

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE JOSEPH SZYMANSKI,

Defendant-Appellant.

UNPUBLISHED

July 6, 1999

No. 201281

Recorder's Court

LC No. 95-000417

ON REHEARING

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted by a jury of the misdemeanor of fleeing a police officer, MCL 750.479a(1); MSA 28.747(1)(1), and the felony of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424. Defendant was sentenced to a term of one year imprisonment for the fleeing conviction and to a term, as enhanced by his status as a third-offense habitual offender, MCL 769.11; MSA, of 2¹/₂ to 6 years' imprisonment for the CCW conviction. Because defendant was on parole from a sentence imposed for a federal drug conviction when the instant offenses were committed, defendant's sentence for his felony conviction of CCW was ordered to run consecutively to the federal sentence imposed as a result of the parole violation. Defendant was not granted any credit toward this sentence. Defendant's sentence for his misdemeanor conviction of fleeing a police officer was ordered to run concurrently with his federal sentence and he was granted 699 days credit toward this sentence. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for a determination of sentence credit in accordance with this opinion.

This case arises out of a November, 1994, incident in which defendant assaulted both Agnes Yourdan and Stephen Yourdan. Defendant subsequently fled from the police in a vehicle and, after the vehicle crashed, on foot. After defendant was apprehended, a gun was recovered from the vehicle. Defendant was charged below in one case with felonious assault and possession of a firearm during the commission of a felony for the assault perpetrated on Agnes Yourdan and assault and battery for the assault perpetrated on Stephen Yourdan. In a separate case, defendant was charged with fleeing a police officer and CCW. The trial court subsequently denied defendant's motion for separate trials and granted the prosecutor's motion to consolidate both cases for trial. The jury convicted defendant of

fleeing a police officer and CCW, acquitted defendant of felonious assault and felony-firearm, and was unable to reach a verdict with respect to the assault and battery charge, which the trial court subsequently dismissed pursuant to the prosecutor's motion.

Defendant first argues that the trial court abused its discretion in refusing to grant his motion for a separate trial with respect to the fleeing a police officer and CCW charges because there was "a real likelihood that the sheer number of charges, rather than the quality of the evidence, caused the jury to convict [defendant] of at least some of the charges." We disagree. "While it is correct that a trial court may sever related offenses in certain circumstances, MCR 6.120(C), a trial court is not required to do so." *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). In this case, the facts presented at trial were relatively simple to follow, and each charge was easy to understand as it related to a certain aspect of the continuing series of events on the date in question. Because the charges against defendant were not so numerous or complex as to cause a potential for confusion or prejudice, we conclude that the trial court did not abuse its discretion in denying defendant's motion for separate trials. MCR 6.120(C); *Duranseau, supra*.

Next, defendant argues that the trial court abused its discretion when it denied his motion to excuse for cause a juror who had been the victim of a felonious assault only 1½ years before the trial in this case. We disagree. "Jurors are presumed to be competent and impartial and the burden of proving otherwise is on the party seeking disqualification." *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). In this case, the juror did not indicate that she was biased against defendant. MCR 2.511(D)(3); MCR 6.412(D). The juror also did not indicate either that she had a state of mind that would prevent her from rendering a just verdict or that she had formed a positive opinion on the facts or outcome of the case. MCR 2.511(D)(4); MCR 6.412(D). Rather the juror stated, apparently credibly to the trial court, that she did not think that the earlier assault would affect her ability to be fair in this case. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's challenge for cause with respect to this juror. *People v Lee*, 212 Mich App 228, 249-251; 537 NW2d 233 (1995); *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Next, defendant argues that the trial court abused its discretion when it refused to admit the proposed testimony of Peter Hamlin concerning a prior inconsistent statement allegedly made by Agnes Yourdan. We disagree.

As explained in *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987):

When attempting to impeach a witness with a prior inconsistent statement made by the witness, a proper foundation must be laid by questioning the witness as to the time and place of the statement and the person to whom it was allegedly made. . . . Once a proper foundation is laid and the witness either admits or denies making the statement, the witness may be impeached by proof of the statement. [Citations omitted.]

In this case, even assuming, without deciding, that the trial court erred in determining that the alleged inconsistent statement related to a collateral matter, we conclude that defendant failed to lay a

proper foundation for the admission of such evidence. Specifically, when questioning Yourdan about a 1994 conversation she had with Hamlin, defendant failed to inquire as to the substance of this conversation. Cf. *Barnett, supra* at 316. When questioning Yourdan about her inconsistent statement to Hamlin, defendant did not allude to the time or place when the statement was allegedly made and did not tie the alleged statement to the 1994 conversation she purportedly had with Hamlin. *Id.* Thus, we conclude that the trial court did not abuse its discretion in refusing to admit extrinsic evidence of the prior inconsistent statement. *Id.*

Finally, defendant concedes that the trial court properly ordered the sentence imposed for his CCW conviction to run consecutively to the sentence imposed for his federal parole violation. See *People v Phillips*, 217 Mich App 489, 500-501; 552 NW2d 487 (1996). However, defendant contends that the trial court erred in failing to grant him 699 days sentence credit¹ against his CCW sentence. Normally, any time spent in custody would be credited against the unexpired portion of the sentence imposed for the paroled offense. *People v Johnson*, 205 Mich App 144, 147; 517 NW2d 273 (1994). However, in *Johnson*, where the Michigan sentencing court was without jurisdiction to order Louisiana to grant sentence credit with respect to a Louisiana sentence the defendant was serving for a paroled Louisiana offense, this Court held that in order to comply with MCL 769.11b; MSA 28.1083(2) the credit must be applied to the Michigan sentence imposed consecutively to the Louisiana sentence. Relying on *Johnson*, defendant likewise contends that because the sentencing court in this case lacked jurisdiction to order the Federal Bureau of Prisons to give him 699 days credit with respect to the sentence imposed for his federal parole violation, then the trial court should have credited these days against his consecutive CCW sentence. However, although not considered in *Johnson*, there is no question but that a defendant is entitled to sentence credit only for serving “any time in jail prior to sentencing *because of being denied or unable to furnish bond for the offense of which he is convicted . . .*” MCL 769.11b; MSA 28.1083(2); see also *People v Givans*, 227 Mich App 113, 124-126; 575 NW2d 84 (1997). A defendant is not entitled to sentence credit under MCL 769.11b; MSA 28.1083(2) in cases where he is incarcerated as a result of charges arising out of an unrelated offense or circumstance. *People v Ovalle*, 222 Mich App 463, 468-467; 564 NW2d 147 (1997). In this case, there is some question concerning whether defendant was incarcerated prior to sentencing in this case as a result of being subject to a federal parole detainer or being returned to federal prison. However, the record is not clear in this regard. Thus, we remand for a determination of sentence credit with respect to defendant’s CCW sentence. To the extent that the trial court determines that defendant served time in jail prior to sentencing because of being denied or unable to furnish bond for the CCW charge, the trial court shall grant defendant credit with respect to his CCW sentence. To the extent that the trial court determines that defendant’s pretrial incarceration was the result of an unrelated offense or circumstance, defendant is not entitled to sentence credit with respect to his CCW sentence.

In summary, we affirm defendant’s convictions and sentences. We remand for a determination of sentence credit in accordance with this opinion.

Affirmed and remanded. We retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff

¹ Defendant apparently spent 699 days in jail from the date he committed his offenses in this case and the date he was sentenced in this case.