

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RAYMOND ZIEGLER,

Defendant-Appellant.

UNPUBLISHED

January 22, 2009

No. 278270

Oakland Circuit Court

LC No. 2007-212758-FH

Before: Judge Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assaulting, battering, obstructing or opposing a police officer performing his duties (resisting arrest), MCL 750.81d. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 15 years' imprisonment for the resisting arrest conviction. For the reasons set forth in this opinion, we affirm.

Defendant first argues that he was denied the effective assistance of counsel because his attorney failed to assist him in preparation for trial. Defendant chose to represent himself in both trials involving the matters currently before this Court.¹ Prior to defendant's first and second trial, the trial court made repeated attempts to appoint counsel for defendant, even offering defendant a second counsel prior to defendant's second trial. Defendant refused counsel during both trials, but did accept counsel sitting at defendant's table during trial to assist defendant in the event he requested assistance.

An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *LeBlanc, supra* at 579. Both the United States Constitution and the Michigan Constitution protect the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. It is presumed that a defendant received the effective assistance of counsel; to prevail, a defendant bears the heavy burden of proving that counsel was

¹ Following defendant's first trial, the jury failed to reach a verdict and the trial court declared a mistrial. This case arises from defendant's second trial.

ineffective. *LeBlanc, supra* at 578. A defendant must establish that: “(1) counsel’s performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defense counsel is afforded wide discretion with regard to trial strategy, and this Court recognizes that counsel may need to take calculated risks in order to provide an effective defense. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). “There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy.” *Odom, supra* at 415. Moreover, “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him. *McGhee, supra* at 627. A defendant is denied the right to the effective assistance of counsel where his attorney fails to investigate and prepare a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988).

Defendant argues that he was ineffectively assisted by counsel because counsel failed to obtain medical records to support defendant’s contention that shoulder and back injuries, combined with mental problems such as bi-polar and post-traumatic stress disorders, resulted in defendant’s inability to comply with Police Officer David Newcomb’s attempts to arrest him. However, defendant failed to submit any document, at either the trial court level or on appeal, to support his bare allegations that he in fact suffers from the physical and mental problems that he claims. Defendant also provided no documentary evidence that he ever served in the military; much less records supporting his allegation that he sustained post-traumatic stress disorder as a result. Consequently, defendant cannot demonstrate that counsel’s performance was deficient. *LeBlanc, supra* at 578.

Moreover, defendant cannot show that a different outcome would have resulted but for his attorney’s failure to obtain documentary evidence with respect to defendant’s alleged maladies. *Odom, supra* at 415. At trial, defendant elicited testimony from his mother and brother regarding his alleged mental and physical disabilities, and defendant asserted during his closing argument that these disabilities rendered him unable to comply with Newcomb’s attempt to arrest him. Because defendant cannot demonstrate that his attorney’s failure to obtain documentary evidence pertaining to his alleged disabilities deprived him of a substantial defense, defendant’s argument, that he was denied the effective assistance of counsel, fails. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant further argues that he received ineffective assistance of counsel because his attorney failed to contact Blockbuster’s headquarters in a timely manner in order to obtain records regarding the identity of persons present in the store at the time of his arrest. During the course of trial, defendant’s stand-by counsel contacted the Blockbuster central office at defendant’s request, and, according to counsel, a representative of Blockbuster’s legal department informed him that it was impossible to ascertain the names of the persons in the store at the time of the disturbance. Accordingly, because the records showing who was in the store at

the time of defendant's arrest do not exist, defendant cannot demonstrate that he was prejudiced by his attorney's failure to attempt to obtain such records. *Odom, supra* at 415.

Defendant further contends that he received ineffective assistance of counsel because counsel failed to investigate and present an insanity defense. However, where a defendant claims that he received the ineffective assistance of counsel on the basis of counsel's failure to present a defense, "the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, there is no evidence that defendant made a good-faith effort to avail himself of the right to present an insanity defense, aside from his unsupported claims that he suffered from post-traumatic stress disorder and bi-polar disorder. Moreover, because defendant cannot demonstrate that his counsel's failure to investigate and develop an insanity defense affected the outcome of the trial, defendant's argument that he was deprived the effective assistance of counsel lacks merit.

Defendant next argues that he did not voluntarily, knowingly and intelligently waive his right to be represented by counsel at trial. The record before us clearly demonstrates that the opposite is true.

This Court reviews trial court's findings regarding whether a defendant's waiver of counsel was voluntary, knowing and intelligent for clear error, while the determination of the meaning of knowing and intelligent waiver is a question of law that is reviewed de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). This Court reviews a trial court's decision to allow a defendant to represent himself is reviewed for an abuse of discretion, *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The Sixth Amendment of the United States Constitution guarantees the right to counsel at all stages of the criminal process to defendants who may be subject to incarceration. US Const, Am VI. The Sixth Amendment right to counsel has been incorporated into the substantive due process clause of the Fourteenth Amendment, and has thus been made applicable to the states. US Const, Am XIV; *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). The United States and Michigan Constitutions also protect a defendant's right of self-representation at trial; however, the exercise of this right is subject to the discretion of the trial court. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005).

Before allowing a defendant to represent himself or herself, the trial court must consider the defendant's request to do so in light of the following factors: "(1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Willing, supra* at 219, citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). See also, *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed2d 562; (1975). Further, the trial court is required to comply with MCR 6.005(D), which allows a trial court to accept defendant's initial waiver of the right to counsel only after:

- (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Before a defendant can effectively waive the right to counsel, a trial court must substantially comply with the factors set forth in *Anderson, supra*, and the requirements of MCR 6.005(D). *Willing, supra* at 220. That a defendant did not waive his or her right to counsel is presumed. *Id.* Rather, “[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.” *Id.*, quoting *Williams, supra* at 641.

The record demonstrates that the trial court substantially complied with all of the requirements necessary to elicit a valid waiver of defendant’s right to counsel. At defendant’s arraignment, defendant, through counsel, acknowledged his receipt of the felony information and the “habitual information,” and waived a formal reading; accordingly, defendant was actually aware of the maximum potential penalty upon conviction.

Defendant’s request to represent himself was consistently unequivocal, and defendant continued to insist that he represent himself after repeated reminders regarding the disadvantages of self-representation, and in view of the fact that the trial court allowed defendant to again represent himself at his second trial, the trial court presumably concluded that defendant would not disrupt or unduly inconvenience the court. *Willing, supra* at 219. Moreover, the record shows that the trial court substantially complied with the requirements of MCR 6.005(D). The trial court advised defendant at several points in each of his trials regarding the disadvantages of self-representation, appointed stand-by counsel to assist defendant, and repeatedly urged defendant to reconsider his decision to proceed on his own. Moreover, the trial court offered to replace defendant’s stand-by counsel, which was declined by defendant. The record clearly reveals that defendant voluntarily, knowingly and intelligently waived his right to counsel. Accordingly, defendant’s argument, that the trial court abused its discretion when it allowed him to proceed in propria persona, fails.

Next, defendant argues that the trial court’s evidentiary rulings precluded him from presenting his defenses. This Court reviews unpreserved evidentiary issues for plain error affecting defendant’s substantial rights. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: “(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where “the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“[A] criminal defendant has a state and federal constitutional right to present a defense.” *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). However, a defendant’s right to present a defense may be circumscribed by “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000).

Defendant argues that the trial court precluded him from presenting his defenses when the trial court sustained the prosecution's objections on the basis of lack of relevance. Those defenses were that defendant had a medical condition of a torn rotator cup which prevented him from placing his hands behind his back as commanded by the arresting officer, and that he was denied the right to present an insanity defense. However, the record demonstrates that the trial court nevertheless permitted defendant to elicit testimony from defendant's mother and brother relating to his physical and mental disabilities, and allowed defendant to argue that these disabilities prevented him from complying with Newcomb's attempt to arrest him. To the extent that defendant argues that the trial court refused to admit defendant's medical records, there is no indication in the record that defendant attempted to introduce these records into evidence, or, more fundamentally, that such records exist. Because the record shows that the trial court did in fact permit defendant to present his defenses relating to his physical and mental disabilities, there is no error apparent from the record, and further, defendant cannot demonstrate that the outcome would have been different but for the trial court's actions in sustaining some of the prosecution's objections on the basis of lack of relevance. *Pipes, supra* at 279. Accordingly, defendant's argument that the trial court precluded defendant from asserting his defenses fails.

Defendant next argues that he was the victim of vindictive prosecution. This Court reviews an unpreserved argument for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

"It is a violation of due process to punish a person for asserting a protected statutory or constitutional right." *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Where a defendant has been prosecuted for asserting a protected statutory or constitutional right, the prosecution is characterized as vindictive. *Ryan, supra* at 35-36. A vindictive prosecution may be one of two types: presumed and actual. Vindictiveness is presumed where there is a reasonable likelihood that vindictiveness motivated the prosecution. *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982). Actual vindictiveness is shown by "objective evidence of an 'expressed hostility or threat' suggest[ing] that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." *Ryan, supra* at 36, quoting *United States v Gallegos-Curiel*, 681 F2d 1164, 1168 (CA 9 1982).

Here, aside from defendant's bare contention that he was the victim of vindictive prosecution resulting from a civil action he previously filed against the city of Farmington Hills, defendant offers no evidence of a nexus between his civil lawsuit and this case. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has provided no basis to support his conclusion that he was being punished for exercising a protected statutory or constitutional right. Accordingly, we find no error.

Defendant next argues that the prosecution committed misconduct because it failed to disclose exculpatory evidence, and failed to correct false testimony. Allegations of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, defendant failed to raise a timely and specific objection to the allegedly false testimony elicited by the prosecutor, and failed to request a curative instruction; therefore,

defendant's allegation that the prosecutor elicited false testimony is unpreserved on appeal, and review is limited to plain error affecting substantial rights. *Unger, supra* at 234.

A prosecutor may not obtain a conviction through the knowing use of false testimony. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Moreover, a prosecutor has an affirmative duty to correct false evidence. *Id.* "A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), citing *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Cox, supra* at 448, citing *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

In his brief, defendant accused the prosecution of failing to correct false testimony and suppressing evidence. However, defendant failed to identify the testimony he believed was false. Accordingly, defendant cannot show that the prosecutor's actions affected his substantial rights. *Unger, supra* at 234. Further, although defendant asserted that the prosecution did not provide him with a list of the names of customers in the store at the time of the incident, defendant cannot demonstrate that the prosecution possessed such a list. That a list of customers was non-existent, and therefore was unobtainable by either the prosecution or the defense, is supported by the statements of defendant's stand-by counsel, which indicated that it was impossible to ascertain the identity of persons present in the store at the time of the incident. Because the evidence was unobtainable, defendant cannot demonstrate either that the prosecution ever possessed it, much less that the prosecution suppressed it, or show that the evidence was favorable to him and that the outcome would have been different had he been provided a list of customers. *Cox, supra* at 448. Defendant fails to demonstrate that any of the prosecution's actions deprived defendant of his right to a fair trial. *Bahoda, supra* at 266-267. Accordingly, we again find no error.

Defendant next argues that the jury instructions given by the trial court with respect to resisting arrest were improper. However, a defendant waives the right to appellate review where a defendant expresses satisfaction with the specific actions of a trial court. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Waiver precludes appellate review of the issue, and extinguishes any error. *Id.*

Both before and after the trial court gave the allegedly improper instruction, defendant indicated that he was satisfied with the instruction. Because defendant expressed satisfaction with the trial court's decision to give the jury instruction, we conclude that he has waived the issue on appeal, and we decline to consider the question further. *Carter, supra* at 219.

Defendant next argues that the cumulative effect of multiple errors denied defendant his right to a fair trial. Because defendant has failed to demonstrate *any* error, we dismiss this claim.

Defendant next argues that the verdict was against the great weight of the evidence. As a preliminary matter, this issue does not appear in defendant's "Statement of Questions Presented." Accordingly, this issue is waived on appeal. MCR 7.212(C)(5). See also, *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). However, even if this issue was properly presented to this Court, we would conclude that the verdict was not against the great weight of the evidence.

This Court reviews the decision of a trial court to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Because a challenge to the great weight of the evidence requires an examination of the entire body of proofs, this Court must also determine whether the evidence preponderates so heavily against the verdict that allowing it to stand would result in a miscarriage of justice. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). "Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(A).

Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). However, "[a] verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925). Because the record is replete with evidence sufficient for a reasonable jury to have convicted defendant, we hold that the verdict was consistent with the great weight of the evidence.

Lastly, defendant argues that he is entitled to resentencing because the trial court failed to individualize his sentence. This Court reviews an unpreserved sentencing issue for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Pursuant to MCL 769.34(10), if a defendant's minimum sentence falls within the proper guidelines sentence range, "the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's range." Moreover, a sentence within the guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Here, defendant was sentenced to a minimum of two years' imprisonment, which falls within the guidelines range of 5 to 46 months' imprisonment, and defendant does not contest the scoring or accuracy of the information in the presentence investigation report on appeal. Further, defendant's conclusory assertion that probation and community service would "truly have been individualized" is insufficient to rebut the presumption that a sentence within the appropriate sentencing guidelines range was proportionate to the offense. *Id.* Accordingly, we conclude that defendant's challenge to his sentence fails.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello