STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2009
v	No. 284891 07-002735-FC
ALBERT FREEMAN TOWNSEND, Defendant-Appellant.	LC No. 07-002735-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a; leaving the scene of a serious injury accident, MCL 257.617; and felonious driving, MCL 257.626c. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to prison terms of 30 to 60 years for carjacking, 30 to 60 years for leaving the scene of a serious injury accident, and five to 15 years for felonious driving. Defendant's sentences were to run concurrent to each other, but consecutive to the sentence he was serving on an unrelated charge. Defendant appeals as of right. We affirm.

I. Facts

Defendant's convictions arose from an incident that occurred in a Taco Bell parking lot. Defendant had traveled from Flint to Port Huron with two companions so that one of the companions could shoplift. Thereafter, defendant decided to steal a vehicle because the vehicle in which defendant and the others had initially traveled had been reported stolen.

The vehicle defendant chose to steal was a truck belonging to Richard Armstead, who was inside Taco Bell when defendant entered and started the truck. Armstead ran outside when he realized his truck door was open and yelled, "[y]ou're stealing my truck." Witnesses reported that Armstead was hanging onto the inside of the truck's door through the truck's open window and appeared to be trying to strike defendant or reach the keys. Defendant drove out of the parking lot at a high rate of speed, squealing the tires, and Armstead fell off. Defendant then ran over Armstead with the truck. As a result of the injuries he sustained from this incident, Armstead was hospitalized for 30 days, underwent numerous surgeries, and continues to require 24-hour supervision.

II. Admission of Evidence

Defendant first argues that the trial court erred in admitting evidence that defendant had been involved in a retail fraud scheme. We disagree.

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Analysis

The prosecutor argued that the disputed evidence was admissible under MRE 404(b) in order to establish identity or proof of motive or intent. A review of the record demonstrates that the trial court agreed that the evidence was admissible under either theory, as well as under the theory that the evidence was part of the res gestae of the charged offense. Defendant's challenge to the propriety of the trial court's decision focuses solely on whether the evidence should have been admitted to establish identity. Yet, defendant makes no argument that the trial court erred in allowing the evidence under a res gestae theory. Because this would serve as an independent basis for admission, and defendant does not challenge it, appellate relief is not warranted. See *Derderian v Genesys Health Care System*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

III. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to support his convictions for carjacking and leaving the scene of a serious injury accident. We disagree.

A. Standard of Review

In reviewing a sufficiency of the evidence claim, we apply a de novo standard of review. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Due process requirements prohibit a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A reviewing court must examine 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 reasonable doubt. *Hawkins, supra* at 457. Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

B. Analysis

Defendant first challenges the sufficiency of the evidence supporting his conviction for carjacking. The offense of carjacking requires proof of three elements: (1) defendant took a motor vehicle from another person, (2) defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998). Because carjacking is a general intent crime, "no intent is required beyond the intent to do the act itself, that is, using force, threats, or putting in fear in order to take a vehicle from a person in lawful possession and in that person's presence." *People v Davenport*, 230 Mich App 577, 580-581; 583 NW2d 919 (1998).

Defendant argues that his conviction on this charge cannot stand because the prosecution failed to present sufficient evidence that defendant intended to use force or violence in the course of stealing the victim's truck because there was nothing to indicate that defendant was aware that the victim was on the truck. We disagree.

While it is true that defendant testified that he had no recollection of the victim coming up to the truck, putting his hands in the truck, or hanging onto the truck, defendant acknowledged that still-shots from the Taco Bell surveillance system show a man hanging onto the truck. In addition, defendant testified that the windows of the truck were down when he took it. Also, two witnesses testified that the victim was loudly yelling, "[y]ou're stealing my truck." Furthermore, one witness reported seeing the victim make arm movements that appeared to be punching at the driver or reaching to take the keys out of the ignition. A jury could therefore reasonably infer that defendant was aware the victim was on the truck. In addition, defendant himself and two witnesses all testified that the truck was moving at a speed fast enough to cause the tires to squeal and skid. The inference that defendant was aware the victim was clinging to the truck and attempting to stop its theft, coupled with defendant's high rate of speed, would support the conclusion that defendant intended to use force. As a result, when taken in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins, supra* at 457.

Defendant also argues there was insufficient evidence to sustain his conviction for leaving the scene of an accident causing serious injury. Pursuant to statute, the driver of a vehicle "who knows or has reason to believe he or she has been involved in an accident" is required by statute to "immediately stop his or her vehicle at the scene of the accident." MCL 257.617(1). The statute provides for varying degrees of penalties depending on whether the accident results in serious injury or death of another individual. MCL 257.617(2); MCL 257.617(3).

MCL 257.617 provides:

> (1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619(a) and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.
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> (2) Except as provided in subsection (3), if the individual violates subsection (1) and the accident results in serious impairment of a body function or death, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $5, 000.00, or both.
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> (3) If the individual violates subsection (1) following an accident caused by that individual and the accident results in the death of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

When interpreting a statute, the primary goal is to give effect to the intent of the Legislature by construing the language of the statute itself. *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). The Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005).

Under the plain and unambiguous language of MCL 257.617, it is clear that the driver need not be aware that serious injury resulted from the accident in order to obtain a conviction. Instead, a conviction can be obtained if there is proof that the driver knew or had reason to believe he had been involved in an accident. The level of injury simply determines the appropriate penalty for a violation of the statue.

As discussed above, there was sufficient evidence presented to lead to the conclusion that defendant was aware that the victim was clinging to the side of the truck in an attempt to prevent the theft of his vehicle. The fact that the victim then fell off the truck would serve to establish that defendant knew or had reason to believe he had been involved in an accident and was therefore required to stop. Moreover, there was testimony from an eyewitness that when the truck drove over the victim, the wheel was high enough off the ground for the witness to see light between the wheel and the pavement. It is reasonable to infer from this testimony that defendant would have felt the resulting bump. As such, this testimony alone could serve to establish that defendant knew or had reason to believe he had been involved in an accident and was required to stop.

In sum, taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented below and the reasonable inferences stemming from that evidence were sufficient to support defendant's convictions. *Hawkins, supra* at 457.

IV. Jail Credit

Defendant also argues the trial court erred in denying jail credit. We disagree.

A. Standard of Review

Whether a statute, such as the jail credit statute, has been properly applied is an issue of law that we review de novo. *People v Filip*, 278 Mich App 635, 640; 754 NW2d 660 (2008).

B. Analysis

MCL 769.11b governs jail credit and provides that a defendant is entitled to jail credit when any time in jail has been served prior to sentencing "because of being denied or unable to furnish bond for the offense for which he is convicted." Under the current interpretation of this statute, parole detainees are not entitled to jail credit at sentencing for a subsequent offense. *People v Idziak*, __ Mich __; __ NW2d __ (Docket No. 137301, decided July 31, 2009), slip op pp 9-19. Therefore, the trial court correctly denied jail credit.

V. Attorney Fees

Defendant also argues the trial court improperly imposed attorney fees without first considering his ability to pay. We disagree.

A. Standard of Review

We review this unpreserved constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

B. Analysis

Our Supreme Court recently addressed this issue in *People v Jackson*, 483 Mich 271; __ NW2d __ (2009). The *Jackson* Court overruled this Court's decision in *People v Dunbar*, 264 Mich App 240, 255-256; 690 NW2d 476 (2004), insofar as *Dunbar* required a trial court to consider a defendant's ability to pay *prior to* imposing an order for reimbursement of attorney fees. *Id*. at 290 (emphasis added). The *Jackson* Court further held that a defendant would only be entitled to an assessment of his ability to pay when the imposition of a fee is enforced. *Id*. at 292. Finally, the *Jackson* Court noted that MCL 769.1*l* inherently calculates a prisoner's general ability to pay and creates a presumption of nonindigency, which may be difficult to overcome. *Id*. at 295.

In the instant case, defendant requests that this Court vacate the imposition of attorney fees or remand the matter for an assessment of his ability to pay. However, there is no indication that efforts have been made to enforce the imposition of the disputed fee. Therefore, defendant is not entitled to such assessment until or unless efforts to enforce are begun.

VI. Jury Composition

Defendant also filed a supplemental brief arguing that he was denied due process because he was convicted by an all-white jury and that he was denied effective assistance of counsel because his trial counsel failed to object to the composition of the jury pool.

As an initial matter, we conclude that we need not address defendant's due process claim as it was waived when defendant expressed satisfaction with the jury before the oath was administered. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

VII. Ineffective Assistance of Counsel

We also disagree with defendant's claim that he was denied the effective assistance of counsel.

A. Standard of Review

This issue is unpreserved because defendant did not request a new trial or an evidentiary hearing after trial. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Therefore, our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that counsel was ineffective solely for failing to object to the composition of the jury. A criminal defendant is entitled to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Moreover, "the American concept of a jury trial contemplates a jury drawn from a fair cross section of the community . . . ." *People v Smith*, 463 Mich 199, 214; 615 NW2d 1 (2000) (Cavanagh, J). However, the requirement for a fair cross section does not guarantee that "any particular jury actually chosen must mirror the community." *Id*.

To establish a prima facie violation of the fair cross section requirement, a defendant has the burden of proving "that a distinctive group was underrepresented in his jury pool and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003) (internal citations omitted). Defendant has provided no evidence of systematic exclusion of African Americans for the jury selection process in St. Clair County. Instead he asserts that simply because he faced an

all-white jury, systematic exclusion must be present. Defendant provides no support for this conclusory argument. An appellant may not merely announce his position and then leave it to this Court to discover and rationalize the basis for his claims. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Because there is nothing in the record to substantiate defendant's assertion that there were no African Americans in the jury pool, or that the absence of any African Americans on the jury or in the jury pool was the result of systematic exclusion, defendant has failed to establish that defense counsel had an obligation to object. Defense counsel has no obligation to raise a meritless motion or make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens