STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR MASSENBURG,

Defendant-Appellant.

UNPUBLISHED
December 22, 1998

No. 199244
Recorder's Court
LC No. 92-010908

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right his convictions and sentences for kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), following a two-day jury trial in Recorder's Court. The jury acquitted defendant of felony murder and second-degree murder. Defendant was sentenced to life in prison on the kidnapping conviction, consecutive to the mandatory two-year term on the felony-firearm conviction. We affirm defendant's convictions but remand for resentencing.

I

Defendant first contends that the trial court erred in denying his motion to dismiss the charges for violation of the 180-day rule set forth in MCL 780.131; MSA 28.969(1) and MCR 6.004(D).[1] We disagree.

Application of the 180-day rule is a question of law that this Court reviews de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). Consideration of this issue requires that we review the sequence of events in this case from a procedural standpoint.

Defendant was originally charged with first-degree premeditated murder, felony murder, kidnapping, and felony-firearm arising from the drug-related shooting death of Murada Muhammad on the night of September 4, 1992, in Detroit. In April of 1993, following a jury trial in Recorder's Court, defendant was convicted of felony murder, kidnapping, and felony-firearm and sentenced to mandatory life in prison without parole. On April 10, 1995, this Court reversed

defendant's conviction in an unpublished opinion per curiam and remanded for a new trial (*People v Massenburg*, issued 4/10/95, Docket No. 166321). On October 17, 1995, after a delay of 190 days[2], this Court issued a remittitur of record to return the trial court record to Recorder's Court, which received it on October 20, 1995.

On November 6, 1995, when an order was issued appointing counsel for defendant, the prosecutor issued a writ to return defendant from state prison, where he was serving a sentence for a parole violation stemming from an unrelated conviction[3], for a pretrial hearing. Following two pretrial hearings in early December 1995, a retrial date was set for April 29, 1996. Defendant, at his counsel's request, was returned to the state prison pending trial. On April 26, 1996, the trial court adjourned retrial to May 20, 1996, because new counsel was appointed to represent defendant, and on May 20, 1996, the trial court again adjourned the trial until July 29, 1996.

On July 19, 1996, defendant moved to dismiss the charges for failure to comply with the 180-day rule because the prosecutor had not disposed of the untried charges against defendant, a state prisoner, within the requisite statutory period. The trial court denied defendant's motion, and the retrial and resultant convictions, out of which the present appeal arises, ensued on July 29-30, 1996.

On appeal, defendant contends that the trial court erred in denying his motion to dismiss the charges on the basis of a violation of the 180-day rule. Defendant argues that once his conviction was reversed by this Court on April 10, 1995, the 180-day rule began to run, and because the lower court file in this case was not returned to Recorder's Court until after more than 180 days had elapsed, the trial court lost jurisdiction to retry defendant. Citing *People v Wolak*, 153 Mich App 60, 64; 395 NW2d 240 (1986), defendant maintains that this Court's delay in returning the file should be charged against the prosecution, and even if the delay is not attributable to the prosecution, retrial was still barred because more than 180 days elapsed after the trial court received the lower court file on October 20, 1995, until the first scheduled trial date on April 29, 1996. We disagree.

As the Michigan Supreme Court recognized in *People v Smith*, 438 Mich 715, 718; 475 NW2d 333 (1991) (opinion by Levin, J.), quoting with approval *People v Loney*, 12 Mich App 288, 292; 162 NW2d 832 (1968):

> The purpose of the statute [MCL 780.131; MSA 28.969(1)] is clear. It was intended to give the inmate, who had pending offenses not yet tried, an opportunity to have the sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.

See also *Connor, supra* at 425.

This statutory purpose, however, is not served in the instant case, where defendant was imprisoned pending the retrial because he violated his parole when he committed the instant offenses. Under these circumstances, concurrent sentencing is neither a concern nor an option. Rather, consecutive sentencing is mandated. MCL 768.7a(2); MSA 28.1030(1)(2).[4] See also *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 572; 548 NW2d 900 (1996).

We therefore conclude that the 180-day rule does not apply to the present circumstances. See also *People v Bell*, 209 Mich App 273, 279; 530 NW2d 167 (1995) (where this Court held that the purpose of the 180-day rule did not apply in a case where the defendant, a prison inmate, had already been convicted of six counts of felony murder in another case and was serving six mandatory life sentences at the time of the first trial).

II

Defendant next alleges that he was denied a fair trial because the prosecutor, while questioning prosecution witness Nicole Alexander about an earlier out-of-court statement that she had made to the police, read portions of that statement to her on the record, thereby injecting prejudicial evidence into trial for the jury's consideration under the guise of impeachment evidence. We find no error in this regard.

The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. This Court will find an abuse of discretion in an evidentiary matter where the court's ruling has no basis in law or fact. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Reversal is required only if the error is prejudicial under review for harmless error. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Nicole Alexander, originally charged as a codefendant in this case, was called as a witness by the prosecution. She had earlier entered a plea to second-degree murder and dismissal of all other charges against her, in exchange for a "truthful statement" regarding the death of the victim and, if called, her testimony at trial against defendant. At defendant's trial, Alexander testified that she remembered nothing about the events in question. After she expressed this lack of memory, the prosecutor asked Alexander if she remembered entering into a plea agreement with the prosecution a few months earlier. She testified that she would not recognize the actual agreement if she saw it and did not remember making a written statement. When shown the alleged statement, Alexander testified that the signature on it did not look like her signature. Alexander did admit that she had been a defendant in the case and that she had pleaded guilty to second-degree murder. However, Alexander did not recall what she had said at her plea about the victim's death. Over objection, the prosecutor, in an attempt to impeach or refresh the recollection of the witness, then questioned Alexander about her prior statement and, in so doing, read verbatim from portions of the statement, thereby eliciting inculpatory testimony concerning defendant's involvement in the shooting death of the victim. Alexander did not otherwise testify at trial concerning the substance of her earlier statement reiterated on the record by the prosecutor.

We conclude that the impeachment of Alexander by the prosecutor was properly within the bounds of MRE 607, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). A review of the record in the instant

case shows that the prosecutor, obviously surprised by a recalcitrant witness, questioned Alexander about her prior statement for the sole purpose of impeaching her testimony that she did not remember what occurred on the night in question. The prosecutor used the extrinsic evidence of the prior inconsistent statement to impeach her, not to prove the truth of the matter asserted. The requirements for the admission of extrinsic evidence under MRE 613(b)[5] were met, and the trial court, in accordance with MRE 105[6], cautioned the jury, during its final instructions, that the evidence was admitted solely for the purpose of judging the credibility of the witness, not to satisfy or prove any of the elements of the charged offenses. Under these circumstances, we find defendant's argument to be without merit.

III

Next, we reject defendant's contention that he was denied a fair trial when the trial court ruled that defense counsel could not, during closing argument, argue that the jury should consider that a prosecution witness was granted immunity from prosecution for unrelated drug offenses. While a witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony, *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990), limitation on the exploration of a witness' bias is subject to harmless error analysis. *People v Minor*, 213 Mich App 682, 688; 541 NW2d 576 (1995) (opinion of Markman, J.); *People v Morton*, 213 Mich App 331, 336; 539 NW2d 771 (1995). In the instant case, the error, if any, was harmless in light of the abundant testimony from other witnesses regarding defendant's role in the kidnapping of the victim. *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998).

IV

At trial, defendant maintained that although he did go to the victim's apartment on the night in question and told her "come on, let's go," she left voluntarily with him. On appeal, defendant therefore contends that he was denied a fair trial when the trial court did not give his requested instruction on consent as a defense to the charge of kidnapping. We disagree.

A review of the record indicates that in response to defense counsel's request for the consent instruction, the trial court responded that it would give the instruction "the way it is written in CJI." There was no ensuing objection and the court gave the standard kidnapping jury instruction which, as given, made no specific reference to the defense of consent. No subsequent objection was registered by defense counsel.

Jury instructions are to be reviewed as a whole rather than extracted piecemeal to establish error. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). The instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). However, even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the rights of the defendant. *Id*. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Id*. If a defendant fails to object to the jury instruction, any error is waived unless relief is

necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We find no manifest injustice under the present circumstances. Although there was record evidence to support the consent instruction, a review of the jury instructions as a whole does not reflect error requiring reversal. The trial court followed the standard jury instructions and, in so doing, made it clear to the jury that the prosecution had to show that defendant, without legal authority, forcibly confined or imprisoned the victim and, *against her will*, forcibly moved her from one place to another, and that he acted "willfully and maliciously" and without legal authority. When reviewed as a whole, the gist of these instructions adequately conveyed that consent (or the lack thereof) was an integral element of the kidnapping charge.

Even assuming arguendo that there was instructional error, any error was harmless because of the absence of actual prejudice to defendant. We conclude that the jury, properly instructed, would not have reached a different verdict had the consent instruction been given. *People v Vaughn*, 447 Mich 217, 235-239; 524 NW2d 217 (1994) (opinion of Brickley, J.); *People v Thinel*, 429 Mich 859, 859-860; 412 NW2d 923 (1987).

Defendant's related claim of ineffective assistance of counsel on the basis of his trial counsel's failure to object to the kidnapping instruction as given is likewise without merit. There was no evidentiary hearing regarding this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). After a thorough review, we conclude that defendant has neither sustained his burden of proving that his counsel made a serious error that affected the result of trial nor overcome the presumption that his counsel's actions were strategic. *People v Reed*, 449 Mich 375, 384; 535 NW2d 496 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994).

V

Defendant further argues that he was denied his due process rights to a fair trial and fair sentencing by a neutral and impartial judge. The trial judge in the instant case also presided over the sentencing of codefendant Alexander, whereby she pleaded guilty to a reduced charge of second-degree murder in exchange for her agreement to testify against defendant. Defendant maintains that despite his acquittal of the murder charges, the trial judge, using information garnered at Alexander's plea taking, found defendant to have participated in the murder and sentenced defendant to life in prison for kidnapping on the basis of an independent finding that defendant was guilty of murder. The trial judge, according to defendant, should have sua sponte disqualified himself, as "he was enmeshed in offering Nicole Alexander significant leniency in order to help convict the person whom Judge Townsend personally believed to have committed the crime." On this basis, defendant alleges that he is entitled to a new trial or, at the very least, resentencing before a different judge.

The issue of disqualification has not been properly preserved for appellate review by timely objection at trial. In any event, defendant in the instant case has not overcome the heavy presumption of judicial impartiality in his bias challenge.

Whether a judge should disqualify himself is a question of law that is ordinarily reviewed de novo. MCR 2.003(C)(3); *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). In *In re Hamlet*, 225 Mich App 505, 524; 571 NW2d 750 (1997), this Court summarized the standard applicable to the issue of judicial disqualification:

> Absent an actual personal bias or prejudice, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). Opinions formed by a judge on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* at 496. Likewise, judicial remarks during the course of a trial that are " 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.' " *Id*. at 497, n 30, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Moreover, a party who challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497.

Under this strict standard, defendant has not set forth sufficient evidence of bias during the trial proceedings to warrant a conclusion that the trial judge should have been disqualified and a new trial granted.

However, we do agree with defendant that resentencing is warranted under the present circumstances. Although a defendant's admissions or other record evidence that defendant committed a greater offense may be considered by the court as an aggravating factor in imposing sentence, *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987); and a sentencing judge may also consider the facts underlying uncharged offenses, pending charges, and acquittals, *People v Ewing (After Remand)*, 435 Mich 443, 446 (opinion by Brickley, J.), 473 (opinion by Boyle, J.); 458 NW2d 880 (1990); *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), a trial court may not make an independent finding of a defendant's guilt on another charge and use it as a basis for justifying a sentence. *Newcomb, supra* at 427-428; *People v Tyler*, 188 Mich App 83, 85-86; 468 NW2d 537 (1991).

The sentencing record[7] in the instant case clearly reflects that the trial court improperly made an independent finding of guilt of a crime [murder] other than that for which defendant was being sentenced and then sentenced defendant on the basis of that finding, in contravention of established principles of case law. See *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996); *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993); *Newcomb*, *supra*; *Tyler*, *supra*; *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986); *People v Spalla*, 147 Mich App 722, 725-726; 383 NW2d 105 (1985). Therefore, we conclude that defendant is entitled to resentencing.

Prior to *Cain, supra*, we would have ordered resentencing before a different judge. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). Because here the trial judge clearly expressed an unshakable belief that defendant committed murder, even though the jury acquitted him of

the murder charges, it is reasonable to conclude that the trial judge would be unable to put out of his mind his previously expressed findings. Under such circumstances, disqualification and reassignment would be advisable in order "to preserve the appearance of justice." *Id.* However, in *Cain, supra,* the Supreme Court established rigorous standards for disqualification which have not been met in the present case. As we noted in *People v Leonard,* 224 Mich App 569, 596, n 9; 569 NW2d 663 (1997):

> If we had ordered a remand in this case, we would conclude that this case should not be assigned to a different judge because disqualification for bias or prejudice is warranted only in the most extreme cases. *Cain v Dep't of Corrections,* 451 Mich 470, 498; 548 NW2d 210 (1996).

Defendant's request for reassignment to a different judge is denied for the reason that he has failed to satisfy his burden pursuant to *Cain.*[8]

Affirmed and remanded for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] MCL 780.131; MSA 28.969(1) provides in pertinent part:

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. . . .

MCR 6.004(D) incorporates the requirements of the statutory 180-day rule set forth in MCL 780.131 *et seq*.; MSA 28.969(1) *et seq*. and provides:

> (D) Untried Charges Against State Prisoner.
>
> (1) The 180-Day Rule. Except for crimes exempted by MCL 780.131(2); MSA 28.969(1)(2), the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:
>
> (a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or

(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.

For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.

(2) Remedy. In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good-faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

[2] The delay was apparently attributable to a clerical error.

[3] On August 11, 1982, defendant was convicted of attempted possession with intent to deliver heroin and sentenced to a term of six months to five years' imprisonment. Immediately thereafter, defendant was listed as an escapee and was not returned to custody until October 30, 1990. Defendant was later paroled on March 4, 1991, for a period to expire on March 4, 1993. At the time of the instant offenses, defendant was on parole, which was violated when he was convicted in the first trial.

[4] MCL 768.7a(2); MSA 28.1030(1)(2) provides:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

[5] MRE 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. . . .

[6] MRE 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

[7] The following comments were made by the trial court in sentencing defendant to life imprisonment for the kidnapping conviction:

> . . . I know that Mr. Massenburg was convicted [at the first trial] of first degree murder, second degree murder, kidnapping and felony firearm. I already know that, and I heard the facts in this case. And, I would be less than honest if I would say that I wasn't convinced because I am that he did commit murder in the first degree. He did kill the victim in this case.
>
> Now, just because the jury found him guilty of man – of kidnapping doesn't mean he did not kill because his accomplish [sic] pled guilty to second degree murder that she helped him out.
>
> * * *
>
> The [first] jury found him guilty of murder in the first degree, and because of the circumstances known only to the judge who tried the case and had it sent back here as far as I am concerned, he did commit a murder. And, I want the record to be quite clear that I'm aware of that. And, I can't just ignore the fact and say oh, well, we're not paying any attention to that. . . .
>
> * * *
>
> I believed that this is the man who committed that murder. . . . And, I can't act blindly and say all he was convicted of was kidnapping the second time around. No, that, that can't, that can't stand.
>
> * * *
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> . . . [T]he Court has already ruled that a sentence of life is, no matter what the term of years is, it is the sentence of life is greater than any term of years. So, therefore, I won't give any term of years.
>
> The Court is going to sentence him to life for the kidnapping charge and we will sentence him to each two years for the felony firearms because I believe that the crime was committed here and the drafting of the guidelines certainly truly do not reflect the gravity of this killing and the fact that he has no, absolutely no remorse whatsoever.

[8] On the same day that *Cain* was decided, the Supreme Court also decided *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996). In *Ireland, supra* at 469, n 13, the Supreme Court indicated that this Court had erred in disqualifying the trial judge because "we [the Supreme Court] have located in this record no basis for the disqualification of the first judge." The rationale employed by the Court of Appeals, but rejected by the Supreme Court, was as follows:

In our view, it would be unreasonable to expect the trial judge to be able to put previously expressed views out of his mind without substantial difficulty. *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777 (CA 9, 1986). We find that the advancement of the interests of preserving the appearance of justice and fairness outweighs other considerations here. Accordingly, we reverse the trial court's decision to deny plaintiff's motion to disqualify and order this case to be heard by a different judge on remand. [*Ireland v Smith*, 214 Mich 235, 251; 542 NW2d 344 (1995), modified 451 Mich 457 (1996).]