The prosecution's introduction of the audio recording, and the questions to witnesses regarding the audio recording did not constitute prosecutorial misconduct, but constituted a good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecution's opening statement provided an outline of the case and advised the jury of the import of the evidence to be presented, *People v Stimage*, 202 Mich App 28, 31; 507 NW2d 778 (1993), and during closing argument, the prosecution advanced arguments of what he believed the evidence showed and all reasonable inferences derived therefrom relating to its theory of the case. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). While the challenged questions to Officer James Fannon and Cross may have included facts based on the prosecution's perspective of the audio recording, the trial court provided an instruction that the attorneys' questions are not evidence. Thus, there could be no error in the questions where such a curative instruction prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). On the record, the prosecution's questions, opening statement, and closing argument did not meet the threshold for reversal based on unpreserved error. *Id.* at 454.

## II. Ineffective Assistance of Counsel

Next on appeal, defendant raises numerous claims of ineffective assistance of counsel.

### A. Standard of Review

Because no hearing was held and no findings were made, however, this Court's review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

### B. Analysis

To prevail on an ineffective assistance of counsel claim, defendant must prove that trial counsel's "performance was deficient" and that deficiency "prejudiced the defense" to sustain a claim of ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

After reviewing the entire record, we conclude that all of defendant's claims of ineffective assistance of counsel lack merit. Defendant's arguments are directed at defense counsel's trial strategy, and there has been no showing that defense counsel's trial strategy was unsound. *Matuszak, supra* at 57-58. We will not substitute our judgment for that of trial counsel in reviewing a claim of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 415-416; 639 NW2d 291 (2001). Significantly, even if a strategy fails, it does not render counsel's assistance ineffective. *Id.* 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. *Strickland, supra* at 690-691; *Matuszak, supra* at 57-58.

## III. Speedy Trial

Finally, defendant asserts on appeal that he was denied a speedy trial when our Supreme Court remanded his case.

### A. Standard of Review

Whether a defendant has been denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A trial court's factual findings are reviewed for clear error, while constitutional questions of law are reviewed de novo. *Id.*

### B. Analysis

Generally, the pertinent period commences on the date of the defendant's arrest in determining whether a defendant has been denied his right to a speedy trial. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). However, this issue actually addresses defendant's speedy retrial following the Supreme Court's remand. The following factors are used to assess whether a defendant has been denied his right to a speedy trial: (1) the length of the delay, (2) the

reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.* at 261-262.

First, approximately 11 months (338 days) passed between our Supreme Court's order for reversal and remand for new trial and the commencement of the instant trial. "A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue." *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). However, the length of the delay is not determinative in a speedy trial claim. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Second, we find that the bulk of the delay (180 days) can be attributed to docket congestion, which is assigned only minimal weight in determining the existence of a violation. *Williams, supra* at 263. Ninety-seven days should be attributed to defendant based on his filing of three motions. The remaining portion of the delay (61 days) should be attributed to the prosecution and defendant, where there was a delay in transferring defendant from facilities and where defense counsel withdrew before trial commenced. The reasons for the 11-month delay do not weigh in favor of finding a speedy trial violation. Third, defendant mentioned his right to a speedy trial in his August 14, 2006, motion, and previous trial counsel asserted defendant's right to a speedy trial at the October 13, 2006, motion hearing. Defendant asserted his right to a speedy trial approximately six months (192 days) following our Supreme Court's February 3, 2006, order. This factor weighs in defendant's favor. Finally, however, we agree with the trial court that defendant suffered no prejudice as a result of the delay. Defendant argues on appeal that he suffered prejudice, because he could not find exculpatory witnesses. However, defendant then makes the contrary assertion:

If he had an additional 7 or 8 months with his investigator in the field, he may have found these witnesses. Instead of 11 months, he had only about 2 months to find these witnesses.

Further, while defendant claims that his defense suffered because he could not locate two specific witnesses, there is no indication that either of these individuals could ever have been located for, and willing to testify at, trial. Indeed, there was no evidence that those witnesses were unable to testify due to the delay.

The trial court ruled that defendant was not denied his right to a speedy trial, because defendant did not suffer any prejudice as a result of the delays. On this record, the trial court's ruling was not clearly erroneous, *Gilmore, supra* at 459 and that the new trial commenced within a reasonable time under the circumstances. *People v Spalding*, 17 Mich App 73, 75; 169 NW2d 163 (1969).

Affirmed.

/s/ David H. Sawyer  
/s/ Brian K. Zahra  
/s/ Douglas B. Shapiro