STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2000
v	No. 211411 Wayne Circuit Court
KORON BASHARA WATSON, Defendant-Appellant.	LC No. 96-001545

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendant Koron Bashara Watson appeals as of right from his bench trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).[1] The trial court sentenced Watson to three to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction and a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

This matter concerns a shooting that occurred in the early morning hours of April 19, 1995, near the Black Orchid Lounge in Detroit. Christopher Cooper and Arnold Lawton, who did not encounter any problems in the bar, left the Black Orchid Lounge and walked toward Lawton's van, which was parked across the street. Before Cooper and Lawton were able to get into the van, a man approached them. Cooper did not recognize the man, but noticed that the man had a gun in the waistband of his pants. As the man was about to reach for his gun, Cooper and Lawton began running. Cooper then heard the man shoot at Lawton before the man fired two rounds at him. One shot struck Cooper in the right thigh, and he immediately fell to the ground.

At this same time, Inkster Police Officer Darin Williams and Detroit Police Officer Frazier Davis, who were off-duty, had just left the Black Orchid Lounge. Officer Williams was sitting in his car waiting for Officer Davis when he saw two men running. Officer Williams then saw a third man with a handgun shoot at the two men who were running. Officer Williams, who later stated that he had a good

look at the shooter's face, identified Watson as the shooter. After he and Officer Davis unsuccessfully chased Watson, Officer Williams returned to the scene of the shooting to help Cooper. Although Cooper was bleeding profusely, he, evidently, was able to describe the man who shot him as a 5' 9" light-skinned black male wearing a black hat. Eventually, emergency medical technicians arrived at the scene of the shooting and rushed Cooper to Grace Hospital for surgery.[2]

Several Detroit police officers arrived on the scene and Officer Williams described Watson as 6' 2" to 6' 4" tall, he estimated that Watson weighed more than two hundred pounds, and recalled that Watson was wearing a white baseball cap and a dark blue and white jacket. When Officers Williams and Davis went with other police officers to canvass the surrounding area, they saw Watson running near the Lodge Freeway. Watson, who appeared to be very tired and was sweating heavily, looked the same as he had at the scene of the shooting according to Officer Williams. The only exception was that Watson was not wearing a baseball cap. The police placed Watson under arrest and searched him but did not find any weapons in his possession. At 8:10 p.m. on the same day, Officer Williams picked Watson out of a lineup.

As we noted above, the offense occurred on April 19, 1995. A magistrate issued an arrest warrant on December 1, 1995, which the police executed that same day. Watson's trial commenced on February 3, 1998, approximately twenty-six months after his arrest.

Watson's longtime friend, Tyrone McAdoo, testified on his behalf at trial. McAdoo stated that on April 19, 1995, around 2:00 a.m., he was with Virgil Burton and Leroy Pete at the Uptown Barbecue, a restaurant near the Black Orchid Lounge. McAdoo stepped out of the restaurant to use his cellular phone, when he heard gunshots, saw someone run down the street and saw a second person fall in the street. He did not see anyone chase the person who was running away from the person lying in the street. McAdoo did, however, see the 5'11" to 6' tall shooter wearing dark clothing; McAdoo did not recognize the man. After the shooting, McAdoo was walking back into the restaurant to get his friends when he ran into Watson. Watson asked McAdoo, "What's up," to which McAdoo replied, "some n***** just got busted." McAdoo did not see Watson with a gun, and the two men went their separate ways.

Later, McAdoo testified, he learned that someone other than Watson fired the shot that wounded Cooper. McAdoo attempted to recount an incriminating statement the actual shooter supposedly made, but the trial court sustained the prosecutor's objection that such testimony would be hearsay. Sometime later in the trial, defense counsel made a record with respect to the trial court's decision not to allow McAdoo to testify to the incriminating statement this other man made. The trial court repeated its ruling that the testimony was not admissible.

The trial court heard the closing arguments and reiterated the law on the charges. After a short recess, the trial court acquitted Watson of the assault and felony-firearm charges with respect to Lawton, as well as the assault with intent to murder charge with respect to Cooper. However, the trial court found Watson guilty of the lesser included offense of assault with the intent to do great bodily harm less than murder as well as the felony-firearm charge for shooting Cooper. In support of its verdict, the trial court stated:

With respect to the assault charge – assault with intent to murder on Mr. Cooper. There's no doubt in my mind that you were the person who shot him.

The only issue that the law creates and the facts create is what the specific intent was at the time that you shot Mr. Cooper, obviously, only you would know why you shot him, Mr. Cooper certainly didn't.

The Court found the testimony of officer Williams and the civilian, Paytra Williams[3] to be probably as good and as reliable as I've had in the almost 20 years on the bench.

Both of them were completely unequivocal in terms of the substantive facts that they saw and the identifications that they made both at the scene, at the time of your arrest on the part of officer Williams and within a short time at the lineups that each of them individually attended.

When coupled with the testimony that was stipulated to on the gunpowder residue, there's absolutely no doubt in my mind whatsoever.

Many people attended the sentencing hearing to show their support for Watson.[4] Watson, who did not testify at trial, asked the trial court to be lenient when sentencing him because, he claimed, he was innocent. The trial court and Watson spoke back and forth a number of times before the trial court explained its decision and sentence in the case:

If I had a doubt in my mind, and your lawyer as well as the prosecutor know that having come up off the street the way I did, having been in trouble as a youngster like I was, I understand. And whenever there is a doubt in my mind, I give the benefit of that doubt to the person who is accused. That is part of our criminal justice system. And too often there are judges who presume not that someone is innocent, but that they're guilty. I presumed that you were innocent. But I have to tell you, I'm only a human being. In the 20 years that I have been doing this the law of averages alone would have to say that there are individuals who I acquitted who are probably guilty. That's not by design or intention. I go with my heart and my mind.

And the prosecutor well knows that unless the evidence is strong enough to convince me to eliminate any doubt in my own mind, I cut people loose. I would rather set a hundred guilty people free than send one innocent man to prison. And you may very well be, but I have to go by the evidence that's in front of me.

And, Mr. Watson, if there's an injustice that's been committed, there's a higher authority than me who will ultimately sit in judgment. But I rarely have had a case where the testimony was so overwhelming and so strong where two off-duty police officers were absolutely positive in their identification, where the woman who worked in the bar

was absolutely positive in her identification. The strength of that testimony is what convinced me beyond a reasonable doubt.

* * *

The sentencing guidelines in this case are 12 to 48 months. Again, if you have been wrongfully convicted, then a great injustice has occurred and we do have the appellate courts that you can pursue to seek a new trial to have the conviction overturned. But I based my verdict on the strength of that evidence and those three eyewitnesses were as strong witnesses as I have ever had in a case before. And it was not a case where a couple of white guys, you know, think you all look alike and, well, there's Koron Watson, he's running away, he looks like the guy that did it. Everybody involved here were people of color and the testimony of the Inkster police officer was so positive and so convincing to me that it eliminated any doubt in my mind.

II. Right To A Speedy Trial

A. Preservation Of The Issue And Standard Of Review

Watson contends that he was denied his constitutional right to a speedy trial. In order to preserve a speedy trial issue for appeal, the defendant must make a "formal demand on the record." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), citing *People v Rogers*, 35 Mich App 547, 551; 192 NW2d 640 (1971). Watson never made a formal request for a speedy trial and, therefore, he failed to preserved this issue for appeal. We review unpreserved, constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

B. Right To A Speedy Trial

A defendant has the right to a speedy trial under both the federal and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20. Michigan also enforces the right to a speedy trial by statute. MCL 768.1; MSA 28.1024. In *Cain*, this Court outlined the four-part balancing test used to determine if a pretrial delay violated a defendant's right to a speedy trial: "(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *Cain, supra*, at 112, citing *People v Williams*, 163 Mich App 744, 755; 415 NW2d 301 (1987).

> This fourth element, prejudice, is critical to the analysis. A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice. *People v Taylor*, 110 Mich App 823, 828-829; 314 NW2d 498 (1981). However, a delay of eighteen months or more . . . is presumed prejudicial and places a burden on the prosecutor to rebut that presumption. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994). [*Id.*]

C. The Delay

The parties disagree regarding how to allocate the responsibility for the twenty-six-month delay in this case, each placing responsibility with the other in an attempt to shift the burden of proof and presumption of prejudice. The biggest difficulty we have in attributing delay to either party stems from four adjournments made "at the request of the court." The reasons for these adjournments are not apparent from the record. Ultimately, however, the reason for the delay is irrelevant in this case. Even if Watson had preserved the issue with a demand for a speedy trial and could demonstrate that the bulk of the delay was the prosecutor's fault, the prosecutor successfully rebutted the presumption that Watson was prejudiced by the delay.

In particular, a defendant can be prejudiced by pretrial incarceration, which is known as prejudice to the person, or a negative effect on being able to prepare a defense or "the unavailability of witnesses . . ." *People v Sickles,* 162 Mich App 344, 357; 412 NW2d 734 (1987). Watson was in jail for fifty-eight days before he was able to post bond, not the length of the entire delay. Although Watson also argues that he suffered "anxiety" because of the "accusation over his head," this did not cause significant prejudice to his person because Watson actually requested five separate adjournments before trial. These adjournments are hardly the actions of a man who is suffering from anxiety awaiting trial.

The prosecutor also rebutted the presumption of prejudice to Watson's ability to mount a defense. Watson was released on bond and able to assist his attorney in preparing a defense. He never claimed that the delay prevented him from presenting witnesses who would have been able to testify in his favor absent the delay, or that the delay affected any other type evidence he intended to introduce at trial. The facts on the record simply do not suggest that Watson was prejudiced in any substantial manner by the delay.

III. Ineffective Assistance Of Counsel

A. Preservation Of The Issue And Standard Of Review

Watson contends that he was denied effective assistance of counsel. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial in the trial court. *People v Kenneth Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Watson filed an untimely motion with this Court seeking a remand to the trial court for a *Ginther* hearing[5] in this case, which this Court denied. Accordingly, this Court may only consider the claimed mistakes of counsel that are apparent from the record. *Id*.

B. Legal Test

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), the Michigan Supreme Court adopted the ineffective assistance of counsel standard articulated by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove a claim of ineffective assistance of counsel under *Pickens* and *Strickland*, a defendant must show that defense counsel's performance fell below

an objective standard of reasonableness and that the deficient performance prejudiced the defense so much that it denied the defendant a fair trial. *Strickland, supra* at 688-689; *Pickens, supra* at 326-327. To prove this high level of prejudice, "[t]he defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

C. Watson's Allegations

Watson alleges six instances of ineffective assistance of counsel on appeal. Five of the six depend on facts that can be found only in the supplemental affidavits Watson attached to his brief on appeal, not the lower court record. This Court may not consider these affidavits to resolve this issue on appeal. MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998). Accordingly, because the lower court record does not provide any factual support for these five claims, they do not establish a basis for relief.

The only allegation Watson makes that is identified in, if not supported by, the lower court record is his argument that defense counsel was ineffective for failing to call Lawton, one of the complainants, to testify that he was unable to identify Watson as the shooter. At trial, defense counsel noted in her opening statement that Lawton attended a lineup and was unable to identify Watson as the shooter. The record suggests that defense counsel did not introduce the showup and photo identification record for Lawton. Defense counsel's failure to introduce this evidence may have fallen below an objective standard of reasonableness. However, even if defense counsel had introduced this evidence, we see no reasonable probability that the outcome of the proceedings would have been different. *Strickland, supra* at 688-689; *Stanaway, supra* at 687-688. The evidence in this case was overwhelming. Two-off duty police officers witnessed the incident and identified Watson as the shooter. Paytra Williams also witnessed the incident and identified Watson in a lineup on the same day. Moreover, a gunshot residue test indicated that Watson had recently fired a gun. Given this evidence against Watson, it is extremely unlikely that the trial court would have altered its opinion of Watson's guilt had defense counsel introduced the showup and photo identification record.

Furthermore, the decision not to call Lawton to testify may have been a trial strategy. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Asking a victim of an alleged crime to testify for the defense is fraught with peril. On cross-examination, Lawton could have provided inculpatory evidence against Watson. We are in no position to substitute our judgment in issues of trial strategy. *Id.*

IV. McAdoo's Proposed Testimony

A. Standard Of Review

Watson next contends that the trial court erred in denying defense counsel an opportunity to make an offer of proof after the trial court ruled that McAdoo could not testify that someone else, the alleged culprit, made an incriminating statement that exculpated Watson.[6] We review a trial court's

decision on evidentiary matters for an abuse of discretion. See *People v Bahoda*, 448 Mich. 261, 289; 531 NW2d 659 (1995).

B. Offer Of Proof

When a party claims that a trial court erred in excluding evidence, MRE 103(A)(2) requires that party to make an offer of proof to show that the evidence is relevant and otherwise admissible. See *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). By making an offer of proof, the proponent of the evidence creates a record that facilitates appellate review. See *People v Thomas Johnson*, 133 Mich App 150, 154-155; 348 NW2d 716 (1984). However, an offer of proof is not necessary if the substance of the proposed evidence "was apparent from the context within which questions were asked." MRE 103(A)(2).

In this case, defense counsel asked McAdoo if he "learn[ed] of someone else who had fired" the shot that struck Cooper. McAdoo responded, "Yes, I did." Defense counsel then asked how McAdoo knew about the other shooter, and McAdoo began to explain that he had heard a rumor, at which point the prosecutor objected. Defense counsel later indicated that she wanted to make an offer of proof that McAdoo's testimony would be admissible because the declarant's statement was against his penal interest under MRE 804(B)(3). The trial court did not specifically prevent defense counsel from making an offer of proof. Defense counsel, instead, chose to make a legal argument that the testimony was admissible. The record suggests that the trial court knew the substance of the proposed testimony was a statement supporting McAdoo's testimony that he had heard a rumor that another person shot Cooper when, which is why the trial court stated that it was standing by its earlier ruling. We cannot say that the trial court, generally aware of McAdoo's proposed testimony, erred in not allowing more extensive arguments or an offer of proof on this issue. MRE 103(A)(2).

V. The Trial Court's "Reasonable Doubt"

A. Standard Of Review

Watson contends that the trial court evidenced reasonable doubt at sentencing, and thus, this Court must reverse his convictions because the trial court violated his constitution rights to a fair trial and the due process protection that permits criminal conviction only when the prosecutor proves guilt beyond a reasonable doubt. US Const, Ams VI and XIV. This Court reviews constitutional issues de novo on appeal. *Cain, supra* at 108.

B. The Trial Court's Statements

We note with disapproval that Watson's appellate counsel quoted the trial court's remarks at sentencing out of context and in a way that misrepresented the trial court's certainty of Watson's guilt. At sentencing, as the portions of the record reprinted in the first section of this opinion indicate, the trial court stated several times that it was convinced beyond a reasonable doubt on the basis of the evidence adduced at trial that Watson was guilty of the shooting. In particular, the trial court noted that it considered the consistent eyewitness testimony compelling. The statements that appellate counsel

suggests revealed the trial court's doubts about Watson's guilt were a response to his claim that he was innocent and that appeal was the proper procedure for challenging the verdict. There is no evidence that the trial court had any doubts whatsoever about Watson's guilt and, as a result, the trial court's comments at sentencing do not provide a basis for relief.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] Watson was originally charged with two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of felony-firearm. Defendant was acquitted of one count of assault with intent to murder and one count of felony-firearm, and was found guilty of the lesser crime of assault with intent to do great bodily harm less than murder and one count of felony-firearm.

[2] Cooper was in the hospital for over two weeks. He still walks with a cane, participates in physical therapy, and needs pain medication.

[3] A Black Orchid Lounge employee who is not related to the officer with the same last name.

[4] In fact, Watson's supporters wrote twenty-four letters on his behalf.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[6] In the text of Watson's argument, he also contends that the trial court substantively erred when it ruled this testimony inadmissible. However, this issue is not properly presented for our review in the statement of questions involved. MCR 7.212(C)(5). Therefore, we do not address it. *Hammack v Lutheran Social Services*, 211 Mich App 1, 7; 535 NW2d 215 (1995).