STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 290765 Genesee Circuit Court
KERRICK SHAFRAN FARQUHARSON, Defendant-Appellant.	LC No. 08-023682-FC

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 450 to 900 months for the second-degree murder conviction and 285 to 600 months for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

Defendant's convictions arise from a shooting outside a nightclub in Flint during the early morning hours of January 30, 2005. David Colen was fatally shot and his sister, Denise Colen, was shot in the face, leaving her permanently blind. The evidence showed that defendant went to the nightclub with Otis Dickerson and George Smith, but waited in a car outside the club because he was not old enough to enter. Dickerson and David Colen became involved in a fight inside the club, and several other persons joined the fight and began attacking Colen. After the fight broke up, David and Denise Colen left the nightclub, and Dickerson and Smith also left. The Colens passed Dickerson's car while walking to their own car. According to Dickerson, Smith, and another witness, Delon Savage, defendant jumped out of Dickerson's car and shot both David and Denise Colen as they attempted to get into their car.

Two witnesses, Andre Mathis and Tyrone Savage, died before trial. Mathis was fatally shot on December 29, 2005, and Savage was shot on January 2, 2007. In May 2006, the trial court granted defendant's pretrial motion to admit Mathis's prior testimony, given pursuant to an investigative subpoena, in which Mathis had identified Dickerson as the shooter. The prosecution appealed that decision. This Court held that Mathis's prior testimony was admissible under MRE 804(b)(10), provided the prosecution had a similar motive to develop

Mathis's testimony at the investigative-subpoena hearing. *People v Farquharson*, 274 Mich App 268, 278-279; 731 NW2d 797 (2007), lv den 478 Mich 931 (2007). This Court declined to address defendant's argument that his constitutional right to present a defense would be violated if he were precluded from presenting Mathis's prior testimony because the prosecution had not raised that issue and defendant had not filed a cross appeal. *Id.* at 279. This Court remanded the case for further proceedings consistent with its opinion. *Id.*

On remand, in January 2008, the trial court determined that the prosecution did not have the same motive to develop Mathis's testimony during the investigative-subpoena hearing, but ruled that the prior testimony was admissible to protect defendant's constitutional right to present a defense. The prosecution filed another application for leave to appeal, this time arguing that the trial court improperly exceeded the scope of this Court's prior remand order by admitting Mathis's prior testimony on the basis of defendant's constitutional argument. After this Court denied the application, *People v Farquharson*, unpublished order of the Court of Appeals, entered January 30, 2008 (Docket No. 283300), the prosecution moved to adjourn the trial to enable it to pursue an application for leave to appeal with the Supreme Court. The trial court denied the motion to adjourn, following which the prosecution dismissed all charges and filed an application for leave to appeal with the Supreme Court. On March 24, 2008, the Supreme Court dismissed the application "[b]ecause the application sought to appeal a ruling made in connection with charges that have since been dismissed by the prosecutor." *People v Farquharson*, unpublished order of the Michigan Supreme Court, entered March 24, 2008 (Docket No. 135744).

Defendant was re-arraigned on October 13, 2008. Two weeks later, the prosecution filed a complaint for superintending control in this Court, seeking to reverse the trial court's January 2008, order admitting Mathis's prior investigative subpoena testimony. This Court denied the complaint on November 14, 2008, "due to the fact that plaintiff has other adequate legal remedies available." *In re Farquharson*, unpublished order of the Court of appeals, entered November 14, 2008 (Docket No. 288558), lv den 483 Mich 901 (2009). Trial thereafter began in December 2008. Mathis's prior investigative-subpoena testimony was introduced at defendant's trial.[1] The jury found defendant guilty of second-degree murder, assault with intent to commit murder, and felony-firearm. This appeal followed.

II. EVIDENCE OF DRUG ACTIVITY

Defendant argues that the trial court erred in admitting evidence of drug activity at the home that he and Dickerson shared. To preserve a challenge to the admission of evidence, a party must make a timely objection on the record, stating the same ground for the objection as argued on appeal. MRE 103(a)(1); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). The record discloses that defendant objected to the admission of the tabulation of items seized during the execution of a search warrant at defendant and Dickerson's home, which

[1] The trial court also permitted the prosecutor to introduce a statement that Mathis made in connection with a later guilty plea in an unrelated case. In that statement, Mathis indicated that Dickerson was not the shooter at the nightclub shooting.

the trial court sustained, but that defendant did not assert a general objection to the admission of evidence of drug activity at the home. Accordingly, this issue is not preserved. We review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Defendant contends that the evidence of drug activity was irrelevant and unduly prejudicial. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). Generally, all relevant evidence is admissible, and evidence that is not relevant is not admissible. MRE 402; *Fletcher*, 260 Mich App at 553. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Fletcher*, 260 Mich App at 553.

Dickerson was originally charged with offenses arising from both the nightclub shooting and his drug trafficking. He was permitted to plead guilty to reduced charges of maintaining a drug house and accessory after the fact in relation to the nightclub shooting (for destroying both defendant's clothing and the gun that defendant allegedly used to shoot the victims), in exchange for his agreement to provide truthful testimony against defendant. Thus, evidence of Dickerson's drug activity was relevant to Dickerson's plea, which in turn was relevant to his credibility and motive to give false testimony against defendant. A witness's credibility is "an appropriate subject for the jury's consideration," and evidence of a "witness's bias or interest in a case is highly relevant to credibility." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

Furthermore, evidence of Dickerson's and defendant's joint participation in drug trafficking activities was relevant to establish the nature of their relationship. Defendant's relationship with Dickerson was relevant to defendant's motive for shooting someone who had been involved in an altercation with Dickerson, but had not been involved in any dispute with defendant. Their relationship was also relevant to explain Dickerson's motives for destroying evidence, and for previously giving conflicting statements about the shooting.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court limited the testimony to general evidence that drugs were found in the home. It precluded specific testimony concerning the quantities and locations of the drugs, or specific items listed in the search warrant tabulation, thereby minimizing any prejudicial effect. Defendant also was not prejudiced by the evidence that an automatic rifle was found in the house. Dickerson explained that he acquired the gun for his wife's defense, and the evidence indicated that the gun was not linked to the nightclub shooting.

For these reasons, there was no plain error in the admission of the evidence of drug activity at the home defendant shared with Dickerson.

III. ADDITIONAL EVIDENTIARY ISSUES

Defendant raises additional evidentiary issues in which he challenges (1) Dickerson's testimony that he had been shot ten times because of this case; (2) Delon Savage's testimony that his brother Tyrone was killed by someone named Raymond McClure; and (3) George Smith's testimony that defendant had once assaulted someone. Defendant objected to Dickerson's testimony on the basis of relevancy, but did not argue that it was unfairly prejudicial under MRE 403. Accordingly, only the relevancy challenge is preserved for appellate review. MRE 103(a)(1); *Bauder*, 269 Mich App at 177-178. Defendant objected to Delon Savage's testimony on hearsay grounds, but did not preserve his present claim that the testimony was not relevant. Defendant did not object to Smith's testimony, leaving that issue unpreserved.

We review defendant's preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review defendant's unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

When Dickerson was asked why he failed to appear at a previous proceeding in the case, he responded, "I got shot 10 times because of the case and I just didn't want – and plus I care for [defendant]." Matters relating to Dickerson's motive to testify and his personal feelings for defendant were relevant to his credibility. Thus, the trial court did not abuse its discretion in overruling defendant's relevancy objection. Further, we disagree with defendant's claim that any probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. The context of the prosecutor's question and Dickerson's response indicate that Dickerson was referring to the nightclub shooting case. Dickerson did not, however, implicate defendant as the person responsible for shooting him. Thus, Dickerson's brief response was not unduly prejudicial.

The relevancy of Delon Savage's testimony identifying Raymond McClure as the person who killed Delon's brother Tyrone, is not entirely clear. It appears that the prosecutor may have been attempting to ward off any suggestion that Dickerson killed Tyrone to prevent Tyrone from testifying that Dickerson was the shooter in the nightclub shooting. Regardless, there was no suggestion that defendant was involved in Tyrone's death, so any error did not affect defendant's substantial rights.

Lastly, we find no merit to defendant's argument that Smith was improperly allowed to testify that defendant had previously assaulted another person. It was defense counsel who initially raised this issue. On cross-examination, counsel elicited that Smith was aware defendant had previously been involved in a fight in which someone knocked defendant's tooth out and defendant "beat that guy up," but he had never previously obtained a gun and shot or stabbed someone.[2] On redirect examination, the prosecutor followed up with additional

[2] Presumably, defense counsel intended to reveal Smith's opinion that defendant would stop short of using a deadly weapon even when retaliating against an assailant.

questions about the assault. Because defendant opened the door to this issue, the prosecutor could properly pursue the issue on redirect examination. There was no plain error.

IV. SEIZURE OF LETTER FROM DEFENDANT'S JAIL CELL

Defendant next argues that the trial court erred in denying his request to suppress a letter that was seized from his jail cell. He contends that the letter was seized without a warrant in violation of his Fourth Amendment rights. He further argues that the letter was racially inflammatory and, therefore, should have been excluded under MRE 403. Defendant preserved his constitutional argument by raising this issue below. We review constitutional issues de novo as questions of law. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). However, because defendant did raise an objection based on MRE 403, our review of that claim is limited to plain error affecting defendant's substantial rights.

Both the United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. *Jenkins*, 472 Mich at 31. The government performs a search within the meaning of the Fourth Amendment when it intrudes on an individual's reasonable or justifiable expectation of privacy. *People v Nash*, 418 Mich 196, 204-205; 341 NW2d 439 (1983).

In *Hudson v Palmer*, 468 US 517, 523, 527-528; 104 S Ct 3194; 82 L Ed 2d 393 (1984), the United States Supreme Court held that while prisoners "are not beyond the reach of the Constitution," a prisoner has no legitimate expectation of privacy in a prison cell given the need to ensure institutional security and internal order.[3] See also *People v Herndon*, 246 Mich App 371, 397; 633 NW2d 376 (2001). In *People v Phillips*, 219 Mich App 159, 160-161; 555 NW2d 742 (1996), this Court held that "the rationale . . . in *Hudson* applies equally to pretrial detainees and inmates confined in jails." "'[T]he need to maintain order in places of confinement [applies] to pretrial detainees who are confined in jails.'" *Id*. at 162 (citation omitted). Thus, defendant here had no reasonable expectation of privacy in his jail cell. Accordingly, seizure of the letter from defendant's jail cell did not violate defendant's Fourth Amendment rights.

Defendant also argues that any probative value of the letter was substantially outweighed by the danger of unfair prejudice because of the racially inflammatory nature of the letter. The letter apparently was offered as evidence of defendant's intent to threaten some witnesses who he had learned would be testifying at trial. Such evidence is generally admissible because it can demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Here, however, the letter does not identify the intended recipient and the alleged threats are vague, thereby diminishing its probative value. The portion of the letter that was read into the record consists more of an angry rant, peppered with racial epithets. Under the circumstances, we believe that any probative value was outweighed by its prejudicial effect. However, there is no reasonable basis for believing that the letter affected defendant's substantial rights, i.e., that it

[3] The Eighth Amendment is available to protect a prisoner against "cruel and unusual punishments" when he or she is concerned about calculated harassment unrelated to prison needs. *Hudson*, 468 US at 531.

affected the outcome of the trial. Rather, the outcome of the trial depended mainly on whether the jury believed the testimony of Dickerson, Smith, and Delon Savage. The letter had no affect on their credibility. Therefore, any error does not require reversal.

V. SPEEDY TRIAL

Defendant argues that the more than 3-1/2-year delay between his initial arrest and trial violated his constitutional right to a speedy trial.

A determination whether a defendant was denied his or her constitutional right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review a trial court's factual findings for clear error and we review constitutional questions of law de novo. *Id*. Defendant concedes that he did not preserve this issue by asserting his right to a speedy trial in the trial court. Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A defendant's right to a speedy trial is guaranteed by the United States and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20; see also MCL 768.1; MCR 6.004(A). This Court reviews a defendant's speedy trial claim by balancing the factors set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). See *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Those factors are: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id.* In determining whether a defendant has been denied his or her right to a speedy trial, the pertinent period begins on the date of the defendant's arrest. *Id*. If the total delay was under 18 months, the burden is on the defendant to prove that he or she suffered prejudice. *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). If the delay is 18 months or more, prejudice is presumed and the prosecutor has the burden of showing that there was no injury. *Williams*, 475 Mich at 262. "The establishment of a presumptively prejudicial delay 'triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial.'" *Gilmore*, 222 Mich App at 442 (citation omitted).

With regard to the first factor, there was a delay of more than 3-1/2 years between the date of defendant's initial arrest and his trial. Thus, the delay is presumptively prejudicial and triggers inquiry into the other factors.

As for the second factor, both parties were responsible for some of the delay. Defendant was responsible for some of the delay through his own motions for adjournment of trial. We agree with defendant, however, that most of the delay was caused by the prosecutor's repeated efforts to appeal the trial court's decisions admitting Mathis's investigative subpoena testimony. The prosecutor's first appeal successfully led to the trial court's initial order being vacated and the case remanded for further proceedings to determine the admissibility of Mathis's prior testimony. However, none of the prosecutor's subsequent appellate efforts were successful. Moreover, we disagree with the prosecutor's argument that its second appeal and its complaint for superintending control were justified because the trial court violated this Court's mandate in the first appeal when it admitted Mathis's investigative subpoena testimony on constitutional grounds, despite finding that the prosecutor lacked sufficient motive for cross-examination at the investigative-subpoena hearing.

This Court's decision in *Farquharson*, 274 Mich App 268, was limited to the specific question of admissibility raised in the prosecutor's initial application. This Court expressly left open the question whether Mathis's testimony might be admissible under other constitutional grounds. *Id*. at 279. The prosecutor's contention that the trial court was somehow barred from considering that issue on remand was unjustified. Further, after the prosecutor unreasonably filed its second interlocutory application for leave and this Court denied the application, the prosecutor voluntarily dismissed the charges, yet filed an application for leave to appeal with the Supreme Court. The Supreme Court never reviewed the matter because the prosecutor had voluntarily dismissed the charges. When the prosecutor refiled the charges, it then improvidently filed a complaint for superintending control with this Court for the purpose of again challenging the trial court's decision admitting Mathis's prior testimony. Both the prosecution's second interlocutory appeal and its complaint for superintending control were unjustified and unreasonably delayed bringing defendant's case to trial. Thus, the second factor weighs in defendant's favor.

With respect to the third factor, defendant asserted his right to a speedy trial in the Supreme Court during plaintiff's appeals, but did not do so in the circuit court. This factor weighs against defendant.

Regarding the fourth factor, prejudice, because the prosecution's serial appeals resulted in a delay of more than 18 months, it has the burden of showing that defendant was not prejudiced by the delay. *Williams*, 475 Mich at 262. Two types of prejudice arise from delay in the commencement of trial—prejudice to the defendant's person, and prejudice to the defense. *Id.* at 264. Prejudice to the person arises when the defendant is incarcerated pending trial. *Gilmore*, 222 Mich App at 462. Prejudice to the defense is the more serious deprivation, "'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Williams*, 475 Mich at 262 (citations omitted). General allegations of prejudice to the defense from fading witness memories and financial burdens is insufficient. *Gilmore,* 222 Mich App at 462.

Defendant argues that he was prejudiced because two witnesses, Mathis and Tyrone Savage, died before trial. However, defendant received the benefit of Mathis's prior exculpatory testimony at trial. There is no indication of how Tyrone would have testified. More significantly, Mathis died before any of the delay caused by the prosecution. Indeed, defendant moved for an adjournment of trial at least twice after Mathis was shot. Similarly, Tyrone Savage was killed on January 2, 2007, while the prosecutor's initial appeal of the trial court's evidentiary ruling was pending. Thus, both witnesses died before the prosecution filed any of its leave applications with the Supreme Court, and before the later proceedings that led to the prosecution's interlocutory application for leave to appeal the trial court's decision on remand, the dismissal of the case without prejudice and the refiling of the charges, and the complaint for superintending control. Therefore, any prejudice resulting from the witnesses' deaths was not caused by the subsequent delays by the prosecution. Defendant's lengthy incarceration constituted prejudice to his person, but if a defendant does not suffer prejudice to his defense, he may be incarcerated for longer than 19 months and not suffer prejudice to his person. *Williams*, 475 Mich at 264. Accordingly, under the circumstances, the prosecution has satisfactorily established that defendant was not prejudiced by the delay.

Although the issue is a close one, after balancing the four factors, we are unable to conclude that defendant was denied his right to speedy trial.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective for failing to preserve the evidentiary issue discussed in section II, *supra*, and for failing to raise the speedy trial claim discussed in section V, *supra*. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, this Court's review of this issue is limited to mistakes apparent from the record. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). To establish ineffective assistance of counsel, defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *Werner*, 254 Mich App at 534.

We concluded in section II, *supra*, that the drug activity evidence was relevant and not unduly prejudicial. Thus, defense counsel was not ineffective for failing to object. Counsel was not required to make a meritless objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). Additionally, defense counsel used the drug evidence to impeach Dickerson's credibility. This was a strategic decision and this Court does not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

We concluded in section V, *supra*, that, despite the significant delay, defendant was not prejudiced by the delay and, therefore, his right to a speedy trial was not violated. Thus, we are unable to conclude that there is a reasonable probability that defendant would have prevailed on a speedy trial claim had the issue been presented to the trial court. Therefore, this ineffective assistance of counsel claim cannot succeed.

VII. SCORING OF THE GUIDELINES

Defendant challenges the trial court's scoring of offense variables 3, 4, and 14 of the sentencing guidelines. This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A scoring decision will be upheld if there is any evidence in the record to support it. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The trial court scored the guidelines for defendant's second-degree murder conviction. In scoring the challenged variables, the court only considered defendant's conduct relative to David Colen, the second-degree murder victim, consistent with *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

Initially, defendant concedes that the trial court's 25-point score for OV 3, physical injury to a victim, is supported by our Supreme Court's decision in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005). In that case, the Supreme Court held that although MCL 777.33(2)(b) precludes a trial court from scoring 100 points for the death of a victim where homicide is the sentencing offense, the court is not precluded from scoring 25 points on the basis of a life-

threatening injury. *Id.* at 405. Although defendant contends that *Houston* was wrongly decided, we are bound to follow that decision. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Accordingly, we uphold the trial court's 25-point score for OV 3.

Defendant also challenges the trial court's score of ten points each for OV 4 and OV 14. It is unnecessary to determine whether those variables were properly scored because any error does not affect the appropriate guidelines range. Defendant received a total offense variable score of 125 points. A 20-point reduction will still leave defendant in Offense Variable Level III (100+ points), which is the highest level of offense severity on the applicable sentencing grid. MCL 777.61. Because any scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v McGee*, 280 Mich App 680, 686; 761 NW2d 743 (2008).

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Talbot