

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL ANTHONY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

April 26, 2011

No. 295980

Wayne Circuit Court

LC No. 09-011041-FC

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to 22 to 35 years' imprisonment. Defendant appeals as of right. We affirm.

I. PREARREST DELAY

On appeal, defendant argues that the trial court erred in denying his motion to dismiss for prearrest delay. We disagree.

“For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant raised this issue in the trial court, although he initially termed it a speedy trial issue. With defendant's consent or at defendant's request, the trial court twice deferred ruling on the issue of prearrest delay. When defendant finally sought a ruling, he again addressed it as a speedy trial issue and the trial court treated it as such. Thus, the issue of prearrest delay was never decided by the trial court, leaving the issue unpreserved. *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007). An unpreserved issue is reviewed for plain error affecting the defendant's substantial rights. *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008).

“Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process.” *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979) (internal citations omitted). “Before dismissal may be granted because of prearrest delay

there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds *People v Miller*, 482 Mich 540 (2008). Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charges "in such a manner that the outcome of the proceedings will likely be affected," *id.*, e.g., the loss of exculpatory evidence that could not be obtained by other means. *People v Adams*, 232 Mich App 128, 136; 591 NW2d 44 (1998). "Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence." *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003). Once the defendant meets the initial burden of demonstrating prejudice, the burden then shifts to the prosecutor to explain that the reason for the delay was sufficient to justify the resulting prejudice. *Adams*, 232 Mich App at 134.

The allegations were first disclosed to authorities in January 2005. The charges were issued in July 2007 and defendant was located and arrested in March 2009. The prejudice claimed by defendant below was the alleged loss of recorded Kids Talk interviews, but the recordings were subsequently found and produced. Defendant then claimed prejudice because he did not have the benefit of the recorded interviews for use in cross-examining the complainants during the preliminary examination, but the case was remanded to the district court for cross-examination of one of the complainants, who apparently was the only complainant who had made statements of impeachment value. The charges relating to that complainant were thereafter dismissed. Therefore, defendant failed to establish prejudice below as a result of the delay.

On appeal, defendant contends that he was prejudiced because the police or prosecutor did not undertake a "thorough investigation of the home" or conduct DNA testing. However, there is nothing in the record to show that there was any evidence that could have been found and tested. More significantly, due process does not require that the prosecution seek and find exculpatory evidence or test evidence for a defendant's benefit. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant also argues that the victim's inability to provide specific dates and locations prevented him from presenting some sort of defense. However, defendant has not shown that the prosecution attempted to gain a tactical advantage by the delay. Moreover, he has not provided any details of any possible defense or any details regarding how possible witnesses could have supported any defense. Accordingly, defendant has not established "actual and substantial" prejudice. *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009).

II. IMPEACHMENT BY PRIOR CONVICTION

Defendant also argues on appeal that the trial court abused its discretion when it denied his motion to exclude evidence of a prior bank robbery conviction for impeachment purposes under MRE 609(a). However, the prosecutor did not impeach defendant with evidence of his conviction. Rather, defendant introduced the evidence himself during direct examination. "[A] defendant who preemptively introduces evidence of a prior conviction on direct examination" after a pretrial ruling that the evidence is admissible for impeachment purposes "may not on appeal claim that the admission of such evidence was error." *Ohler v United States*, 529 US 753, 755, 760; 120 S Ct 1851; 146 L Ed 2d 826 (2000). Therefore, the issue is waived and,

accordingly, there is no “error” to review.” *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Affirmed.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Donald S. Owens