STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v WILLIE BENJAMIN WEBB, Defendant-Appellant.	No. 291033 Gogebic Circuit Court LC No. 08-000201-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JESSIE JAMES WALTON, Defendant-Appellant.	No. 291147 Gogebic Circuit Court LC No. 07-000335-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant Willie Webb of assisting in causing a prison riot,[1] and two counts of assaulting a prison employee.[2] The trial court sentenced him as a second habitual offender,[3] to 95 months to 15 years' imprisonment for the assisting in causing a prison riot conviction and four to six years' imprisonment for each assault conviction. The same jury convicted defendant Jessie Walton of assisting in causing a prison riot and assaulting a prison employee. The trial court sentenced him as a third habitual offender,[4] to 7-1/2 to 20 years'

[1] MCL 752.542a.

[2] MCL 750.197c.

[3] MCL 769.10.

[4] MCL 769.11.

imprisonment for the assisting in causing a prison riot conviction and four to eight years' imprisonment for the assault conviction. Webb now appeals as of right in Docket No. 291033, and Walton appeals as of right in Docket No. 291147. We affirm in both appeals.

I. BASIC FACTS AND PROCEDURAL HISTORY

Webb's and Walton's convictions stem from an April 9, 2006 riot at the Ojibway Correctional Facility in Marenisco, Michigan. Walton and Webb were tried jointly before a single jury, resulting in their convictions and these appeals.

According to numerous Ojibway corrections officers who testified during the trial, approximately two hours before the riot, a Caucasian inmate, called "Mason," stabbed an African-American inmate, called "Lundy," with a homemade knife. Tension among the inmates was high because the stabbing appeared to be racially motivated. African-American inmates were upset because they believed that the prison corrections officers, all of whom were Caucasian, did not adequately assist Lundy. But according to Inspector Donald Majurin, the corrections officers complied with protocol and did not get involved in the altercation until there were enough officers present to properly handle the situation.

Sergeant Dale Ann Havenor testified that after the Mason-Lundy altercation, the inmates seemed to stop paying attention to the guards' directions. Corrections officers then began videotaping the inmates in an attempt to coerce them to return to their housing units. Sergeant Havenor testified that oftentimes inmates will disperse when a guard attempts to videotape their faces. However, the inmates instead began to congregate in the T.V. room. The inmates, including Webb, also began threatening to harm or kill the corrections officers.

At approximately 8:40 p.m., one of the inmates made a saluting motion, and chaos erupted thereafter. The inmates yelled, screamed, and beat the officers. Approximately 50 African-American inmates were involved in the disturbance. Sergeant Sheldon Ewers responded as part of the emergency response team. He estimated that between 8 and 12 staff members were injured. The emergency response team quelled the riot with a teargas gun.

During trial, several officers identified both Webb and Walton as participants or instigators of the riot. The jury convicted Webb and Walton and they now both appeal.

II. DOCKET NO. 291033 (DEFENDANT WEBB)

A. SUFFICIENCY OF THE EVIDENCE

1. STANDARD OF REVIEW

Webb argues that the evidence failed to show that he participated in the prison riot or that he assaulted Officer Brady Roberts or Officer John Ahola. When determining whether sufficient evidence exists to support a conviction, a reviewing court must view the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could conclude

that the prosecution proved every element of the crime charged beyond a reasonable doubt.[5] The reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury's verdict.[6] Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense.[7]

2. ANALYSIS

The jury convicted Webb of assisting in causing a prison riot, contrary to MCL 752.542a, which provides:

> A person shall not willfully instigate, cause, attempt to cause, assist in causing, *or* conspire to cause a riot at a state correctional facility. As used in this section, "riot at a state correctional facility" means 3 or more persons, acting in concert, who intentionally or recklessly engage in violent conduct within a state correctional facility that threatens the security of the state correctional facility or threatens the safety or authority of persons responsible for maintaining the security of the state correctional facility.[8]

The disjunctive term "or" in the statute allows for conviction based on any one theory stated in the statute.[9] Here, Webb was charged with willfully assisting in causing a riot at the facility and the jury convicted him based on this theory.

The jury also convicted Webb of two counts of assault of a prison employee. To establish that charge, the prosecution was required to prove: (1) that defendant was lawfully imprisoned in a place of confinement, (2) that he used violence, threats of violence, or dangerous weapons to assault an employee or other custodian of the place of confinement, and (3) that he knew the person to be an employee or custodian of the place of confinement.[10]

We find no merit to Webb's argument that the evidence was insufficient to support his convictions. Several corrections officers testified regarding his involvement in both inciting the riot and assaulting corrections officers Roberts and Ahola.

Sergeant Kurt Zazeski testified that he observed that Webb and fellow inmates were very angry and trying to incite 15 to 20 other inmates to attack the corrections officers. Webb told Sergeant Zazeski that they were going to "kick [his] ass" and that Webb had burnt the place down before and would do it again. Sergeant Zazeski heard Woods say, "Let's rush them. They

---

[5] *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

[6] *Nowack*, 462 Mich at 400.

[7] *Id*.

[8] Emphasis added.

[9] See *People v Hyde*, 285 Mich App 428, 448; 775 NW2d 833 (2009).

[10] MCL 750.197c(1); *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007).

can't get us all." Webb stepped forward, but another inmate grabbed him and said, "Not now. We'll get them later." Webb tried to pull away and spun out of his jacket. Webb threw his jacket at Sergeant Zazeski's feet and told him that he would be the first to die. Sergeant Zazeski also testified that Webb was a leader of the disturbance.

Officer Leonard Janssen also recalled that Webb and another inmate were very upset after the altercation between Lundy and Mason. Officer Leonard Janssen heard some of Webb's threats after the Mason-Lundy altercation and heard Webb attempting to convince other inmates to back him up. Webb told Officer Janssen that if there was any bloodshed between Mason and Lundy, "there was going to be a lot of gray shirts that were going to get hurt."

Officer Marc Pangrazzi also observed Webb attempt to rally the other inmates to burn down the facility and start a riot. According to Officer Mark Mazanec, video footage of the riot depicted Webb raising his arm and striking Officer Roberts. The video further showed Webb pick up a "wet floor" sign, raise it above his head, and swing it in front of him. Officer Ahola was struck with a "wet floor" sign and Webb was identified as the inmate who had struck him with the sign.

Officer Stephen Peterson was involved in identifying security threat groups. From his experience with security threat groups, Officer Peterson determined that Webb was one of the main characters in the riot.

Although Webb speculates that certain video footage that was disposed of before trial would have been exculpatory, nothing in the record supports this contention.

The evidence supported that Webb willfully instigated, attempted to cause, and assisted in causing the riot.[11] Moreover, the evidence supported that Webb, an Ojibway inmate, used violence to assault Ojibway corrections officers Roberts and Ahola.[12] Thus, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational fact-finder could have concluded that the prosecution proved every element of the crime charged beyond a reasonable doubt.

B. GREAT WEIGHT OF THE EVIDENCE

1. STANDARD OF REVIEW

Webb argues that his convictions are against the great weight of the evidence. Because he failed to preserve this issue for appellate review by raising it in a motion for a new trial in the trial court, our review is limited to plain error affecting his substantial rights.[13] Reversal is warranted only if the error resulted in conviction despite Webb's actual innocence or if it

---

[11] See MCL 752.542a.

[12] See MCL 750.197c(1); *Odom*, 276 Mich App at 418.

[13] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence.[14]

2. ANALYSIS

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand.[15] For the same reasons previously discussed regarding Webb's sufficiency of the evidence claim, the verdict was not against the great weight of the evidence. The evidence showed that Webb incited other inmates to riot, participated in the riot, and personally assaulted Officer Roberts and Officer Ahola. Thus, Webb has failed to establish a plain error affecting his substantial rights.

C. JURY INSTRUCTIONS

1. STANDARD OF REVIEW

Webb argues that the trial court's instruction regarding MCL 752.542a did not fairly present the issues to be tried because it improperly allowed conviction based on mere participation in the riot. We review de novo claims of instructional error.[16]

2. ANALYSIS

Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights.[17] The instructions must include all elements of the charged offenses and must not exclude relevant issues, defenses, and theories if supported by the evidence.[18] "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required."[19]

Jury instructions must interpret statutory language according to its plain terms.[20] The plain language of MCL 752.542a states that "[a] person shall not willfully instigate, cause, attempt to cause, assist in causing, or conspire to cause a riot at a state correctional facility." As we stated previously, the disjunctive term, "or," allows for conviction based on any one theory stated in the statute.[21] One such theory is willfully assisting in causing a riot, and the trial court

---

[14] *Carines*, 460 Mich at 763.

[15] *Musser*, 259 Mich App at 218-219.

[16] *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004).

[17] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[18] *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

[19] *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

[20] *People v Shakur*, 280 Mich App 203, 210; 760 NW2d 272 (2008).

[21] *Hyde*, 285 Mich App at 448.

properly instructed the jury in accordance with this theory using the statutory language.[22] Contrary to Webb's argument, the trial court did not instruct the jury that a defendant's mere participation in a riot is sufficient for conviction under MCL 752.542a. Accordingly, we conclude that the trial court's jury instruction fairly presented the issues to be tried.

D. SEVERANCE OF TRIALS

1. STANDARD OF REVIEW

Webb argues that the trial court erred by denying his motion for separate trials. We review for an abuse of discretion a trial court's decision on a motion to sever the trials of multiple defendants.[23] A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.[24]

2. ANALYSIS

MCR 6.121(C) provides:

> On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice."[25] Absent such a showing or an indication that the requisite prejudice actually occurred at trial, this Court should affirm a trial court's decision denying a motion for severance.[26] The Michigan Supreme Court has further recognized that "severance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'"[27] In other words, a defendant must show that the magnitude of the

---

[22] See *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004) (stating that a trial court's use of the statutory language in instructing the jury is proper).

[23] *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

[24] *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

[25] *Hana*, 447 Mich at 346.

[26] *Id.* at 346-347.

[27] *Id.* at 359-360, quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993).

prejudice denied him a fair trial.[28] Prejudice requiring reversal exists when one of the defendant's substantive rights, such as the right to present an individual defense, is violated.[29]

Webb contends that he was prejudiced by the joinder of his trial to Walton's because the evidence against him was slim, while the evidence against Walton was strong and incriminating, and included graphic photographs of the injuries that Walton caused. However, as we previously discussed, the evidence against Webb was not slim and was more than sufficient to support his convictions. Moreover, Webb has not shown that the evidence against Walton tainted the jury and prejudiced Webb's substantial rights as required under MCR 6.121(C).

Although Webb contends that the testimony and "bloody pictures" established Walton's guilt regarding the prison riot charge and showed that he assaulted Sergeant Steven Buda, Lieutenant Joseph Basso, and Sergeant Roberta Hemming, the jury acquitted Walton of assaulting Lieutenant Basso and Sergeant Hemming. Thus, the jury apparently did not deem the evidence overly prejudicial to Walton, let alone Webb. The record shows that the jury was able to independently evaluate each charge. There is no basis for concluding that joinder prevented the jury from making a reliable judgment about guilt or innocence.[30] Thus, in the absence of a showing that prejudice actually occurred at trial, we affirm the trial court's decision denying Webb's motion for severance.

E. SENTENCING

1. STANDARD OF REVIEW

Webb argues that he is entitled to resentencing because the trial court misscored offense variables (OVs) 1,[31] 3,[32] 9,[33] 14,[34] and 19.[35] A defendant may preserve an objection to the scoring of an offense variable by objecting to the scoring at sentencing or challenging the scoring in a proper motion for resentencing or a proper motion to remand.[36] Webb preserved his objections to the scoring of OVs 1, 3, and 14 by objecting to the scoring of these variables at sentencing. But because Webb failed to challenge the scoring of OVs 9[37] and 19 at sentencing,

---

[28] *Id.* at 360.

[29] *Id.*

[30] See *id.* at 359-360.

[31] MCL 777.31.

[32] MCL 777.33.

[33] MCL 777.39.

[34] MCL 777.44.

[35] MCL 777.49.

[36] MCL 769.34(10); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

in a motion for resentencing, or in a motion to remand filed with this Court, he did not preserve his arguments regarding those variables for appellate review.[38]

This Court reviews for clear error a trial court's factual findings at sentencing.[39] The proper application of the statutory sentencing guidelines presents a question of law that this Court reviews de novo.[40] A sentencing court has discretion in determining the number of points to score for each variable, provided that record evidence adequately supports a given score.[41] "Scoring decisions for which there is any evidence in support will be upheld."[42] This Court reviews unpreserved scoring challenges for plain error affecting substantial rights.[43]

2. OV 1 AND OV 3

Webb argues that the trial court erred by scoring 25 points each for OV 1 and OV 3. A trial court should score 25 points for OV 1 if "a victim was cut or stabbed with a knife or other cutting or stabbing weapon[.]"[44] OV 1 further provides that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points."[45] A trial court should also score 25 points for OV 3 if a victim suffered "[l]ife threatening or permanent incapacitating injury[.]"[46] Like OV 1, OV 3 also provides that "[i]n multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points."[47]

For logistical reasons, the prosecution chose to prosecute the inmates involved in the riot in groups. Some of the inmates, who entered guilty pleas, were not assessed points for OV 1. Other inmates, like Jerry Johnson, were convicted. But it was not until Johnson's sentencing that the prosecution argued that points should be scored for OV 1 because a stabbing weapon was used, which caused life threatening injury. The trial court agreed and assessed Johnson 25 points for OV 1.

(…continued)

[37] Although Webb's counsel discussed OV 9 at sentencing, he did not argue that it was improperly scored. Rather, he sought a list of names of all of the corrections officers who were injured during the riot. Thus, he did not raise at sentencing the issue that he now asserts on appeal with respect to the scoring of OV 9.

[38] *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

[39] *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

[40] *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

[41] *Endres*, 269 Mich App at 417.

[42] *Id*.

[43] *Kimble*, 470 Mich at 312.

[44] MCL 777.31(1)(a).

[45] MCL 777.31(2)(b).

[46] MCL 777.33(1)(c).

[47] MCL 777.33(2)(a).

Webb argues that he was erroneously assessed 25 points for OV 1 and OV 3 because the inmates sentenced before Johnson were assessed zero points for those variables, and the instructions require that the same number of points be assessed in multiple offender cases. We conclude that Webb was properly assessed 25 points for OV 1 and OV 3 based on the prosecutor's concession that the scores for these variables assessed to the previously sentenced inmates were erroneous.

In *People v Morson*,[48] two codefendants, Morson and Northington, were involved in an armed robbery. As Northington fled after stealing the female victim's purse, she shot a man who was attempting to recover the purse.[49] Northington was assessed 15 points for OV 1 and zero points for OV 3.[50] At Morson's sentencing, she argued that she should be assessed the same number of points for these variables because the statutory language required the trial court to score the same number of points.[51] The trial court, however, assessed Morson 25 points for each variable.[52] The Michigan Supreme Court held that the plain language of OVs 1 and 3 required that Morson be assessed the same number of points that were scored for Northington.[53] The Court stated, however, "[w]hile we agree that the sentencing court should not be bound to apply an erroneous score in the multiple offender context, we note that the prosecution does not characterize . . . Northington's scores on OV 1 and OV 3 of her armed robbery conviction as inaccurate or erroneous."[54] The Court again emphasized that the prosecution did not dispute Northington's scores and did not argue that her scores were erroneous.[55] The Court held that "in the absence of any clear argument that the scores assessed to Northington under OV 1 and OV 3 were incorrect, the sentencing court should have assessed [Morson] the same number of points that were assessed to Northington for OV 1 and OV 3[.]"[56]

Here, the prosecution argued at sentencing that the inmates who were sentenced before Johnson were erroneously assessed zero points for OVs 1 and 3. Thus, this case is distinguishable from *Morson*. Moreover, it is undisputed that Lieutenant Basso suffered a life-threatening or permanently incapacitating injury during the riot when he was stabbed with a "sticker." He suffered a two-inch deep stab wound along the side of his spine in the back of his neck. These facts support the trial court's 25-point score for OV 1 and OV 3.

---

[48] *People v Morson*, 471 Mich 248, 251; 685 NW2d 203 (2004).

[49] *Id.* at 253.

[50] *Id.*

[51] *Id.* at 253-254.

[52] *Id.* at 254.

[53] *Id.* at 259.

[54] *Id.*

[55] *Id.* at 260-261.

[56] *Id.* at 261. See also *People v Libbett*, 251 Mich App 353, 367; 650 NW2d 407 (2002) (holding that OV 1 does not require a sentencing court to assess the same *erroneous* score for a subsequently sentenced defendant in a multiple offender case).

3. OV 9

Webb argues that the trial court erred by scoring 25 points for OV 9. A trial court should score 25 points for OV 9 if "10 or more victims . . . were placed in danger of physical injury or death[.]"[57] Webb argues that a trial court may not consider conduct beyond the sentencing offense in scoring OV 9 and that no evidence showed that he personally placed 10 or more people in danger. Webb relies on *People v McGraw*,[58] which held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise."

We conclude that OV 9 was properly scored. The jury convicted Webb of assisting in causing a prison riot, which requires that "3 or more persons, acting in concert," "intentionally or recklessly engage in violent conduct" "that threatens the security of the state correctional facility or threatens the safety or authority of persons responsible for maintaining the security of the state correctional facility."[59] Because the language of the statute required the trial court to consider the conduct of Webb and at least two other individuals involved in the riot, the statutory language necessarily encompassed the conduct of the other inmates. Therefore, the trial court did not consider conduct beyond the sentencing offense.[60] Because the conduct of Webb and other inmates placed 10 or more people in danger of injury, the trial court properly scored OV 9 at 25 points.

4. OV 14

Webb argues that the trial court erroneously scored 10 points for OV 14. A trial court should score 10 points for OV 14 if "[t]he offender was a leader in a multiple offender situation[.]"[61] Webb contends that the record fails to show that he assumed a leadership role. Contrary to Webb's argument, there was testimony that Webb incited his fellow prisoners to riot. He also threatened to kill Sergeant Zazeski. According to Sergeant Zazeski, Webb and Woods were very vocal among a "mass" of inmates and were "trying to beef them up pretty good[.]" Webb was overheard trying to rally a group of inmates to riot and burn down the facility. Because MCL 777.44(2)(a) directs that "[t]he entire criminal transaction should be considered when scoring" OV 14, the evidence supported the trial court's score of 10 points for OV 14.

5. OV 19

Webb argues that 25 points were erroneously scored for OV 19. A trial court should score 10 points for OV 19 if "[t]he offender by his or her conduct threatened the security of a

---

[57] MCL 777.39(1)(b).

[58] *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

[59] MCL 752.542a.

[60] *McGraw*, 484 Mich at 135.

[61] MCL 777.44(1)(a).

penal institution or court[.]"[62] Webb argues that the behavior for which points are scored under OV 19 is inherent in his sentencing offense and that, if points are scored for this variable, they would be scored every time a person is convicted for participating in a prison riot. A similar argument was rejected in *People v Houston*,[63] in which the Court held that sentencing courts should look to the plain statutory language in determining the number of points to be scored for each variable. The Court recognized that if the Legislature had intended to preclude the scoring of points in certain circumstances, it could have done so.[64] For example, the Court noted that in MCL 777.33(2)(b), the Legislature precluded the scoring of 100 points for OV 3 if death is an element of the sentencing offense.[65] OV 19 does not contain such a preclusion if the sentencing offense is assisting in causing a prison riot. Thus, the clear statutory language required the trial court to score 25 points for OV 19.

III. DOCKET NO. 291147 (DEFENDANT WALTON)

A. DOUBLE JEOPARDY

1. STANDARD OF REVIEW

Defendant Walton argues that his convictions should be reversed and the charges against him dismissed because his state and federal protections against double jeopardy barred his second trial. "A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo."[66]

2. ANALYSIS

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense."[67] Because the protection against double jeopardy attaches when a jury is selected and sworn, the Double Jeopardy Clause protects a defendant's interest in avoiding multiple prosecutions even when there is no determination of guilt or innocence.[68] Double jeopardy is implicated when a trial court declares a mistrial before a verdict is reached.[69] "However, the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."[70] If a trial concludes prematurely, retrial is not barred if the defendant

---

[62] MCL 777.49(a).

[63] *People v Houston*, 473 Mich 399, 409-410; 702 NW2d 530 (2005).

[64] *Id.* at 410.

[65] *Id.*

[66] *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

[67] *Id.* at 574, citing US Const, Am V and Const 1963, art 1, § 15.

[68] *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002).

[69] *Id.*

[70] *Id.* (internal quotations and citations omitted).

consented to or requested the mistrial and the prosecution did not goad the request, or if the court declared a mistrial because of manifest necessity.[71]

Defendant Walton was initially tried together with fellow inmates Jerry Johnson and James Woods,[72] but his trial ended in a mistrial in April 2008, after his attorney moved to withdraw because of health concerns related to a seizure disorder. Thereafter, Walton was tried jointly with Webb.

The record shows that at Walton's first trial, the trial court granted defense counsel's motion to withdraw and declared a mistrial based on manifest necessity. In later denying Walton's motion to dismiss the charges based on double jeopardy, however, the trial court determined that Walton consented to the mistrial. The record shows that on the seventh day of Walton's first trial, defense counsel was cross-examining a witness when he asked for a break to speak with Walton. Thereafter, defense counsel was transported to the hospital because of a seizure disorder. When he returned later that afternoon, he moved to withdraw because of his medical condition. The following colloquy then ensued:

> *THE COURT:* Mr. Walton, you understand this, the necessity of this?
>
> *DEFENDANT WALTON:* Yes.
>
> *THE COURT:* Recognizing of course this will prevent proceeding with your trial at this time. You understand that?
>
> *DEFENDANT WALTON:* Yes.

Walton's affirmative responses demonstrated consent to the withdrawal and mistrial, as the trial court determined in ruling on Walton's motion to dismiss. On the other hand, Walton's responses could also be read as indicating only that he understood the necessity of defense counsel's withdrawal and that the withdrawal would preclude proceeding with the trial.

There exists no specific test for determining what constitutes manifest necessity.[73] The Michigan Supreme Court has recognized that the term "manifest necessity" requires "a 'high degree' of necessity."[74] Moreover, this Court has interpreted the term to require "'sufficiently

---

[71] *Id.*; *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997).

[72] This Court affirmed Woods' convictions in *People v Woods*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 285960).

[73] *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

[74] *Lett*, 466 Mich at 218, quoting *Arizona v Washington*, 434 US 497, 506-507; 98 S Ct 824; 54 L Ed 2d 717 (1978).

compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible.'"[75]

Here, the record shows that the mistrial was manifestly necessary because defense counsel's medical condition prevented him from effectively representing Walton. In response to Walton's motion to dismiss, the prosecutor stated that on the morning that defense counsel experienced his medical problems, "everybody was quite concerned" as it was apparent that he "had just done a meltdown, a logical, intellectual meltdown in front of the jury." According to the prosecutor, defense counsel's questions were "totally off point, all over the board," and nonsensical. The prosecutor further remarked that "it was almost laughable because he was so off point." The trial court similarly characterized defense counsel's questioning as "misdirected or not on point, or not fully lucid and logical to the subject." The record of defense counsel's cross-examination of the witness on the morning of his seizure supports the prosecutor's and trial court's characterizations. Defense counsel was unable to form coherent questions and his choice of words was disjointed and confused. Thus, he was unable to complete the trial, and his continued representation would have deprived Walton of effective representation and a fair trial.[76] Therefore, there existed manifest necessity for the mistrial and double jeopardy did not preclude Walton's retrial.

B. RIGHT TO COUNSEL

1. STANDARD OF REVIEW

Walton argues that he is entitled to a new trial because he was denied his Sixth Amendment right to counsel at a critical stage of the proceedings and he did not consent to the removal of his attorney. Although Walton argued in the trial court that he did not consent to defense counsel's withdrawal, he did not assert the constitutional argument that he now raises on appeal. Thus, this issue is unpreserved, and our review is limited to plain error affecting his substantial rights.[77]

2. ANALYSIS

More specifically, Walton argues that he was denied his Sixth Amendment right to counsel when his attorney sought to withdraw during a critical stage of the proceedings without his consent. He also argues that if this Court determines that he consented to the withdrawal and mistrial, his consent was invalid because counsel did not represent him. The record shows that defense counsel represented Walton until the time that the trial court simultaneously granted counsel's motion to withdraw and declared a mistrial. Thus, counsel represented Walton at all times before the trial court declared a mistrial.

---

[75] *Tracey*, 221 Mich App at 326, quoting *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994).

[76] *Id.*

[77] *Carines*, 460 Mich at 763; *Musser*, 259 Mich App at 218.

In any event, defense counsel's motion to withdraw was not a "critical stage" of the proceedings for Sixth Amendment purposes, entitling Walton to representation by counsel. "The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration."[78] Proceedings recognized as "critical stages," include a pretrial lineup, a preliminary examination, and the entry of a plea.[79] In *United States v Franklin*,[80] the court held that a defense counsel's motion to withdraw does not qualify as a critical stage of the proceedings because it "is simply not the sort of trial-like confrontation between the accused and the state that gives an accused a Sixth Amendment right to counsel[.]" Thus, even if Walton had been denied counsel with respect to the motion to withdraw, such denial would not have amounted to a constitutional violation. Therefore, no plain error has been shown.

C. CHANGE OF VENUE

1. STANDARD OF REVIEW

Walton argues that the trial court abused its discretion by denying his motion for a change of venue. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.[81]

2. ANALYSIS

Generally, a criminal defendant must be tried in the county where the offense occurred.[82] A court may change venue to another county, however, where justice demands or where statutory law provides.[83] Community prejudice based on extensive, highly inflammatory pretrial publicity can constitute a circumstance warranting a change of venue where such prejudice amounts to actual bias and the inflammatory pretrial publicity saturates the community to such an extent that the entire jury pool is tainted.[84] Pretrial publicity alone does not warrant a change of venue, and the trial court must look to the totality of the circumstances.[85] In addition, a court must distinguish "'largely factual publicity from that which is invidious or inflammatory.'"[86]

---

[78] *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

[79] *Duncan v State of Michigan*, 284 Mich App 246, 264; 774 NW2d 89 (2009), lv gtd ___ Mich ___; 775 NW2d 745 (2009).

[80] *United States v Franklin*, 547 F3d 726, 734 (CA 7, 2008).

[81] *Carnicom*, 272 Mich App at 617.

[82] MCL 600.8312(1); *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997).

[83] *Id.* at 499-500.

[84] *Id.* at 500-501.

[85] *Id.* at 502.

[86] *Id.* at 504, quoting *Murphy v Florida*, 421 US 794, 800 n 4; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

The Michigan Supreme Court has previously recognized that Gogebic County is a "sparsely populated rural community" with "a relatively small jury pool[.]"[87] Walton contends that a change of venue was necessary because of extensive pretrial publicity regarding the riot, the racial makeup of the community, including the lack of African-American residents, and the fact that numerous members of the jury pool were relatives, friends, or acquaintances of the victims, witnesses, and attorneys. In denying Walton's motion for change of venue before his first trial, the trial court recognized these jury selection issues and indicated its intent to grant the motion to change venue only if an attempt to seat an impartial jury proved unsuccessful. In denying Walton's renewed motion for a change of venue, the trial court acknowledged that Walton was entitled to a trial before a fair cross section of the community—Gogebic County. The trial court correctly recognized, however, that this constitutional requirement does not entitle Walton to a jury consisting of members of a certain race.[88]

During Walton's first trial, the trial court conducted jury voir dire for just over two days and then a jury was impaneled. Thus, even considering the racial makeup of the county and the fact that numerous prospective jurors had heard about the riot or were relatives or friends of persons associated with the case, the trial court was able to seat a jury. Accordingly, the trial court did not abuse its discretion by denying Walton's motion for change of venue.

D. SPEEDY TRIAL

1. STANDARD OF REVIEW

Walton argues that he was denied his constitutional right to a speedy trial. A criminal defendant has both constitutional and statutory rights to a speedy trial.[89] We review his constitutional claim de novo.[90] But because he did not raise the statutory issue in the proceedings below, our review of that claim is limited to plain error affecting his substantial rights.[91]

2. CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

In determining whether a defendant has been denied a speedy trial, a court must consider: "(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay."[92] "The time for

---

[87] *Id.* at 501.

[88] See *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996).

[89] US Const, Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1.

[90] *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

[91] *Carines*, 460 Mich at 763.

[92] *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (quotations and citations omitted).

judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest."[93] A delay of less than 18 months requires a defendant to prove that he suffered prejudice.[94] On the other hand, a delay of 18 months or longer is presumed prejudicial, and the burden is on the prosecutor to rebut the presumption of prejudice.[95]

The record shows that the warrant for Walton's arrest was issued on April 11, 2007, and his first trial began on April 15, 2008, approximately one year later. The trial court declared a mistrial on April 24, 2008, and Walton's second trial began on January 19, 2009, approximately nine months later. Thus, there was a delay totaling approximately 21 months between Walton's arrest and his second trial. Because the delay was greater than 18 months, it is presumed prejudicial and the prosecution must rebut that presumption.

Looking to the reasons for the delay, this Court generally assigns each period of delay to either the prosecution or the defendant.[96] Although Walton was arrested on or around April 11, 2007, his arraignment was not conducted until June 15, 2007, and his preliminary examination did not begin until June 28, 2007. The reason for this delay is unexplained and is thus attributable to the prosecution.[97] Although Walton's preliminary examination began on June 28, 2007, at Walton's request his preliminary examination was "held open" for three months to allow him to conduct discovery and was not concluded until September 20, 2007. Thus, this period of time is attributable to Walton.

Walton was bound over for trial on October 2, 2007. He thereafter filed several pretrial motions, including defense counsel's motion to withdraw, and motions regarding the identification of res gestae witnesses, to compel the videotape of the riot, for change of venue, for severance of Walton's trial, and to dismiss the charges against Walton. The trial court denied these motions on January 16, 2008. Therefore, this period of delay is attributable to Walton. Following these motions, Walton filed another motion to dismiss, another motion regarding res gestae witnesses, a motion to compel electronic evidence, and a renewed motion for change of venue, on which the trial court ruled on March 13, 2008. Thus, this period of delay is also attributable to Walton. Further, on March 31, 2008, Walton filed a motion for continuance seeking to delay the trial for several months and a renewed motion to compel or dismiss. The trial court denied these motions on April 3, 2008. This period of delay is thus attributable to Walton. Finally, after Walton's first trial ended in a mistrial based on defense counsel's health condition, a new attorney had to be appointed and allowed sufficient time to prepare for trial. This period of delay is not the fault of either party. In sum, the majority of the delays were attributable to Walton.

---

[93] *Williams*, 475 Mich at 261.

[94] *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

[95] *Id.*

[96] *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985).

[97] *Id.*

The third factor to consider in determining whether Walton was denied his right to a speedy trial is whether he asserted his right.[98] Walton did not assert his right to a speedy trial until August 8, 2008, well after his first trial ended in a mistrial and approximately 15 months after his arrest. The trial court denied the motion, determining that Walton had not suffered prejudice. Despite this motion, on January 8, 2009, approximately one week before Walton's second trial, Walton requested substitute counsel, which would have delayed his trial had the trial court granted the motion. Because of Walton's delayed request for a speedy trial and his effort to further delay his trial, this factor does not favor Walton.

Finally, this Court must consider whether Walton was prejudiced by the delays.[99] "There are two types of prejudice: prejudice to the person and prejudice to the defense."[100] Walton does not argue that he suffered any prejudice to his defense. Rather, he contends that he suffered prejudice to his person because he was expected to be released from prison within one year at the time of the riot. The record fails to support this contention. To the contrary, testimony at trial suggested that Walton's earliest release date was 22 months from the time that the riot occurred. Thus, Walton has failed to show that he was prejudiced by the delays.

Balancing each of the relevant factors, we conclude that Walton was not denied his constitutional right to a speedy trial.

3. STATUTORY RIGHT TO SPEEDY TRIAL

Walton also argues that he was denied his right to a speedy trial under MCL 780.131, known as the 180-day rule. "[T]he purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently."[101] MCL 780.131(2)(a) specifically provides, however, that "the 180-day rule does not apply to a charge of a criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility."[102] Because Walton committed the charged offenses while incarcerated in a state correctional facility, the 180-day rule does not apply.

E. SEVERANCE OF TRIALS

1. STANDARD OF REVIEW

Walton argues that the trial court erred by denying his motion for a mistrial because he and Webb asserted inconsistent defenses during trial. We review for an abuse of discretion a

---

[98] *Mackle*, 241 Mich App at 602.

[99] *Id.*

[100] *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997).

[101] *People v Bell*, 209 Mich App 273, 279; 530 NW2d 167 (1995).

[102] *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993).

trial court's decision regarding severing the trials of multiple defendants.[103] We also review for an abuse of discretion a trial court's decision on a motion for a mistrial.[104]

2. ANALYSIS

A motion for a mistrial should be granted "'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'"[105] "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice."[106] Absent such a showing or an indication that the requisite prejudice actually occurred at trial, this Court will affirm a trial court's decision denying a motion for severance.[107] In order to show that his substantial rights will be prejudiced if separate trials are not granted, a defendant must establish that his defenses and those of his codefendants are "not only inconsistent, but also mutually exclusive or irreconcilable."[108] A trial court should grant severance when defenses are antagonistic—that is, when it appears that a codefendant may testify to exculpate himself and incriminate the defendant.[109]

The trial court did not abuse its discretion by denying Walton's motion for a mistrial because Walton's and Webb's defenses were not mutually exclusive or antagonistic. Webb's defense was that he was misidentified on the video depicting the riot. Walton's defense was that he participated in the riot because of duress since other inmates had threatened his life if he refused to participate. These defenses are not mutually exclusive and the jury could have credited both. Because the defenses were not mutually exclusive or antagonistic, the trial court did not abuse its discretion by denying Walton's motion for a mistrial.

F. JURY INSTRUCTION

1. STANDARD OF REVIEW

Walton argues that the trial court erroneously instructed the jury regarding the prison riot charge.[110] Because Walton did not join in defendant Webb's objection to the jury instruction, he

---

[103] *Hana*, 447 Mich at 346.

[104] *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

[105] *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005), quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

[106] *Hana*, 447 Mich at 346.

[107] *Id.* at 346-347.

[108] *People v Cadle* (*On Remand*), 209 Mich App 467, 469; 531 NW2d 761 (1995).

[109] *People v Harris*, 201 Mich App 147, 152-153; 505 NW2d 889 (1993).

[110] MCL 752.542a.

did not preserve this issue for appellate review.[111] Therefore, our review is limited to plain error affecting his substantial rights.[112]

2. ANALYSIS

As previously discussed with respect to Webb, the trial court properly instructed the jury on assisting in causing a prison riot in accordance with the plain language of MCL 752.542a. The disjunctive term "or" in the statute allows for conviction based on any one of the theories stated in the statute, including assisting in causing a riot.[113] Contrary to Walton's argument, the trial court did not instruct the jury that a defendant's mere participation in a riot is sufficient for conviction under MCL 752.542a. Thus, Walton has failed to show a plain error.

G. EFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Because Walton did not raise these issues in a motion for a new trial or request for an evidentiary hearing in the trial court, and this Court has denied his motion to remand for an evidentiary hearing, our review is limited to errors apparent on the record.[114]

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial.[115] With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.[116] A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy.[117]

2. FAILURE TO MOVE FOR A CHANGE OF VENUE

Walton contends that he was denied the effective assistance of counsel when his attorney failed to move for a change of venue following voir dire and after exhausting his peremptory challenges during Walton's second trial.

---

[111] *Musser*, 259 Mich App at 218.

[112] *Carines*, 460 Mich at 763.

[113] *Hyde*, 285 Mich App at 448.

[114] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[115] *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004).

[116] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, 262 Mich App at 75-76.

[117] *Toma*, 462 Mich at 302.

Walton's second trial presented the same jury-related issues as his first trial. During voir dire, counsel for Webb acknowledged that "it's not a diverse area up here," and "the biggest African American population in this county unfortunately probably resides at the prison." Numerous prospective jurors were immediate family members of persons who worked at the prison. But all of those prospective jurors were excused. Several other members of the jury pool had spoken to prison employees about the riot and all of those prospective jurors were excused as well. Although some of the prospective jurors were aware of the verdicts rendered in previous trials regarding the riot, their knowledge was limited to basic information that the convictions resulted from the riot and that some people were injured in the riot. These jurors indicated that their prior knowledge of the convictions would not affect their ability to be impartial regarding Webb and Walton. The prospective jurors also indicated that the defendants' race would not affect their ability to be impartial. Although Walton contends that his attorney was ineffective for failing to move for a change of venue following voir dire, he fails to offer a valid basis for such a motion.

In addition, Walton argues that his counsel should have attempted to excuse for cause more jurors who admitted knowledge about the case. However, Walton has not demonstrated that the jurors were unable to decide the case impartially. In short, Walton has failed to demonstrate that highly inflammatory pretrial publicity tainted the entire jury pool,[118] or that the jury impaneled was not impartial. In addition, as previously discussed, Walton was not entitled to a jury consisting of members of a certain race.[119] In fact, counsel for Webb objected to the racial composition of the jury, but the trial court determined that the jury pool represented a fair cross section of the community. Thus, Walton's counsel was not ineffective for failing to move for a change of venue.[120]

3. FAILURE TO OBJECT TO TESTIMONY REGARDING SECURITY THREAT GROUPS

Walton argues that he was denied the effective assistance of counsel when his attorney failed to object to testimony regarding security threat groups or prison gangs. Walton argues that this evidence was prejudicial and could have caused the jury to infer that he was involved in the security threat groups. Walton concedes, however, that the testimony indicated that he was not involved in a security threat group. Officer Peterson identified and observed security threat groups within the prison. He testified that the riot appeared to have been organized by leaders of security threat groups, including Webb and Woods. Officer Peterson did not identify Walton as a leader of a security threat group and testified that he did not know much about Walton. Officer Peterson knew who Walton was but had no prior experiences with him. Officer Peterson characterized Walton as a follower rather than a leader. In this respect, Officer Peterson's testimony supported Walton's theory of defense that he participated in the riot because of duress and feared for his safety if he did not participate. Thus, Walton has not overcome the strong

---

[118] *Jendrzejewski*, 455 Mich at 500-501.

[119] *Taylor*, 419 US at 538; *Hubbard*, 217 Mich App at 472.

[120] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that defense counsel is not ineffective for failing to assert futile arguments).

presumption that counsel's actions constituted sound trial strategy.[121] Furthermore, Walton has not shown that he was prejudiced. Officer Peterson did not testify that Walton was involved in a security threat group. Thus, there is no reasonable probability of a different result if counsel had objected to the testimony.[122]

4. FAILURE TO PREPARE

Walton also argues that he was denied the effective assistance of counsel when his attorney questioned him about the whereabouts of other inmates without confirming where those inmates were located within the Michigan Department of Corrections. Walton contends that this error exposed him to impeachment that allowed the jury to discredit his testimony. Contrary to Walton's argument, his attorney did not question him about the whereabouts of other inmates. Rather, Walton's attorney questioned him about other inmates who Walton claimed were watching him before and during the riot, which prompted Walton's feigned participation in the riot. One of these other inmates was Michael Rice, who Walton maintained was involved in stabbing Walton's brother at a St. Louis, Michigan, prison in 2000 or 2001. Walton testified that he felt threatened by Rice because Rice believed that Walton was actually Walton's brother.

After Walton testified, the prosecution presented the rebuttal testimony of Mary Ann Majurin, a unit manager at the Ojibway facility. She testified that Walton's brother, Frank Walton, was stabbed on June 3, 2004, at the Brooks correctional facility where he was held from December 19, 2003, until June 4, 2004. She further testified that Rice was held at the Brooks facility from October 31, 2001, until December 18, 2003. Thus, Rice and Walton's brother were never at the facility at the same time and Rice was not present at the facility when Walton's brother was stabbed.

Walton contends that if his attorney had reviewed his prospective testimony with him, created a timeline, and verified dates, his testimony would not have been impeached and the jury would have accorded it more weight. We are not persuaded that Walton's attorney's conduct was objectively unreasonable. A criminal defendant has a constitutional right to testify on his own behalf.[123] The decision whether to testify "is a strategic decision best left to an accused and his counsel."[124] The record shows that Walton testified to explain his actions depicted on the video of the riot and to clarify that his participation in the riot was feigned and that he never actually assaulted any of the corrections officers. Considering that the video was played repeatedly during trial and it depicted Walton's apparent participation, Walton's testimony describing his version of the incident constituted sound trial strategy. While testifying, however, Walton claimed that Rice previously orchestrated the stabbing of Walton's brother at a different facility. The prosecution's rebuttal testimony discredited that claim. Defense counsel was not obligated to independently verify the substance of Walton's testimony. In any event, even if

---

[121] *Toma*, 462 Mich at 302.

[122] *Id.* at 302-303; *Moorer*, 262 Mich App at 75-76.

[123] *People v Solomon* (*Amended Opinion*), 220 Mich App 527, 533; 560 NW2d 651 (1996).

[124] *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986).

Rice was not involved in stabbing Walton's brother, the jury could have believed that Walton felt threatened to participate in the riot because of other individuals who he claimed had threatened him, including Herman Gilstrap, Fultz, Gregory Jackson, and "Templeton." Thus, Walton has failed to show that there existed a reasonable probability of a different result absent counsel's alleged error.[125]

5. FAILURE TO OBJECT TO JURY INSTRUCTION

Because Walton's argument that the trial court erred in instructing the jury lacks merit, defense counsel was not ineffective for failing to object to the jury instruction. "[C]ounsel does not render ineffective assistance by failing to raise futile objections."[126]

H. SENTENCING

1. STANDARD OF REVIEW

Walton argues that he is entitled to resentencing because the trial court misscored OVs 1, 3, 4, and 9.

2. OV 1 AND OV 3

As previously discussed with respect to Webb, MCL 777.31(2)(b) and MCL 777.33(a) required that Walton be assessed 25 points for OV 1 and OV 3 because previously sentenced inmates were assessed 25 points for those variables and the statutory language directs that the same number of points be assessed in multiple offender cases. Although Walton argues that this was not a classic multiple offender situation, MCL 752.542a required "3 or more persons, acting in concert" to engage in violent conduct that threatened the security of the facility or the safety or authority of the corrections officers. Thus, the plain language of the statute recognized that a prison riot presents a multiple offender situation. In scoring sentencing variables, courts should look to the plain statutory language.[127] Thus, Walton was properly scored 25 points for OV 1 and OV 3.

3. OV 4

Walton challenges his score of 10 points for OV 4. A trial court should score 10 points under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim."[128] More specifically, 10 points may be scored "if the serious psychological injury may

---

[125] *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

[126] *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

[127] *Houston*, 473 Mich at 409.

[128] MCL 777.34(1)(a).

require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive."[129]

Officer Sandra Nyman testified that Lieutenant Basso ran into her immediately after the riot. She recalled that he was covered in blood and hysterical. He grabbed her arms and repeatedly asked, "Am I stuck? Am I stuck?" Lieutenant Basso testified that he was planning on retiring at the time of the riot and that, after working for more than 30 years, he had only 23 more shifts to work before his retirement. Following the riot, however, he "thought long and hard and [he] really didn't want to go back." He retired following his surgeries for the injuries he sustained in the riot. Although Walton argues that the trial court relied on testimony from a previous trial to support his score for OV 4, the trial court recognized that testimony from the instant trial supported the score as well. Therefore, the record supports the trial court's scoring of 10 points for this variable.

4. OV 9

Walton argues that he was improperly scored 25 points for OV 9. A trial court should score 25 points for OV 9 if "10 or more victims . . . were placed in danger of physical injury or death[.]"[130] Walton argues that because he was convicted of assaulting only Sergeant Buda, his OV 9 score should have reflected only one victim rather than 10 or more victims. As previously recognized, assisting in causing a prison riot requires that "3 or more persons, acting in concert," "intentionally or recklessly engage in violent conduct" "that threatens the security of the state correctional facility or threatens the safety or authority of persons responsible for maintaining the security of the state correctional facility."[131] Because the language of the statute required the trial court to consider the conduct of Walton and at least two other inmates involved in the riot, the statutory language necessarily encompasses the conduct of other inmates. Thus, the trial court did not sentence Walton based on conduct beyond the sentencing offense.[132] Because the conduct of Walton and other inmates placed 10 or more persons in danger of physical injury, Walton was properly scored 25 points for OV 9 despite being convicted of assaulting only one corrections officer.

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello

---

[129] MCL 777.34(2).

[130] MCL 777.39(1)(b).

[131] MCL 752.542a.

[132] See *McGraw*, 484 Mich at 135.