

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK DOUGLAS HENDERSON,

Defendant-Appellant.

UNPUBLISHED

June 21, 2011

No. 297994

Ingham Circuit Court

LC No. 08-001406-FH

Before: WHITBECK, P.J., AND MARKEY AND K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant Frank Henderson of three counts of third-degree criminal sexual conduct (CSC III).¹ The trial court sentenced Henderson as a third habitual offender² to serve concurrent prison sentences of 15 to 25 years on each count. Henderson appeals as of right. We affirm.

I. FACTS

Henderson's convictions arose as a result of two separate sexual assaults that occurred at the home of the complainant's aunt. Henderson was a frequent visitor at the aunt's home during the time period in question. The first assault occurred in July or August 2008. The complainant testified that Henderson came in to the room that she shared with her brother and cousin and told her that her aunt wanted to see her. However, instead of taking her to her aunt, Henderson pulled the complainant into an unoccupied bedroom, where he pushed her onto the bed, removed her clothes, and penetrated her vagina with his finger and his penis. The complainant said that Henderson stopped when one of the other children in the home at the time was seen in the doorway. The complainant, then 14 years old, did not immediately notify an adult about the encounter, but instead told her two younger relatives not to tell anyone what they had seen. At trial, the relatives testified that they had witnessed the complainant and Henderson together in a room at the aunt's home. Henderson's brother specifically stated that he heard his sister crying and saw Henderson moving up and down on top of her.

¹ MCL 750.520d(1)(a) (victim between 13 and 16 years).

² MCL 769.11.

The next incident occurred in September 2008, when the complainant again stayed at her aunt's house. When complainant learned that Henderson would be present without any other adults at the home, she asked her older cousin to stay, but he refused. Later, Henderson tried to engage the complainant in conversation, and she tried to leave the room. He prevented her from leaving, pulled her onto the bed, pushed her clothes down, and again penetrated her vagina with his finger and his penis. Afterward, the complainant observed bleeding in her vaginal area. She did not immediately report this incident either. However, in November 2008, she eventually told her mother what had occurred, which led to an investigation and the trial at issue in this appeal.

II. 180-DAY RULE

A. STANDARD OF REVIEW

Henderson argues that his convictions must be vacated because he was not brought to trial within 180 days. This Court reviews de novo interpretation and application of the 180-day rule.³

B. LEGAL STANDARDS

MCL 780.131—the 180-day rule—provides, in part, as follows:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth *against any inmate of a correctional facility of this state* a criminal offense for which a prison sentence might be imposed upon conviction, the inmate *shall be brought to trial within 180 days* after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.^[4]

MCL 780.133 in turn divests the court of personal jurisdiction if the provisions of MCL 780.131 are not complied with.⁵

C. APPLYING THE STANDARDS

Despite the fact that Henderson's trial occurred more than 15 months after he was taken into custody, he is not entitled to relief under the 180-day rule. Henderson's reliance on MCL 780.131 is misplaced. This Court has held that MCL 780.131 is applicable only to prisoners serving time in a state penal institution and is not applicable to individuals awaiting trial in a county jail.⁶ Here, Henderson has not alleged that he was an inmate of a correctional facility at

³ *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

⁴ Emphasis added.

⁵ *People v Lown*, 488 Mich 242, 247; 794 NW2d 9 (2011).

⁶ *McLaughlin*, 258 Mich App at 643-644.

any time from the date the charges in the instant case were filed. Rather, the parties indicate, and the lower court record confirms, that Henderson was detained in the Ingham County jail before trial. Accordingly, Henderson is not entitled to relief under MCL 780.131. Likewise, Henderson is not entitled to relief under MCR 6.004(D)(1), the counterpart to MCL 780.131, because that rule also explicitly limits its applicability to state prisoners.⁷ Thus, Henderson is not entitled to reversal of his convictions for failure to be tried within 180 days of his arrest.

Additionally, we note that, in arguing this issue in his brief on appeal, Henderson at times frames this issue as implicating his constitutional right to a speedy trial.⁸ It is important to clarify that the 180-day rule and the speedy trial right are two separate concepts. The 180-day rule is a creation of statute and court rule, whereas the right to a speedy trial is guaranteed by the United States and Michigan constitutions. When a defendant claims a violation of the right to a speedy trial, a trial court must consider four factors: “(1) the length of the delay, (2) the reasons for the delay, (3) the defendant’s assertion of the right, and (4) any prejudice to the defendant.”⁹ As to the fourth element, when the delay is less than 18 months, the defendant bears the burden to prove prejudice.¹⁰

Here, Henderson’s trial occurred more than 15 months—but less than 18 months—after he was taken into custody. Thus, to the extent that he raises his constitutional right to a speedy trial, he bears the burden to prove prejudice from the delay. However, in making his argument on appeal, Henderson relies solely on the authority provided by the 180-day rule in MCL 780.131 and MCR 6.004(D)(1), and does not raise the issue of prejudice. Thus, to the extent that Henderson challenges his trial delay on constitutional grounds, that argument fails.

III. EVIDENTIARY RULING

A. STANDARD OF REVIEW

Henderson argues that the trial court improperly denied his request for an evidentiary hearing related to a sexually transmitted infection (STI) that the complainant contracted but that Henderson claimed he had not. We review the trial court’s decisions to admit or exclude evidence for an abuse of discretion.¹¹ Likewise, a trial court’s decision related to a motion for an evidentiary hearing is reviewed for an abuse of discretion.¹²

⁷ See *id.* at 644 n 2.

⁸ US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999).

⁹ *McLaughlin*, 258 Mich App at 644.

¹⁰ *Id.*

¹¹ *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

¹² *People v Unger (After Remand)*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

B. PRETRIAL EVIDENTIARY HEARING

Henderson argues that the trial court should have granted an evidentiary hearing prior to trial. However, our review of the underlying discussion concerning this issue reveals that Henderson misrepresents what actually occurred below. Rather than foreclosing the possibility of further inquiry into this evidence, the trial court's statements concerning the admission of the fact that the complainant had contracted an STI can more accurately be characterized as an invitation for defense counsel to provide an appropriate foundation for the requested evidence. Defense counsel declined the invitation by not attempting to introduce expert testimony or other foundational evidence that the trial court requested.

Henderson allegedly committed the crimes between July and September 2008. And he was taken in to police custody in December 2008, after the complainant reported that he had assaulted her. Henderson was later tested for the disease; the order authorizing the test was entered on November 4, 2009. While Henderson maintained that the evidence would show that he did not receive any treatment while he was incarcerated, and one might expect this to be confirmed by jail records, no evidence was introduced to show that Henderson did not receive treatment *before* he was incarcerated. In addition, the trial court noted, some of the parties' hearsay evidence suggested that the infection could be hard to detect in men, that men could be asymptomatic and remain contagious, and that the infection could be easily cured by antibiotics.

Under the circumstances, the trial court's ruling was not erroneous. In essence, the trial court stated that it would entertain an evidentiary hearing if Henderson had any reliable evidence to review at such a hearing. Thus, contrary to Henderson's contention on appeal, the trial court did not *deny* him the opportunity to have an evidentiary hearing to determine whether the evidence was admissible. Rather, by choosing not to pursue the issue further, Henderson effectively waived his right to do so. A "[d]efendant should not be allowed to assign error on appeal to something which [he] deemed proper at trial. To do so would allow [the] defendant to harbor error as an appellate parachute."¹³

C. POST-TRIAL EVIDENTIARY HEARING

Henderson argues in passing that the trial court should have entertained his post-trial motion for an evidentiary hearing. As to this issue, Henderson argued that an evidentiary hearing was necessary to show "that by denying the introduction of this evidence of the victim's sexually transmitted disease, and [Henderson's] lack thereof, [Henderson] was denied a fair trial, and that he is entitled to a new trial." Henderson relies on MRE 404(a)(3) and MCL 750.520j(1) in support of his contention that the evidence was admissible.

Generally, evidence of specific instances of a victim's sexual conduct is precluded under the rape shield statute.¹⁴ This is because inquiries into sexual history, "even when minimally

¹³ *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002), quoting *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

¹⁴ MCL 750.520j.

relevant, carry a danger of unfairly prejudicing and misleading the jury.”¹⁵ There is an exception to the general prohibition that allows for the introduction of specific instances of the victim’s sexual activity “showing the source or origin of semen, pregnancy, or disease.”¹⁶ However, before this evidence can be introduced, the trial court must make a finding that the proposed evidence is “material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value[.]”¹⁷

Henderson has not met his burden of showing that the information that the complainant had contracted an STI was material to the main fact at issue in this case. Had Henderson presented any supporting evidence that he did not have this infection and was not treated for this infection, that the complainant had intercourse with someone other than Henderson, or that it was at least improbable that she could catch the infection through means other than sexual intercourse, Henderson might arguably then be able to show that this evidence was relevant to deciding whether he did, in fact, assault the complainant. However, Henderson did not, and has not, presented any evidence to support such a finding other than his assertion that he was not treated for this infection while incarcerated.

Henderson’s further speculation that the complainant may have contracted the STI from her cousin, merely because she was seen sleeping in the cousin’s bed at some point, is simple conjecture with no factual support. Therefore, Henderson has not shown that the trial court abused its discretion in refusing to grant him a post-trial evidentiary hearing on the ground that he did not present a foundation to support his motion and that defense counsel’s decision not to offer further evidence on this issue before trial was a strategic one.

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

¹⁵ *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982).

¹⁶ MCL 750.520j(1)(b).

¹⁷ MCL 750.520j(1). Likewise, MRE 404 provides in pertinent part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(3) Character of alleged victim of sexual conduct crime. In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.