

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES MILLER,

Defendant-Appellant.

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UNPUBLISHED

February 9, 2010

No. 286771

Genesee Circuit Court

LC No. 07-021141-FH

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant appeals by right his convictions of first-degree home invasion, MCL 750.110a(2), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(c). Defendant was sentenced to 50 to 240 months' imprisonment for the first-degree home invasion conviction, and 24 to 180 months' imprisonment for the CSC II conviction, to be served consecutively. Because defendant is not entitled to a new trial or resentencing, we affirm.

Defendant first argues that the trial court violated his due process rights by referring to jurors by number instead of by name. We review the trial court's decision concerning the conduct of voir dire for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Using an anonymous jury impacts a defendant's "interest in being able to conduct a meaningful examination of the jury", and his "interest in maintaining the presumption of innocence." *Williams*, 241 Mich App at 522-523. To raise a successful challenge to an anonymous jury, however, the record must support "that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised." *People v Hanks*, 276 Mich App 91, 93; 740 NW2d 530 (2007), citing *Williams*, 241 Mich App at 523. We conclude on the record in this case that no error requiring reversal occurred. *Hanks*, 276 Mich App at 92.

Similar to the circumstances in *Hanks* and *Williams*, the jury was anonymous in a literal sense because the prospective jurors were referred to by number instead of by name. However, the record shows that defense counsel had access to biographical information; for example, he questioned a juror about his occupation. The trial court also questioned the jurors at length, and

there is no indication that any information was withheld. Defendant has failed to demonstrate that the trial court's use of numbers instead of names prohibited him from conducting a meaningful voir dire or compromised his presumption of innocence, and because "none of the dangers of an 'anonymous jury' was implicated," there was no plain error requiring reversal. *Id.* Although defendant relies on two cases from other jurisdictions, *United States v Sanchez*, 74 F3d 562, 564 (CA 5, 1996), and *State v Tucker*, 259 Wis 2d 484; 657 NW2d 374 (2003), this Court previously considered, and rejected, arguments based on these cases in *Hanks*, 276 Mich App at 94-95. We are bound by *Hanks*. MCR 7.215(C)(2) and (J)(1).

Defendant next contends that due process requires a new trial because portions of the prospective jurors' answers during voir dire were not recorded by the audio equipment in the courtroom and therefore could not be transcribed. We previously granted defendant's motion to remand his case to the trial court to settle the record in this regard. *People v Miller*, unpublished order of the Court of Appeals, entered March 6, 2009 (Docket No. 286771). The record was not settled, but the trial court considered, and denied, defendant's motion for a new trial based on the unavailability of the entire voir dire transcripts. Whether defendant's due process rights to a proper appeal were denied is a constitutional issue that we review de novo on appeal. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

"The courts of this state have held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered." *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981) (citations omitted). Where "it is impossible to review the regularity of the proceedings due to the lack of transcripts[.]" reversal is required in order to "insure defendant's right of appeal in a criminal case as guaranteed by Const 1963, Art 1, § 20." *Id.* We "must determine whether the unavailability of those portions of the transcript so impedes the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered. . . . If the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied; the sufficiency of the record depends upon 'the questions which must be asked of it.'" *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983) (internal citations omitted). A defendant bears the burden of showing that he suffered prejudice because of the missing transcript; he must provide something more than gross speculation to support his claim. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986); *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993).

After reviewing the jury selection transcript, we conclude that defendant has failed to establish that the inability to obtain the prospective jurors' inaudible responses "so impede[s] [] defendant's right of appeal that a new trial must be ordered." *Horton (After Remand)*, 105 Mich App at 331. The record reflects that, at trial, both the prosecutor and defense counsel informed the trial court that they were satisfied with the jury as impaneled after 64 pages of voir dire. At that point, defense counsel had exercised three peremptory challenges, raised no challenges for cause, and had two peremptory challenges remaining. Further, a review of the jury selection transcript reveals that at least some of the answers from the prospective jurors were audible, and other answers can be inferred based on the trial court's or counsels' questions and comments. Once the parties began exercising their peremptory challenges, almost all of the responses by the replacement jurors were audible regarding whether they would have answered any previous questions differently than the rest of the jury panel, whether they could be fair to both parties,

and their education and occupations. Considering the available responses, and the trial court's and parties' questions and comments, it is not entirely impossible to review the jury selection as a whole, and the surviving record is sufficient to allow evaluation of defendant's claims on appeal. *Audison*, 126 Mich App at 834-835. The proceedings simply do not indicate that any irregularity occurred, and defendant has failed to overcome the presumption of regularity by merely speculating that he may have had a claim if a complete transcript was available. *Carson*, 19 Mich App at 7 n 10. In other words, although defendant argues that trial counsel may have rendered ineffective assistance by failing to challenge for cause a juror who could potentially have been biased, defendant offers no proof in support of this assertion, beyond mere speculation, and does not even proffer a possible basis for a for-cause challenge. He has therefore failed to establish any prejudice. *Bransford*, 806 F2d at 86.

In defendant's final claim of error, he asserts that the trial court improperly based its decision to impose consecutive sentences<sup>1</sup> on the fact that defendant maintained his innocence at sentencing. Because defendant raised this issue in his motions for resentencing and for remand, it is preserved on appeal. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).

A defendant's Fifth Amendment right against self-incrimination may be violated when the trial court improperly considers the defendant's refusal to admit guilt in determining his sentence. *People v Conley*, 270 Mich App 301, 314-316; 715 NW2d 377 (2006). In determining whether the trial court improperly considered defendant's failure to admit guilt, we examine "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). However, if the trial court "did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *Id.* at 713.

Based on the record, we conclude that the trial court did not improperly base its sentencing decisions on defendant's failure to admit guilt. Although defendant maintained his innocence at sentencing, and the trial court commented on it, the trial court did not attempt to get defendant to admit guilt or indicate that if he did so, his sentence would be less severe. *Wesley*, 428 Mich at 713; *Conley*, 270 Mich App at 314. Rather, the trial court discussed the fact that defendant's failure to be honest with his sister and family caused the breakup of a longtime friendship between defendant's sister and the victim, caused defendant's family to be mad at the victim, and would ultimately cause his family to suffer because they believed that he was innocent and was therefore being "railroaded" by the court system. At defendant's motion for resentencing, the trial court specifically stated that it did not consider defendant's claims of innocence in determining his sentence, but rather "sentenced him for what he did." It noted that defendant actually deserved a more severe sentence given the facts of the case, and that

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<sup>1</sup> The trial court is authorized to "order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.110a(8).

defendant needed to be removed from society to protect the victim and to give him a chance to mature so he would not re-offend in the future. Many of the trial court's comments regarding defendant's refusal to be honest with his family related to defendant's potential for rehabilitation, i.e., that defendant would not receive the help he needed and would likely re-offend, which was a proper factor for the trial court to consider when fashioning a sentence. *Wesley*, 428 Mich at 713-714. There was no sentencing error.

Affirmed.

/s/ Alton T. Davis

/s/ Karen M. Fort Hood

/s/ Deborah A. Servitto