STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2003
v	No. 237177 Wayne Circuit Court
FELICIA A. SHOWERS, Defendant-Appellant.	LC No. 01-003625-01

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of resisting and obstructing a police officer, MCL 750.479,[1] for which she was sentenced to serve eighteen months' probation. She appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On October 15, 1996, defendant was arrested and charged with disorderly conduct and interfering with a police officer. The charges arose from an incident where defendant interfered in the arrest of her cousins, Brandon Carter and Lorenzo Welch. James Grier – the uncle of defendant, Carter, and Welch – was also involved in the incident and arrested. The initial charges against defendant were dropped, and a second warrant was issued for her arrest on October 26, 1996, charging defendant with resisting and obstructing. Defendant was not arrested on these subsequent charges until March 15, 2001. Defendant's bench trial was conducted in June 2001 – more than 4-½ years after the incident.

On appeal, defendant argues that her trial counsel rendered ineffective assistance in failing to move to dismiss the charges because of pre-arrest delay, which defendant asserts resulted in the unavailability of a witness and a 9-1-1 tape. She further argues that counsel was ineffective in failing to call Carter, Grier, and certain unidentified neighbors to testify at trial in support of her denial of the charges, and in failing to introduce the previous sworn testimony of Welch, who died in 2001, and whose testimony defendant asserts would have corroborated her testimony.

[1] This statute has been amended since defendant was charged and convicted.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that, but for counsel's deficient performance, a reasonable probability existed that the outcome of the proceeding would have been different. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

To determine if pre-arrest delay violates due process to the extent that it requires reversal of an otherwise valid conviction, the defendant must demonstrate actual and substantial prejudice resulting from the delay. *People v Crear*, 242 Mich App 158, 166-167; 618 NW2d 91 (2000); *People v Adams*, 232 Mich App 128, 134; 591 NW2d 44 (1998); *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982). Once the defendant does so, the prosecution has the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Crear*, *supra*. Prejudice is substantial if the delay meaningfully impaired the defendant's ability to defend against the charges to an extent that the disposition of the criminal proceeding is likely affected. *People v Cain*, 238 Mich App 95, 108-109; 605 NW2d 28 (2000). In evaluating the prosecution's asserted reasons for the delay, a court may consider the explanation given for the delay, whether the delay was deliberate, and whether the delay resulted in undue prejudice to the defendant. *Adams*, *supra* at 136; *Bisard*, *supra* at 786, 791.

Here, defendant alleges that the delay resulted in actual and substantial prejudice because Welch was unavailable to testify at her trial and she was unable to obtain a tape of an alleged 9-1-1 call she made from her home before going outside and getting arrested. We reject these claims of prejudice.

First, defendant has failed to show that the loss of Welch's live testimony resulted in any meaningful impairment of her defense. The death of a material witness alone is insufficient to establish actual and substantial prejudice; rather, to establish prejudice, a defendant must demonstrate that exculpatory evidence was lost and cannot be obtained through other means. *Adams*, *supra* at 136. Although Welch was unavailable to testify at defendant's trial, he did testify at Carter's 1997 trial. Thus, Welch's previous sworn testimony regarding the incident could have been admitted at defendant's trial as an exception to the hearsay rule. See MRE 804(b)(1). In addition, a closer look at Welch's previous testimony indicates it contained several inconsistencies regarding the details of defendant's testimony, weakening any exculpatory value it may have had. Moreover, Welch's familial relationship with defendant and his own involvement in the incident that gave rise to defendant's arrest would have subjected his testimony to credibility attacks for bias and motivation.

Second, defendant fails to explain how the unavailability of the alleged 9-1-1 tape resulted in actual and substantial prejudice. The phone call allegedly occurred while defendant was still in her house as she watched the officers attempting to subdue Carter. We find it implausible that this conversation, assuming it took place, could have supported defendant's version of events that occurred *after* she left the house and confronted the officers.[2]

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[2] We further note the existence in the lower court record of a five-page handwritten letter from defendant to the trial judge after her trial but before sentencing. In the letter, defendant explained that she had attempted to turn herself in soon after the incident, but the police

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In sum, defendant has failed to satisfy the threshold requirement for ineffective assistance of counsel regarding the pre-arrest delay and defendant's inability to call Welch as a witness or produce the alleged 9-1-1 tape. Defendant has not shown a reasonable likelihood that the outcome of the case would have been different had this witness appeared or the 9-1-1 call introduced into evidence. Because defendant has not carried her burden, it is unnecessary to consider whether the prosecution could satisfy its burden of persuasion to justify the delay. *Adams*, *supra* at 138-139. Accordingly, defendant's claim that counsel was ineffective in failing to move for dismissal on grounds of pre-arrest delay is rejected.

Defendant also argues that counsel was ineffective in failing to call Carter or Grier as witnesses or to introduce Welch's previous sworn testimony to support her version of the incident.[3] Defendant argues that, because the trial was a credibility contest between her and the two police officers and the trial court stated that the case presented a "sharp question of fact," the omission of this available defense testimony was outcome determinative. We disagree.

"The decision whether to call witnesses is a matter of trial strategy." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994), "This Court is reluctant to second guess trial counsel in matters of trial strategy." *People v Lotter*, 103 Mich App 386, 390; 302 NW2d 879 (1981). Thus, the testimony from any of these three witnesses would have done little to bolster defendant's case or alter the outcome of the trial. In light of the trial court's finding that defendant's version of events was completely devoid of credibility, there is no reasonable likelihood that additional testimony describing the same incredible event would have persuaded the trial court to reach a different conclusion. In addition, all three of these potential witnesses

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department claimed that there was no outstanding warrant for her arrest. Later, however, she discovered that another warrant had been issued:

> Later on a police check was run to find out that I had a police warrant for me. I was on my way to court to be a witness in my cousin and uncle's case to find out I was gonna be arrested if I showed up. [T]hen at the time I was six months pregnant. So now it's (4) four years later no trouble a single working mom raising my son, is subjected to this case trying to get to an end of this case hanging over my head.

For appellate review purposes, we acknowledge the limited value of this letter, given that it is not a part of the record made at trial and it is not notarized. However, to the extent that defendant concedes by her own hand that she was aware of the existence of an outstanding arrest warrant and actively avoided arrest, her claim of prejudice arising from prearrest delay is seriously undercut. As this Court has stated, "one cannot complain of a delay which he helped create." *People v Johnson*, 41 Mich App 34, 43; 199 NW2d 565 (1972); see also generally *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (If appellant contributed to an alleged error, it is not error requiring reversal.).

[3] Defendant also asserts that counsel should have called certain unnamed neighbors to testify in support of her version of the incident, but she has submitted no affidavits or offers of proof from these potential witnesses. See *Hoag*, *supra* at 6 ("the defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel").

are relatives of defendant and all three were involved in the incident which resulted in defendant's arrest, giving rise to credibility challenges regarding bias and motivation. In this case, defendant has not overcome the presumption that trial counsel's decision not to call these individuals as witnesses represented sound trial strategy. *Daniel*, *supra*.

In conclusion, defendant has not shown defense counsel's assistance to be defective nor a reasonable probability that the outcome of defendant's trial would have been altered had trial counsel taken the actions now urged by defendant on appeal. *Hoag*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray