

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALAN PICKELHAUPT,

Defendant-Appellant.

UNPUBLISHED
September 3, 1999

No. 202917
St. Clair Circuit Court
LC No. 96-001937 FC

Before: Hoekstra, P.J., and O'Connell and R.J. Danhof,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and preparation to burn property, MCL 750.77; MSA 28.272. The convictions stem from defendant's attempt to murder his former wife by pouring gasoline on her and igniting it. Defendant appeals as of right and we affirm.

Defendant first claims that the trial court erred when it denied defense counsel's motion to withdraw before trial and again at the time of trial. We disagree. Contrary to defendant's argument, the record indicates that the trial court made a sufficient inquiry into the matter before denying the motions to withdraw. *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979). Further, the trial court did not abuse its discretion in denying the motions, where defendant's alleged disagreement with counsel pertained to trial strategy and did not prevent the defense from presenting its case. *People v O'Brien*, 89 Mich App 704, 707-708; 282 NW2d 190 (1979). See also *United States v Hillsberg*, 812 F2d 328 (CA 7, 1987), cert den 481 US 1041 (1987).

Defendant next claims that he was deprived of his right to present an effective defense when the trial court refused to allow him to present evidence of a prior act of attempted suicide. Defendant asserts that this evidence was admissible under MRE 404(b) to show motive or intent. Because the evidence was not offered by defense counsel under MRE 404(b), defendant failed to preserve this issue for appeal. MRE 103(a)(2); *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Moreover, defendant has not established plain error or shown that his substantial rights were affected by

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the exclusion of the evidence. MRE 103(d). Examining this issue in the context of the trial record, defendant has not weaved a logical thread linking the prior act to the ultimate inference of motive or intent. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998); see also *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997). Nor are we persuaded that defendant has demonstrated plain error based on MRE 404(a)(1).

Defendant next claims that evidence regarding a statement that he allegedly made to the effect that he intended to make the victim “pay” should have been excluded for failure of the prosecution to comply with the notice provision in MRE 404(b)(2). Because the trial court did not admit the evidence under MRE 404(b), but, rather, admitted the statement to show defendant’s present state of mind, the notice provision of MRE 404(b)(2) was inapplicable. The fact that the statement may also show a separate act, wrong, or crime does not alone bring the evidence within MRE 404(b). *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989).

Defendant next claims that the trial court erred by permitting the prosecution to pursue an irrelevant line of questioning about his prior drug use when questioning the victim. We find no basis for reversal on this issue. First, defendant has not established that the trial court abused its discretion by allowing the prosecution to question the victim regarding her reasons for not continuing her relationship with defendant in order to rebut the defense suggestion, on cross-examination, that she and defendant were still involved in a relationship. *People v Figgures*, 451 Mich 390; 547 NW2d 673 (1996). Second, defendant did not object at trial to the victim’s disclosure of his drug use and, therefore, this issue is forfeited. MRE 103(a)(1); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In any event, the victim’s disclosure of defendant’s prior drug use did not affect defendant’s substantial rights, MRE 103(d), nor was it decisive of the outcome of the case. *Figgures, supra* at 402.

Defendant next seeks reversal on the basis that the jury was exposed to allegedly prejudicial testimony regarding his character and other bad acts during questioning of both the victim and her daughter, by both defense counsel and the prosecutor. However, we conclude that this issue was not preserved for appeal because no objection or motion to strike was made by defense counsel at trial. MRE 103(a)(2). Further, defendant has not established plain error affecting his substantial rights arising from the testimony elicited by either the prosecutor or defense counsel. MRE 103(d). Evidence admitted for one purpose does not become inadmissible because its use for a different purpose is precluded. MRE 105. Moreover, to the extent that defense counsel deemed an inquiry into the subject matters proper, defendant cannot now assign error to that action. *People v Murry*, 106 Mich App 257, 262; 307 NW2d 464 (1981). Finally, the victim’s answers to defense counsel’s questions, even if viewed as volunteered, unresponsive testimony, did not cause manifest injustice. *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987).

Next, relying on *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1997), defendant argues that the trial court failed to recognize that it had discretion to sanction the prosecution by giving the adverse inference instruction requested by defense counsel. We disagree. Based on our review of the record and the findings made by the trial court regarding the absence of bad faith, we conclude that

the trial court did not err in refusing to give the requested instruction. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

Defendant next claims that the trial court erred by refusing to conduct an evidentiary hearing on his pro se claim of ineffective assistance of counsel. Even assuming for purposes of review that such a motion was filed below, the trial court lacked the authority to decide it because it was untimely under MCR 7.208(A), see *People v LaPlaunt*, 217 Mich App 733, 735-736; 552 NW2d 692 (1996), and a motion to remand had not been granted by this Court. Further, given the cursory nature of defendant's discussion of this issue in his brief, we conclude that he has not demonstrated any basis for relief on this issue, nor has he demonstrated the need for a remand to make a testimonial record. Cf. *People v Ford*, 417 Mich 66, 112-113; 331 NW2d 878 (1982); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendant next claims that the trial court erred in refusing to conduct an evidentiary hearing on his pro se claim that he was deprived of his constitutional right to a speedy trial. Although the record is somewhat incomplete as to events prior to February 1, 1996, we reject defendant's request for a remand, finding that the existing record is adequate for us to determine whether defendant was denied a speedy trial.

Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. We review trial court factual findings under the clearly erroneous standard. We review constitutional questions of law de novo. To determine whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. A delay of more than eighteen months is presumed to be prejudicial; the prosecution bears the burden of proving lack of prejudice to the defendant. The establishment of a presumptively prejudicial delay "triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." [*People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Citations omitted.]

Here, the length of delay was approximately nineteen months, thereby shifting the burden to the prosecution to prove a lack of prejudice. *Id.* at 460. With regard to the reasons for the delay, we find that the delay was primarily chargeable to defendant, given the evidence that he refused to cooperate with the forensic examination, refused to cooperate with prior trial counsel, requested substitution of at least two attorneys without an adequate showing of good cause, and succeeded in obtaining more delay by means of stipulated adjournments of trial. There is no record evidence that the prosecution itself acted to delay defendant's trial. *Id.* at 460-461. We further note that defendant only asserted the right to speedy trial one time before trial, namely, at the preliminary examination. Although delay was also a factor in defendant's request for a release on a personal bond in the circuit court, we note that defendant does not argue that the trial court erred in denying his release under the applicable standards. Lastly, although the nineteen-month delay in this case creates a presumption of prejudice that the prosecution must rebut, *Gilmore, supra* at 459, we note that defendant does not argue in his appeal

brief that he was prejudiced by the delay. In evaluating the issue of prejudice, we acknowledge that defendant was incarcerated for the period from arrest to trial. However, we also note that the record indicates that defendant was subject to a bench warrant for probation violation during this period of time. Besides incarceration, the most serious inquiry is whether the delay impaired defendant's ability to present a defense. *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). Given that defendant's defense was based on his own assertion that he intended to commit suicide, rather than to harm the victim, we are unable to say that defendant's ability to challenge the prosecution's case or to marshal evidence in his own defense was harmed. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987); *People v Ross*, 145 Mich App 483, 492; 378 NW2d 517 (1985).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

/s/ Robert J. Danhof