STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DANIEL LEE COOK,

Defendant-Appellant.

UNPUBLISHED
December 28, 2006

No. 261850
Genesee Circuit Court
LC Nos. 04-014804-FC; and
05-015598-FH

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of felonious assault, MCL 750.82, and one count of first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 300 to 600 months for the robbery convictions, 84 to 240 months for the assault with intent to do great bodily harm conviction, 180 to 480 months for the home invasion conviction, and 36 to 96 months for the felonious assault conviction. He appeals as of right. We affirm.

Defendant's convictions arise from two separate incidents in which three men first assaulted Bradley Coffell and then shortly thereafter entered the home of Stacey Metcalfe, where they robbed and assaulted both Metcalfe and Anthony Hilbers. Defendant was charged in both offenses along with codefendants Jamie Huff and Lawrence King. Huff and King both entered guilty pleas and King testified against defendant at trial. The principal issue at trial was defendant's identification as a participant in the offenses.

I

Defendant first argues that trial counsel was ineffective for not calling codefendant Huff and another person, Matthew Parkinson, as witnesses at trial. Although defendant filed a pro se motion for a new trial in which he argued that defense counsel was ineffective for not calling Huff as a witness, he did not raise any issue involving counsel's failure to call Parkinson, or request an evidentiary hearing. The trial court determined that counsel's failure to call Huff was not prejudicial because Huff had implicated defendant in the offenses at Huff's plea hearing. Because defendant did not raise any issue involving Parkinson and no evidentiary hearing was

held on this claim below, our review is limited to errors apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). 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 one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant has presented notorized statements from both Huff and Parkinson in which both state that Rusty Thompson, not defendant, committed the charged offenses along with Huff and King. But there is no indication in the record that defense counsel was aware that these witnesses were willing to testify to these facts at defendant's trial. Although defense counsel was aware of Huff, who was named as a possible witness by the prosecution, Huff was also named as a codefendant. Huff ultimately pleaded guilty and the trial court, which presided at Huff's plea hearing, observed that Huff had implicated defendant in the offenses at the hearing. On this record, there is no basis to conclude that defense counsel acted unreasonably by failing to call Huff at defendant's trial, or that Huff's absence deprived defendant of a substantial defense. Although Parkinson's statement indicates that he advised defendant that he was willing to testify at defendant's trial, there is no indication in the record, nor has defendant shown, that he ever advised counsel of Parkinson's existence or made a good-faith effort to avail himself of a defense based on Parkinson's testimony. In the absence of any evidence to this effect, this Court cannot conclude that defense counsel was ineffective for failing to call Parkinson as a witness. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Defendant also asks this Court to remand this matter for an evidentiary hearing. We decline to do so. This Court will not require a trial court to conduct a hearing regarding the effective assistance of counsel without a proper offer of proof. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Here, defendant has failed to make a proper offer of proof demonstrating that he made a good-faith attempt to avail himself of a defense based on testimony from these witnesses.

II

Next, defendant argues that his two convictions for armed robbery and felonious assault against Stacey Metcalfe violate his double jeopardy protections against multiple punishments for the same offense. We disagree.

Under the double jeopardy protections afforded by both the United States and Michigan constitutions, a defendant may not be subject to multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. *People v Price*, 214 Mich App 538, 541; 543 NW2d 49 (1995). The elements of felonious assault are included within armed robbery for purposes of double jeopardy analysis. *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981). But an assault may be punished separately from an armed robbery where the facts clearly establish that the offenses occurred at separate times. *Id*. at 336.

In this case, defendant's armed robbery conviction against Metcalfe arose from an assault with a screwdriver, during which defendant and his accomplices demanded Metcalf's money and jewelry. The evidence showed that after the robbery was completed, a codefendant separately assaulted Metcalfe with a hot curling iron. The jury was instructed on aiding and abetting and, therefore, properly could have convicted defendant of this separate assault under an aiding and abetting theory. Because the facts establish that the two offenses occurred at separate times, defendant has not established that he was subjected to multiple punishments for the same offense. See *People v Richard Johnson*, 94 Mich App 388, 391; 288 NW2d 436 (1979).

III

Defendant next argues that the trial court erroneously instructed the jury, consistent with CJI2d 3.4, that it could only consider evidence of a prior conviction for the limited purpose of determining if he was a truthful witness. Defense counsel included this instruction with his proposed jury instructions, but did not withdraw it after defendant elected not to testify and there was no objection to the instruction when it was given. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Because defendant never testified, the trial court's instruction based on CJI2d 3.4 was plain error. We conclude, however, that the instruction did not affect defendant's substantial rights. First, no evidence was ever presented that defendant had a prior conviction, and the trial court instructed the jury that it was to base its verdict only on the evidence properly admitted at trial. This instruction was sufficient to protect defendant's rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Secondly, although defendant argues that the instruction was prejudicial because it alerted the jury that he had a prior criminal history, defendant presented evidence that he was incarcerated on an unrelated matter before he was considered a suspect in these offenses. In light of this evidence, we are not persuaded that defendant was unduly prejudiced by the court's instruction referring to an unnamed conviction.

For these reasons, this unpreserved issue does not require reversal.

IV

Defendant next argues that he is entitled to be resentenced because the trial court's scoring of the sentencing guidelines was based on facts not found by the jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Neither *Blakely*, nor the more recent decision in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 143, 154-156, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, resentencing is not warranted.

V

In a supplemental pro se brief, defendant requests this Court to remand this case for an evidentiary hearing on several additional claims of ineffective assistance of counsel. We decline to do so because defendant's claims either lack merit or have not been supported with an appropriate offer of proof showing what evidence defendant would present at an evidentiary hearing. This Court will not require a trial court to conduct a hearing regarding the effective assistance of counsel without a proper offer of proof. See *Simmons, supra*.

There is no merit to defendant's argument that Hilbers's photographic identification should have been suppressed for lack of counsel. Because defendant was not in custody for this offense and criminal proceedings had not yet commenced at the time of the photographic identification, defendant was not entitled to counsel. *People v Hickman*, 470 Mich 602, 611; 684 NW2d 267 (2004); *People v Kurylczyk*, 443 Mich 289, 302, 318; 505 NW2d 528 (1993). Furthermore, even if Hilbers's photographic identification procedure could be considered suggestive, defendant was not prejudiced by counsel's failure to seek suppression on this basis. Other witnesses identified defendant as being involved in the offenses. Moreover, Hilbers admitted at trial that his identification of defendant in the photographic lineup was influenced by the fact that defendant was wearing a hooded sweatshirt, and Hilbers also admitted that he was not positive about his identification of defendant as a suspect. Because defendant's identification was established by other witnesses and the jury was already aware that Hilbers's identification of defendant was questionable, there is no reasonable probability that the outcome would have been different had Hilbers's identification testimony been suppressed.

The circumstances involving the corporeal lineup at which Bradley Coffell identified defendant was a matter of record at trial, and there is no basis in the record for concluding that the lineup was impermissibly suggestive. Also, defendant has not overcome the strong presumption that counsel exercised sound trial strategy by not requesting the appointment of an expert witness on eyewitness identification testimony.

Nor are we persuaded that counsel was ineffective for failing to impeach prosecution witnesses with prior inconsistent statements. Some of the statements identified by defendant were not inconsistent with the witnesses' trial testimony and other statements involve insubstantial matters that would not have affected the outcome.

The record does not support defendant's claim that the prosecutor failed to produce a photograph of defendant during discovery. Also, because the jury heard evidence that

defendant's appearance had changed since the time of the offense, defendant was not prejudiced by the prosecutor's comment about changes in defendant's appearance.

VI

Next, defendant argues that there was insufficient evidence to convict him of armed robbery of Stacey Metcalfe because there was no evidence that he took items from Metcalfe or assaulted her with a weapon. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id*. at 514-515.

Armed robbery involves "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Carines, supra* at 757. At the time of this offense in February 2004, MCL 750.529 provided that an armed robbery occurs when the defendant possesses "a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon."[1] See *People v Norris*, 236 Mich App 411, 414-415; 600 NW2d 658 (1999). Armed robbery is a specific intent crime that requires proof that the defendant intended to permanently deprive the victim of property. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998).

The jury was also instructed on aiding and abetting. To convict a defendant under an aiding and abetting theory, the prosecution must show that (1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra*.

There is no merit to defendant's argument that the evidence failed to show that he assaulted Metcalfe while armed with a weapon. Metcalfe testified that when the three men entered her bedroom, defendant and Huff both held her down on the bed while defendant held a screwdriver to Hilbers's neck and told him not to move or he would kill Hilbers or both of them. Metcalfe and Hilbers were both told to give defendant their money. This evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant assaulted Metcalfe while armed with a dangerous weapon.

Defendant also argues that the evidence did not show that he personally took any items from Metcalfe. It was apparent from Metcalfe's testimony that codefendant Huff obtained

[1] MCL 750.529 was amended by 2004 PA 128, effective July 1, 2004. The amendment does not apply to this case, which involves crimes committed in February 2004.

Metcalfe's jewelry. But the evidence clearly showed that defendant and Huff were acting in concert and the jury properly could find that defendant's conduct aided and abetted Huff in the taking of Metcalfe's property.

Thus, the evidence was sufficient to support defendant's armed robbery conviction involving Metcalfe.

VII

Defendant argues that the trial court erred when it admitted a photograph of him that was taken in October 2001. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Defendant objected to the photograph only on the ground of relevancy. Defendant's theory at trial was that he was mistakenly identified for Russell (Rusty) Thompson, whom some of the witnesses stated looked like one of the suspects. The prosecution offered the photograph to show that defendant previously bore an appearance similar to Thompson. In light of the defense theory, the trial court did not abuse its discretion in determining that the photograph was relevant to the issue of identification. MRE 401, 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999).

Defendant further argues that the photograph should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Because defendant did not object on this ground below, our review of this issue is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 761-767; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Although defendant argues that the photograph is unduly prejudicial because it depicts him wearing prison attire, our review of the photo discloses that it merely depicts him wearing a dark, collared shirt, and that there is nothing about the shirt that suggests it is prison attire. Thus, we find no merit to this issue.

Defendant next argues that his constitutional right to a speedy trial was violated when the trial court adjourned the trial of the case involving Metcalfe and Hilbers so that it could be joined for trial with the case involving Coffell.

A defendant has the constitutional right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). In deciding whether a defendant's right to a speedy trial was violated, this Court considers "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A delay of more than 18 months is presumed to be prejudicial and the prosecution bears the burden of proving lack of prejudice to the defendant. *Id*. Because the delay in this case was less than 18 months, the burden was on defendant to show prejudice as a result of the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). There are two types of prejudice involved in the right to a speedy trial, prejudice to the person and prejudice to the defense. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). General allegations of prejudice (such as witnesses' memories fading over time) are insufficient to establish that a defendant was denied the right to a speedy trial. *Gilmore*, *supra* at 462.

The delay in this case was, at most, less than seven months, and the adjournment of the original trial date was less than a month to enable to the two related cases to be tried together. Defendant failed to establish any prejudice resulting from the short delay. The trial court properly determined that defendant's right to a speedy trial was not violated.

Defendant also argues that the trial court violated the 180-day rule, MCL 780.131, because trial did not commence within that period of time. We disagree. The purpose behind the 180-day rule is to require that prosecutors bring all pending charges against prison inmates so that a defendant has the opportunity to serve his sentences concurrently. *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999); *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). As applied to this case, MCR 6.004(D) set forth the requirements for the 180-day rule:[2]

> **(D) Untried Charges Against State Prisoner.**
>
> (1) *The 180-Day Rule.* Except for crimes exempted by MCL 780.131(2), the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:
>
> (a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or
>
> (b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.
>
> For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.

In *People v Cleveland Williams*, 475 Mich 245, 257-259; 716 NW2d 208 (2006), our Supreme Court explained that the foregoing version of MCR 6.004(D) was inaccurate because it did not properly reflect the language of MCL 780.131, which provides:

> (1) Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth *against any inmate of a correctional facility of this state* a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of

[2] MCR 6.004(D) was amended, effective January 1, 2006. Those revisions are not applicable to this case.

> the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.
>
> (2) This section does not apply to a warrant, indictment, information, or complaint arising from either of the following:
>
> (a) A criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility.
>
> (b) A criminal offense committed by an inmate of a state correctional facility after the inmate has escaped from the correctional facility and before he or she has been returned to the custody of the department of corrections. [Emphasis added.]

Here, although the parties agree that defendant was on parole at the time of this offense, *Cleveland Williams* overruled previous decisions that had held that the 180-day rule does not apply where a defendant commits a crime while on parole. *Cleveland Williams, supra* at 249, 254-255. However, the *Cleveland Williams* Court gave its decision limited retroactive effect, applying it only to cases pending on appeal in which this issue has been raised and preserved. *Id*. at 255. Here, because this issue was not properly raised and preserved, *Cleveland Williams* (and its overruling of previous decisions that had held that the 180-day rule does not apply where a defendant commits a crime while on parole) does not apply to this case. *Id*. Furthermore, there appears to be no dispute that defendant was only being held in the county jail while awaiting trial in this matter, and was not an inmate of a state correctional facility, so the 180-day rule does not apply to him. MCL 780.131.

VIII

Defendant next argues that the prosecutor violated his due process rights by charging him in the assault on Coffell. Defendant maintains that he was selectively prosecuted for that offense and that the charge was added in retaliation for his decision to proceed to trial in the case involving Metcalfe and Hilbers, unlike codefendants King and Huff who entered guilty pleas and were not subject to the same charge. Because defendant did not raise this due process argument in the trial court, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra*.

The authority to decide what charges to prosecute is vested solely and exclusively with the prosecutor. *People v Stacey Jones*, 252 Mich App 1, 6; 650 NW2d 717 (2002). The decision whether to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. *Id*. at 7. A trial court may only review the prosecutor's charging decision to determine if the decision is unconstitutional, ultra vires, or illegal. *Id*. at 6-7. Otherwise, the prosecutor's decision is exempt from judicial review. *Id*. at 7.

It can be a violation of due process to punish a defendant for asserting his constitutional right to trial by adding charges after the defendant refuses to accept a plea agreement. *Id*. Prosecutorial vindictiveness sufficient to find such a constitutional violation can be either presumed or actual. *Id*.

> "Actual vindictiveness will be found only where objective evidence of an 'expressed hostility or threat' suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." [*People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996)], quoting *United States v Gallegos-Curiel*, 681 F2d 1164, 1168 (CA 9, 1982). The burden is on the defendant to demonstrate actual prejudice. *Ryan, supra* at 36 .
>
> The *Ryan* Court stated that "[t]he mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor's charging discretion." *Id*. at 36. Additionally, regarding presumptive vindictiveness, this Court held that "it is well established that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant *presuming* that subsequent changes in the charging decision are vindictive and therefore violative of due process." *People v Goeddeke*, 174 Mich App 534, 536; 436 NW2d 407 (1988) (emphasis added). The "[d]ismissal of a lesser charge and rearrest on a newly filed greater charge due to a defendant's failure to plead guilty to the lesser charge does not, by itself, constitute prosecutorial vindictiveness and denial of due process of law." *Id*. at 537. Accordingly, the defendant must affirmatively prove actual vindictiveness in order to establish that there was a denial of due process. *Id*. [*Jones, supra* at 7-8.]

In this case, there is nothing in the record that objectively shows any clear connection between the plea agreement offered to defendant in the case involving Metcalfe and Hilbers and the filing of the new charge in the case involving Coffell. The case involving the assault against Coffell was delayed because of difficulty securing Coffell for a lineup. Regardless of whether the prosecutor exercised due diligence in attempting to locate Coffell sooner, defendant has not met his burden of proving actual vindictiveness arising from the new charge involving the assault against Coffell.

Nor is there support for defendant's claim of selective prosecution under the Equal Protection Clause. "Selective prosecution claims require proof of intentional or purposeful discrimination." *People v Weathersby*, 204 Mich App 98, 114-115; 514 NW2d 493 (1994). Defendant has not identified any evidence that his prosecution was based on his race, religion, or some other arbitrary classification. *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App 318, 331; 256 NW2d 776 (1977).

We likewise find no support in the record for defendant's claim that the state did not conduct a fair investigation of other possible suspects before charging him.

In sum, defendant has not met his burden of showing plain error arising from the prosecutor's charging decisions or the police investigation.

IX

Defendant lastly argues that the cumulative effect of many errors in this case denied him a fair trial. Only actual errors may be aggregated to determine if the cumulative effect of the errors denied the defendant a fair trial. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002); *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990). In this case, defendant has not established that multiple errors occurred at his trial. Thus, he was not denied a fair trial because of cumulative error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello