

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR COOPER,

Defendant-Appellant.

UNPUBLISHED

January 19, 2012

No. 300876

Wayne Circuit Court

LC No. 10-006456-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction for carjacking, MCL 750.529a. We affirm.

Defendant first argues that the trial court clearly erred in denying his motion to suppress the statement he made to police. Defendant contends that his statement was involuntary, on the ground that the police improperly delayed his arraignment for the purpose of securing his statement. We review this preserved issue de novo, to determine whether defendant voluntarily waived his right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). To the extent the trial court made factual findings with regard to the weight of the evidence or the credibility of witnesses at the hearing on the motion to suppress, we review those findings for clear error. *Tierney*, 266 Mich App at 708.

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court stated that a trial court should consider, among other things, the following factors in determining whether a defendant's statement was voluntary:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Unnecessary delay in arraignment is merely one of the factors to be considered in determining voluntariness of a statement. *People v Manning*, 243 Mich App 615, 642-643; 624 NW2d 746 (2000). Although there may have been a delay in arraignment in this case, the other *Cipriano* factors demonstrate that defendant's statement was nonetheless voluntary. At the time the police took defendant into custody, he was aged 49. He had a lengthy criminal history, was on parole, had experience with the criminal justice system, and was able to read the *Miranda*¹ warnings that the police presented to him. Defendant was in custody for less than 48 hours, and during that time the police interrogated him briefly three or four times. Before interrogating him the first time, the police gave defendant the *Miranda* warnings. In addition, the police officer that obtained defendant's statement testified that he re-advised defendant of the *Miranda* rights before the interrogation in which defendant gave his statement. The police officers testified that defendant did not appear to be under the influence of alcohol or drugs, did not appear to be tired, and did not express hunger or thirst. There was no evidence that defendant was physically abused while in custody, or that there was any threat of abuse. On the basis of these factors, we find no error in the trial court's conclusion that defendant's statement was voluntary, or in the denial of defendant's motion to suppress.

Defendant raises four additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which require reversal.

First, defendant argues that his statement should have been suppressed because it was obtained as a result of an illegal arrest. "In order to lawfully arrest a person without a warrant, a police officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294; 761 NW2d 405 (2008) (internal quotation and citation omitted). Defendant contends that the police lacked probable cause to believe that he committed the carjacking. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). In doing so, we must determine whether the facts available to the police were sufficient to justify a reasonable person in believing that defendant committed the carjacking. *Tierney*, 266 Mich App at 705.

The police had received information that defendant was involved in the carjacking. As a result, the police conducted a surveillance on defendant's residence. When defendant saw a police car near his residence the morning after the carjacking, he ran away. We find no plain error in the police officers' determination, based upon these facts, that there was probable cause to arrest defendant.

Second, defendant contends that his counsel was ineffective. To establish ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that his trial counsel was ineffective for failing to challenge the legality of his arrest. As discussed above, defendant did not establish on the record that he would have prevailed on such a motion. Because defendant cannot show that, but for trial counsel's failure to challenge the arrest, the result of the proceedings would have been different, he has not established ineffective assistance of counsel on this ground. See generally *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (defendant must establish factual predicate for a claim of ineffective assistance).

Next, defendant argues that trial counsel was ineffective for failing to subpoena the alleged female accomplice and failing to subpoena and investigate alibi witnesses. The decision to call a witness is a matter of trial strategy and may only constitute ineffective assistance of counsel where it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The record indicates that the accomplice informed the police of defendant's involvement in the carjacking. Any trial testimony from the accomplice that defendant was not involved would have been severely weakened by her prior statements to police. Therefore, trial counsel's failure to subpoena the accomplice did not deprive defendant of a substantial defense and did not constitute ineffective assistance. Further, trial counsel was not ineffective for failing to subpoena alibi witnesses. Defendant testified at trial that he was "probably" at home getting high when the carjacking occurred. Defendant does not identify the alibi witnesses that should have been called or what they would have said. Because defendant does not identify witnesses and does not identify what the witnesses' testimony would have been, he has not established that he was deprived of a substantial defense. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Defendant also argues that trial counsel was ineffective for failing to seek an expert witness on video enhancement to testify that the store video had been altered to redact exculpatory footage. Defendant fails to explain what was removed from the video that would have helped him, and, as the video did not help in the identification of the carjackers, it is not clear what exculpatory evidence the video could have provided. Because defendant does not show prejudice from this failure, he has not established ineffective assistance of counsel.

Defendant further argues that his trial counsel did not effectively voir dire the jury to ensure a jury balanced for race and gender. A defendant is entitled to a fair and impartial jury, and the purpose of voir dire is to "elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The lower court record does not include evidence of the race and/or gender balance of the jury panel. Therefore, defendant has failed to establish ineffective assistance of counsel on this ground in the record before this Court.

Defendant next argues that there was insufficient evidence to convict him of carjacking. We review this issue de novo, and we consider the record in the light most favorable to the prosecution. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). Defendant does not argue that a carjacking did not occur. Instead he argues that he was not involved and that his confession alone was not sufficient evidence to convict him of carjacking. In *People v Cotton*,

191 Mich App 377, 389-390; 478 NW2d 681 (1991), this Court stated that a confession may not be sufficient evidence to convict, without evidence that the crime in fact occurred. Here, however, the victim's testimony established that a carjacking occurred. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant participated in the carjacking.

Aside from the ineffective assistance claim, defendant argues that the trial court was biased against him and abused its discretion in several rulings. We first address the trial court's denial of defendant's request to represent himself, which we review for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). After the first two witnesses had testified at trial, defendant requested permission to represent himself. That trial had already begun did not necessarily preclude defendant from self-representation. *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976). However, a trial court is permitted to assess the greater potential for delay and inconvenience that may occur if a defendant takes over the representation after trial has begun. *Id.* Here, the trial court was within its discretion in denying defendant's request for self-representation, given that defendant did not present his request until a considerable portion of the trial had already taken place.

Next, defendant argues that the trial court abused its discretion by refusing to allow him to subpoena witnesses. At the beginning of trial, defendant complained to the trial court that his attorney failed to subpoena witnesses for trial. Defendant does not name the witnesses on appeal, and he did not name the witnesses to the trial court, although he said that the witnesses were with him when the carjacking occurred. Trial counsel's decision whether to call witnesses was a matter of trial strategy. *Dixon*, 263 Mich App at 398. The trial court did not abuse its discretion in denying defendant's late request to subpoena unnamed witnesses.

Defendant next argues that the trial court was biased against him and that, when defendant tried to exercise his rights, the trial court admonished him for "playing games." "The Due Process Clause requires an unbiased and impartial decisionmaker." *Cain v Mich Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). However, judicial remarks that are critical, disapproving of, or hostile to a party ordinarily do not support a bias claim. *Id.* at 497 n 30. The trial court's admonishment to defendant at the beginning of trial not to "play silly games here," made outside the presence of the jury, does not establish bias.

Next, defendant argues that the trial court abused its discretion in denying a juror's request to take notes during the trial. Whether to allow jurors to take notes is a matter within the trial court's discretion. MCR 6.414(D) (now revised as MCR 2.513(H)); *People v Young*, 146 Mich App 337, 340; 379 NW2d 491 (1985). Here, given the short length of the trial and the type of evidence presented, it cannot be said that the trial court abused its discretion by not permitting juror note-taking.

Finally, defendant complains that the trial court shifted the burden of proof with its comments and instructions. Defendant does not point to any specific comment or instruction, and our review revealed no improper comments made in the jury's presence and no improper instructions by the trial court. An appellant may not state a position without citing authority and expect this Court to search for grounds to support his claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, we find no merit in defendant's argument.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Mark J. Cavanagh

/s/ Peter D. O'Connell