STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2012
v	No. 302655 Saginaw Circuit Court
JASON JAMAL HUBBERT, Defendant-Appellant.	LC No. 10-034243-FH-1

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by jury of unlawfully driving away an automobile (UDAA), MCL 750.413, and resisting a police officer, MCL 750.81d(1). He was sentenced as a fourth habitual offender to seven years, six months to 15 years in prison on the UDAA conviction and to seven to 15 years on the resisting arrest conviction. Defendant appeals as of right. Though we affirm his convictions, we remand for resentencing because the trial court did not make any findings to support a score of ten points for offense variable (OV) 12.

Around 4:15 a.m. on April 24, 2010, Saginaw police initiated a traffic stop on a 2002 Chevrolet Trailblazer after seeing it traveling at a high rate of speed. As the officer approached the vehicle on foot, it sped away, leading police on a chase. Eventually, the vehicle occupants fled on foot. Defendant was arrested while attempting to hide from pursuing officers. Two stolen firearms were recovered in or near the vehicle. The vehicle was reported stolen. Laboratory analysis showed that glass fragments found on defendant's clothing were similar to glass from the broken windows of the vehicle. Defendant denied being in the vehicle and claimed that he did not know the other two individuals arrested at the scene. However, recorded telephone calls made by defendant from jail indicated that he did know these individuals.

Defendant first argues that he was deprived of his right to a speedy trial. Under both the United States and Michigan Constitutions, a criminal defendant has the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. This right is also statutorily guaranteed. See MCL 768.1. This Court uses a four-part balancing test to determine whether a defendant has been denied this right, analyzing the following factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). The total delay is measured by the period between the defendant's arrest until the beginning of trial, and when that delay is

under 18 months the defendant has the burden to show that prejudice resulted. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

Here, the length of the delay was minimal. Defendant was arrested on April 24, 2010 and he was arraigned on April 28, 2010. His trial commenced on November 30, 2010, a delay of approximately seven months.

The delay from the originally scheduled trial date of August 5, 2010 was caused by the court's workload. This Court has previously noted that "[a]lthough delays inherent in the court system, e.g. docket congestion, 'are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial.'" *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997), quoting *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993).

Defendant argues that by stating that he was not asking for an adjournment on August 5, 2010, he was asserting his right to a speedy trial. However, he did not in any way make a demand for a speedy trial. The only assertion of a speedy trial violation was on the first day of trial. This Court has previously held that where a defendant asserted his speedy trial demand nearly five months before trial, the factor weighed only slightly in the defendant's favor. *People v Waclawski*, 286 Mich App 634, 667-668; 780 NW2d 321 (2009). Even if defendant's statement were considered a demand for a speedy trial, there was a gap of less than three months between the statement and the beginning of defendant's trial and so the assertion should be afforded only minimal weight in his favor.

Finally, defendant concedes he has failed to show prejudice, arguing "[i]t is difficult to determine actual prejudice in this case, however, the Supreme Court cautioned against placing undue emphasis on the need for the defense to show actual prejudice." Well-established case law, however, places the burden to establish prejudice on the defendant in cases where the trial delay is less than 18 months. See *Cain*, 238 Mich App at 112. Defendant did not meet this burden, proffering no colorable argument that he was somehow prejudiced as a result of any purported trial delay.

In sum, the first three factors relevant to a speedy trial claim weigh minimally in favor of defendant, and the fourth factor weighs heavily against defendant. Thus, defendant was not denied his right to a speedy trial.

Defendant also argues that the trial court erred in excusing a juror for cause on the fourth day of trial. A trial court's decision to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). We will only reverse a conviction for an improper juror removal if the defendant can show prejudice. *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988). Under both the Michigan and United States Constitutions, a criminal defendant is entitled to trial by a fair and impartial jury. US Const, Am VI; Const 1963, Art 1 §20. We have previously noted that "while a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, 244 Mich App at 562. Moreover, MCL 768.18 provides in pertinent part:

> Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. *Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12. . . .* [Emphasis added.]

MCL 768.18 "is intended to avoid mistrials in cases where one or more of the original jurors is necessarily discharged during the trial due to personal disability or legal disqualification." *People v Harvey*, 167 Mich App 734, 744; 423 NW2d 335 (1988).

Prior to the fourth day of trial, information came to light that a juror and her husband were involved with a stolen vehicle the previous weekend. Specifically, a copy of the juror's juror voucher receipt was found inside the vehicle. Defense counsel objected to removal, noting that the juror was the only African American on the jury and asserting there was no "indication" she was "personally involved in any crime." However, either the juror or her husband potentially faced charges related to the discovery of the stolen vehicle. Significantly, the statute allows for juror removal for "*any condition* . . . which in the opinion of the trial court justifies the excusal of any of the jurors." MCL 768.18.

> The trial court's discretion is not unlimited; "But error does not necessarily follow when the court, through abundance of caution to secure an impartial jury excuses a juror on ground not technically sufficient to support a challenge for cause, as it would in retaining one who is challenged and ought to have been rejected." [*People v Clyburn*, 55 Mich App 454, 456-457; 222 NW2d 775 (1974) (quoting *Church v Stoldt*, 215 Mich 469, 475; 184 NW 469 (1921)].

The prosecution claims that a challenge for cause was justified under MCR 2.511(D)(2), (3), and (4), because the juror was biased, would not be able to render a just verdict, or had opinions that would improperly influence her verdict. We are not willing to conclude that a mere accusation or suggestion of involvement in a crime is proof of bias, but it does raise a question of bias. Defendant objects that the trial court should have questioned the juror before removing her, but the trial court could not question the juror without potentially violating her Fifth Amendment right against self-incrimination. Under these circumstances, the trial court did not abuse its discretion. Moreover, defendant has not presented any evidence that he was prejudiced by the removal of the juror.

Defendant also argues that trial counsel was ineffective for failing to file notice of an alibi defense, for stipulating to a prejudicial report regarding analysis of glass fragments, and for failing to object to comments made by the prosecutor during closing arguments. Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right includes the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

To prevail, the defendant must overcome the strong presumption that counsel employed prudent trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must show that counsel's "representation fell below an objective standard of reasonableness," and that trial counsel's deficient performance prejudiced the defense. *Id.* at 688, 690. In order to demonstrate prejudice, the defendant must show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Id.* at 694.

Defendant first argues that trial counsel was ineffective for failing to raise his proffered alibi defense. In *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999), We held:

> A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the outcome of the trial.

Defendant cannot demonstrate a reasonable probability that presenting the defense would have made a difference in the outcome of the trial. There was substantial evidence of defendant's guilt. Defendant was found running from the stolen vehicle with his co-defendants, and glass similar to that found in the Trailblazer was found on his clothing. Further, recorded telephone calls made by defendant from jail cut against his assertion that he did not know his co-defendants and was not riding with them in the stolen vehicle. Defendant's alibi defense consisted of statements signed by each co-defendant stating that they did not know defendant and that he had nothing to do with their cases, as well as affidavits from Janay Green and defendant's nephew stating that defendant was drunk and stayed at a house on Ray Street until about 4:00 a.m. on the night in question. One co-defendant gave such testimony at trial, and was apparently not believed by the jury. Given the significant evidence to the contrary, it is unlikely that more testimony in the same vein would have altered the outcome. Defendant's assertion that trial counsel was ineffective for failing to raise his alibi defense lacks merit.

Defendant also argues that trial counsel was ineffective for stipulating to a report that stated that glass fragments found on defendant's clothing were similar to those found in the Trailblazer and for failing to require that the expert who produced the report appear for cross-examination. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). Here, trial counsel stipulated to the admission of a forensic laboratory report that compared glass found on defendant's clothing to that found inside the Trailblazer. These decisions were both presumably matters of trial strategy. Trial counsel may have decided not to call the preparer in an effort to reduce focus on the damaging evidence linking defendant to the stolen vehicle. Defendant has not met the heavy burden of showing that

counsel's performance in this regard was objectively unreasonable or that it resulted in prejudice that may have been outcome determinative.

Finally, defendant argues that trial counsel was ineffective for failing to object to the following statement made during the prosecutor's closing argument:

> I heard the defense counsel say something interesting at the beginning of this trial that [defendant] doesn't know these guys at all. He was just out for a walk. I didn't hear any evidence of that whatsoever. As a matter of fact, I even heard [co-defendant] when he testified yesterday saying he didn't see anybody out on the street.

Defendant argues that this statement impermissibly shifted the burden of proof, requiring defendant to produce evidence of his innocence. However, the prosecutor was commenting on the fact that there was little evidence of defendant's proffered alibi that he was out for a walk and got caught up in the police chase. His comment did not impermissibly shift the burden of proof to defendant. Trial counsel is not ineffective for failing to make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Also, declining to raise objections can be consistent with sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defendant has failed to show that trial counsel's performance was deficient or that the failure to object prejudiced defendant.

Defendant lastly argues that the trial court erred in scoring offense variables 9, 12, and 19. "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). Alleged sentencing errors that have been not been preserved are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501, 514-15 (2003).

OV 9 is scored based on the number of potential victims. MCL 777.39. Where there are "2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss," OV 9 should be scored at 10 points. MCL 777.39(c). Our Supreme Court has held that when scoring OV 9, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009).

Here, the trial court scored OV 9 at ten points based on the finding that in the process of fleeing the police in a high speed chase, defendant endangered two or more police officers. Multiple police officers testified that they were involved in a high speed chase with defendant and co-defendants through residential areas after the traffic stop of the stolen vehicle. Consequently, the trial court did not clearly err in scoring OV 9 at ten points.

Offense variable 19 encompasses "threat[s] to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. It is properly scored at ten points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004), our Supreme Court broadly interpreted the language

of OV 19, holding that the variable could be scored where the defendant had provided police with a false name in the course of an investigation. Here, although defendant did not give police a fake name, he did flee in a stolen vehicle and resisted arrest, running from police and attempting to hide before finally being apprehended while crouching beside a shed. Thus, there was evidence supporting a finding that defendant interfered with the administration of justice and consequently, the trial court did not clearly err in scoring OV 19 at ten points.

Defendant also argues that offense variable 12, MCL 777.42, was improperly scored at ten points. However, defendant did not object to this score at sentencing or in his motion for resentencing, so this issue is not preserved for appeal. Nonetheless, the issue is appealable because defendant's sentence exceeded the applicable guidelines range. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Because defendant did not raise this argument previously, we review this question for a plain error that affected the outcome of the lower court proceedings. *Id.* at 312. Further, reversal is only warranted if the error resulted in a wrongful conviction or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation omitted).

OV 12 is properly scored at ten points if the defendant committed "[t]wo contemporaneous felonious criminal acts involving crimes against a person" or "[t]hree or more contemporaneous felonious criminal acts involving other crimes." MCL 777.42(1)(b)-(c). A contemporaneous felonious criminal act is one that was committed "within 24 hours of the sentencing offense[,]" and "has not and will not result in a separate conviction." MCL 777.42(2)(a)(i)-(ii). Although defendant was convicted of only two offenses, he was initially charged with seven offenses, including carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, receiving and concealing a stolen firearm, MCL 750.535b, and possession of a firearm during commission of a felony, MCL 750.227b. However, defendant was acquitted of these offenses. Because sentencing variables need only be proven by a preponderance of the evidence rather than by proof beyond a reasonable doubt, it is still possible for the trial court to find that defendant committed contemporaneous felonious acts, even though the jury acquitted him. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). As the trial court made no such findings in this case, we remand for the court to do so. Without any such findings, there is no support for scoring OV 12 at ten points. Because a reduction of ten points would alter defendant's sentencing guidelines, resentencing is necessary.[1] *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

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[1] Though not raised on appeal, we also note that the trial court exceeded the guidelines range without stating its reasons for doing so. If resentencing is necessary and the trial court again chooses to exceed the guidelines, it shall state its reasons. *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003) ("Thus, the trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed.").

We affirm defendant's conviction but remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoeksra
/s/ Douglas B. Shapiro