STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL JAMES WHITTIE,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 201508
Macomb Circuit Court
LC No. 95-003263 FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted of one count of receiving or concealing stolen property with a value in excess of $100, MCL 750.535; MSA 28.803, one count of conspiracy to possess stolen property with a value in excess of $100, MCL 750.157c; MSA 28.354(3), one count of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and one count of fleeing a police officer, MCL 257.602a; MSA 9.2302(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to concurrent sentences of 120 to 240 months' imprisonment for the possession of stolen property and conspiracy convictions, 64 to 96 months' imprisonment for the assault conviction, and one year in jail for the fleeing a police officer conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for correction of the judgment of sentence.

I

Defendant asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant offers a lengthy list of his trial counsel's alleged deficiencies, including the failure to review the scene of the incident, to personally inspect and photograph the vehicles involved, to request a jury view of the vehicles involved, to interview all the police officers who took part in the chase, to locate and interview the individuals in the funeral procession on Gratiot, and to obtain copies of police procedures regarding chase and arrest. However, defendant has made no showing that trial counsel's failure to interview the police officers and the members of the funeral procession resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. See *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Regarding defendant's failure to personally inspect and photograph the vehicles involved, the record reveals that counsel obtained the prosecution's photographs of the vehicles, and defendant himself conceded that these photographs showed there was no damage on the side of the vehicle. As for the remaining items, defendant has made no showing that the outcome of the proceedings would have been different if defense counsel had taken the various actions listed by defendant. See *Pickens*, *supra*.

Defendant also claims that defense counsel was ineffective because he was unprepared to start trial. However, defense counsel testified at the *Ginther*[1] hearing that, despite the fact that he had not anticipated the trial continuing past jury selection on January 27, 1997, he was nonetheless "prepared and ready to go." Defendant has not identified any instance where the alleged lack of preparation prejudiced him. Defendant also complains because the court officer had to go and fetch counsel's briefcase from another courtroom; however, he does not explain how this demonstrates that the performance of counsel was below an objective standard of reasonableness under prevailing professional norms or was prejudicial to defendant. See *Pickens*, *supra*.

Defendant further maintains that defense counsel made only two brief visits to defendant in jail. However, at the *Ginther* hearing, counsel testified that he had visited defendant six times at the Macomb County Jail[2] and estimated that he had spent a total of five or six hours with defendant, and possibly more. The trial court resolved the credibility contest between defendant and defense counsel in favor of the latter. Questions of credibility are for the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

In addition, defendant asserts that trial counsel prevented him from testifying, despite the fact that it was the only means of establishing his duress defense. However, defendant himself testified at the *Ginther* hearing that he decided not to testify after the trial court ruled that his prior conviction for armed robbery would be admissible to impeach him. Accordingly, defendant has not demonstrated that counsel was ineffective on this basis.

Defendant next argues that counsel was ineffective for rejecting defendant's preferred defenses of duress and intoxication. We disagree. The selection of a defense is a matter of trial strategy. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). After reviewing the record, we cannot conclude that, in determining that the defenses of duress and intoxication were unlikely to succeed, counsel's performance was below an objective standard of reasonableness under prevailing professional norms. See *Pickens*, *supra*. That the defense utilized by counsel was unsuccessful does not render its use

ineffective assistance of counsel. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Next, defendant claims that defense counsel was ineffective for failing to use the list of questions defendant had prepared when questioning witnesses. However, defendant admitted at the *Ginther* hearing that counsel may have asked some similar questions. In any case, deciding which questions to ask witnesses is a matter of trial strategy which this Court will not second guess. See *Sawyer*, *supra*. Defendant does not identify any questions that counsel failed to ask that might have made a difference in the outcome of the trial. See *Pickens*, *supra*.

Defendant also contends that counsel was ineffective for failing to move to quash the habitual information. Defense counsel testified he discussed the notice with defendant and found that the habitual offender notice was accurate, except for duplicate convictions for receiving and concealing stolen property. Counsel notified the trial court of the error, but did not move to dismiss or quash because only one of the convictions was used to enhance defendant's sentence. Because defendant does not even attempt to explain how defendant was prejudiced by counsel's alleged deficiency, defendant has not established that counsel's failure to move to quash or dismiss the habitual offender notice constituted ineffective assistance of counsel.

Defendant further maintains that counsel was ineffective for failing to subpoena police records of the property confiscated from defendant upon his arrest. Defendant claims that he had the keys to the Camaro on his person at the time that he was arrested and speculates that the keys "were taken and secreted by the police or prosecutor." However, defendant offers no evidence of this. Moreover, given Officer Kenyon's testimony that the damage to the Camaro's ignition system made it impossible to start the vehicle using the key, as well as the testimony regarding the damage to the car's door lock, defendant has not shown that if counsel had obtained the police inventory of his possessions at the time of his arrest, the outcome of the proceedings would have been different. See *Pickens*, *supra*.

Finally, defendant argues that the acrimonious relationship between trial counsel and defendant led counsel to take actions which harmed defendant. First, counsel stated on the record that defendant had "punched" him, thereby denigrating him in front of the trial court prior to sentencing. At the *Ginther* hearing, counsel testified that defendant was angry that counsel was not calling more witnesses and "slapped" counsel's arm with "inappropriate" force. Defendant, however, testified that he did not sock, punch, or otherwise assault defense counsel in any way. The trial court did not resolve this credibility dispute. However, defendant has not established that he was thereby prejudiced. There is nothing on the record from which one could conclude that the trial court gave defendant a more severe sentence because of the incident.

Defendant also complains that trial counsel called the county jail and asked the staff to put defendant on a suicide watch, "knowing that would make defendant's life in jail considerably more uncomfortable." However, because this incident occurred after trial, it cannot be said that defense counsel's action deprived defendant of a fair trial or that it affected the outcome of the proceedings in any way. Accordingly, defendant has not established that counsel was thereby ineffective. See *Pickens*, *supra*.

II

Defendant next argues that the trial court's decision to allow the prosecutor to impeach defendant with his prior conviction for armed robbery constituted error requiring reversal. However, this issue is not preserved for appellate review because defendant did not testify at trial. In order to preserve the issue of improper impeachment by prior convictions, the accused must testify at trial. *People v Finley*, 431 Mich 506, 526; 431 NW2d 19 (1988) (Riley, C.J.), 526 (Brickley, J.).

Even if this issue were preserved, we would find no error requiring reversal. Because armed robbery contains an element of theft, evidence of such a conviction may be admissible under MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). On appeal, defendant merely argues that allowing the jury to learn of his conviction of armed robbery would be prejudicial, as he was charged with crimes involving the elements of theft and assault. The trial court recognized that there would be some prejudicial effect, but concluded that it was outweighed by the probative value. The trial court further concluded that armed robbery was not similar enough to the crimes charged to prevent its admission. Defendant has not shown that the trial court abused its discretion. See *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

III

Defendant next claims that there was insufficient evidence to support his convictions of possession of stolen property with a value in excess of $100, conspiracy to possess stolen property with a value in excess of $100, and assault with a dangerous weapon. In addition, defendant contends that the convictions were against the great weight of the evidence. Defendant preserved this latter claim by moving for a new trial below. See MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. A new trial may be granted when the verdict is against the great weight of the evidence. The trial court may vacate a verdict only when it does not find reasonable support in the evidence, but is more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998).

Defendant contends that there was insufficient evidence to establish that defendant knew that the Camaro was stolen. An essential element of the crime of receiving or concealing stolen property is knowledge that the goods were stolen. See *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993).

The evidence presented at trial established that the car was stolen between 6:00 and 8:30 p.m. on November 29, 1995. Defendant was driving the car at 11:25 a.m. the next day. When a police officer waved the car over, defendant drove off at high speed through residential streets, disregarded stop signs, and drove the wrong way on two main thoroughfares in an attempt to evade the police. A screwdriver or other long, narrow tool had been used to disable both the Camaro's passenger door lock and its ignition system. The police found a screwdriver in defendant's pocket. A police officer testified that the Camaro could no longer be started by using its key. Considering this evidence, the element of guilty knowledge was sufficiently established. Cf. *People v Clark*, 154 Mich App 772, 775; 397 NW2d 864 (1986); *People v Biondo*, 89 Mich App 96, 98; 279 NW2d 330 (1979). Defendant's conviction of receiving and concealing stolen property was supported by the evidence and not against the great weight of the evidence.

Defendant also argues that the conspiracy conviction is not supported by any evidence of any kind of agreement with another person. Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). However, because intent may be inferred from evidence of the circumstances, acts, and conduct of the parties, direct proof of an agreement is not required, nor is it necessary that a formal agreement be proven. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982).

Here, defendant was driving the Camaro with Powell in the passenger seat. In addition to the obvious damage to the Camaro's door lock and the ignition system, the evidence presented at trial established that both defendant and Powell attempted to flee on foot after the Camaro crashed. Evidence of flight may be used to indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Moreover, a police officer testified that after defendant was apprehended, defendant told him that he had been delivering drugs with his companion. Thus, the evidence was sufficient for a rational factfinder to conclude that defendant and Powell had entered into a conspiracy to use the stolen vehicle for the purpose of delivering drugs.

Lastly, defendant asserts that the evidence supports neither the charged crime of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, nor felonious assault, the offense of which the jury convicted defendant. Defendant bases his argument on "the total absence of any evidence of injury to the officer and no surrounding circumstances amounting to a showing of criminal intent."

As an initial matter, any error in submitting to the jury the charge of assault with intent to commit great bodily harm is harmless in light of the fact that the jury acquitted defendant of this charge. The Supreme Court has recently overruled *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), and held that "a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).[3]

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An automobile, when used to accomplish an

assault, is a "dangerous weapon" within the meaning of the statute which penalizes felonious assault. *People v Goolsby*, 284 Mich 375, 378-379; 279 NW 867 (1938); *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

In the instant case, the evidence established that, while a police car was traveling alongside the car that defendant was driving, defendant made a sharp turn into the police car, damaging the door and shattering the window of the police car. Officer Konal, who witnessed the incident, testified that defendant's maneuver was "[d]efinitely a deliberate attempt" to ram the police car. Accordingly, the evidence was sufficient to support the conviction of felonious assault. Contrary to defendant's argument, the infliction of a serious injury is not an element of felonious assault.

In sum, the evidence was sufficient to support defendant's convictions, and the trial court did not abuse its discretion in denying defendant's motion for a new trial because the convictions were not against the great weight of the evidence.

IV

Defendant next argues that the trial court's jury instructions were flawed and that the trial court abused its discretion in its control of the proceedings.

A

Defendant contends that the trial court erred in refusing to instruct the jury on the lesser included offense of assault and battery, MCL 750.81; MSA 28.276. A trial court's refusal to give an instruction on a misdemeanor charge is reviewed for an abuse of discretion. *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991).

A court must instruct on a lesser included misdemeanor where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) where the prosecutor requests the instruction, the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Stephens*, 416 Mich 252, 261-265, 330 NW2d 675 (1982). A misdemeanor instruction is not required when there is no dispute as to the elements separating the misdemeanor from the felony on which the jury is to be instructed. *People v Leighty*, 161 Mich App 565, 580; 411 NW2d 778 (1987).

Both assault and battery and felonious assault are specific intent crimes in which it must be established that the defendant intended either to injure or to put the victim in reasonable fear or apprehension of an immediate battery. *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995); *People v Johnson*, 407 Mich 196, 209-210; 284 NW2d 718 (1979). Felonious assault has the added element that the assault is committed with a dangerous weapon. *Id*. at 222 (Williams, J.), 234-235 (Levin, J.).

In the present case, there is no dispute that defendant drove the Camaro into the police car driven by Officer Blarek. At trial, the defense was limited to the argument that the lack of evidence of

injury to Blarek constituted evidence that there was no intent to commit great bodily harm. Because the jury could not have rationally concluded that defendant committed an assault and battery without using a dangerous weapon, the trial court did not abuse its discretion in refusing to instruct the jury on assault and battery. Cf. *People v Stinnett*, 163 Mich App 213; 413 NW2d 711 (1987).

B

Defendant also argues that the trial court erred in refusing to give an instruction on the intoxication defense. However, because there was no evidence presented at trial which would have supported a defense of intoxication, the trial court did not err in refusing to give the instruction. See *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

C

Next, defendant asserts that the trial court's response to a question posed by the jury constituted error. However, defendant did not object to this instruction at trial. Therefore, this Court's review is limited to whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice because the evidence presented at trial supported the conviction of felonious assault.

D

Finally, defendant argues that the trial court abused its discretion in refusing to allow jurors to ask questions and refusing to permit defendant to recall prosecution witnesses and to call other witnesses. However, by failing to properly brief these allegations of error by providing citations to the record and authority for his positions, defendant has effectively abandoned them. See *People v Smith*, 439 Mich 954; 480 NW2d 908 (1992).

V

Defendant next raises several claims of prosecutorial misconduct. Defendant first argues that the prosecutor improperly overcharged him. However, defendant did not raise this claim in the trial court. "[A]n objection at the appellate level 'comes far too late.'" *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995), quoting *People v Stevens*, 130 Mich App 1, 4; 343 NW2d 219 (1983).

Defendant also contends that the prosecutor improperly commented on the absence of witnesses, suppressed exculpatory evidence, and sought enhancement of his sentence. These allegations of misconduct were not raised in the trial court. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant claims that statements made by the prosecutor during rebuttal argument regarding the absence of Billy Powell were improper. However, the prosecutor's comments were clearly a response to defense counsel's closing argument. Where impermissible comments are made by a prosecutor in response to arguments previously raised by defense counsel, reversal is not mandated. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Moreover, any unfair prejudice produced by the challenged comments could have been cured by a timely instruction. Accordingly, defendant is not entitled to relief. See *Nantelle, supra*.

Defendant also argues that the prosecutor suppressed exculpatory evidence, namely, the keys to the Camaro. However, defendant has not presented any evidence to substantiate this claim. Accordingly, failure to consider this issue will not result in a miscarriage of justice. See *id*.

Finally, defendant argues that the prosecutor improperly sought enhancement of his sentence. However, defendant conceded at the *Ginther* hearing that, with the exception of the two counts of receiving and concealing stolen property, the presentence report accurately set forth his prior convictions. On this record, defendant has not shown any prosecutorial misconduct.

VI

In his next issue, defendant argues that he was denied his right to a speedy trial. The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Because the delay was less than eighteen months, defendant has the burden of demonstrating prejudice. See *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant argues that he was prejudiced because of "a natural decline in the recollection of events, anxiety, depression, stress and mental anguish and the inability to assist counsel in preparation of trial, including the location of, and the interviewing of witnesses and the gathering of evidence." However, a general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, is insufficient to establish that a defendant was denied his right to a speedy trial. *Gilmore, supra* at 462. Similarly, anxiety alone is not sufficient to establish a violation of defendant's right to a speedy trial. *Id*. Furthermore, defendant does not even challenge the trial court's finding that the delay was in large part attributable to defendant. Defendant has not shown that his right to a speedy trial was violated.

VII

Defendant next argues that he is entitled to resentencing because his sentence is disproportionate. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

The comments made by the trial court at sentencing reveal that it focused on the circumstances surrounding defendant's criminal behavior and the protection of society. These are both permissible factors to consider in sentencing a criminal defendant. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Furthermore, considering defendant's extensive criminal record and the conduct at issue, defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Milbourn, supra*.

VIII

Defendant next complains that his handcuffs were not removed during the *Ginther* hearing so that he could take notes. The decision to shackle a defendant is within the sound discretion of the trial court, and this Court reviews the decision for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

The cases cited by defendant are inapposite because they all deal with situations where a defendant was required to remain shackled or in prison garb during a jury trial. Here, defendant was required to wear handcuffs during a post-conviction evidentiary hearing. Thus, there was no danger that jurors would draw prejudicial conclusions from seeing defendant shackled. Moreover, because defendant had already been convicted, the presumption of innocence no longer applied. See *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969). Furthermore, the record discloses that defendant's trial counsel accused defendant of striking him during trial. We conclude that defendant has not established that the trial court abused its discretion in refusing his request for removal of his handcuffs. See *Dixon, supra*.

IX

Defendant next alleges that the reassignment of his case to Judge Bruff was improper. Because defendant did not object below to the assignment of Judge Bruff to his case, this issue is not preserved for appellate review. See *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994). Moreover, defendant has not established that the assignment of Judge Bruff to his case was not done in conformity with MCR 8.111. In addition, although defendant asserts that he was prejudiced because several pretrial proceedings were held before other judges, defendant does not point to any specific instances where Judge Bruff lacked the knowledge essential to ruling on a particular issue. Finally, there is no error requiring reversal because defendant has made absolutely no showing that the assignment of Judge Bruff to his case resulted in a miscarriage of justice. See MCL 769.26; MSA 28.1096.

X

Finally, we note that the judgment of sentence gives an incorrect statutory citation for the conviction of receiving or concealing stolen property with a value in excess of $100, MCL 750.535[; MSA 28.803].[4] The error is repeated in the statutory citation for the conspiracy to receive or conceal stolen property conviction. We therefore remand for the limited purpose of correcting the judgment of sentence.

Defendant's convictions and sentences are affirmed. However, we remand for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] In support of this claim, defense counsel produced six visitors passes at the *Ginther* hearing.

[3] In *Graves*, the Supreme Court noted that reversal may be warranted where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense if sufficiently persuasive indicia of jury compromise are present. *Graves*, *supra* at 487-488. However, defendant has presented no evidence of jury compromise.

[4] The statutory citation on the judgment of sentence is to MCL 750.535a[; MSA 28.803(1)], which prohibits owning, operating, or conducting a chop shop.