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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON VERN KELSEY,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 349159
Genesee Circuit Court
LC No. 18-042881-FC

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of the lesser included offense of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.85, disarming a peace officer of a nonlethal weapon (DPO), MCL 750.479(b)(1), and two counts of assaulting, resisting, or obstructing a police officer (APO), MCL 750.81d(2). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 72 months to 240 months' imprisonment for the AWIGBH conviction, 72 months to 180 months' imprisonment for the DPO conviction, and 72 months to 180 months' imprisonment for each of the APO convictions. On appeal, defendant argues: (1) the trial court erred by stating jury instructions regarding defendant's state of mind that were misleading and improperly shifted the burden of proof; (2) defendant was denied his state and federal right to a speedy trial as a result of the unjustified 17-month delay between defendant's arrest and his trial; (3) the prosecutor engaged in misconduct by making statements during voir dire insinuating he would not prosecute defendant unless defendant was guilty; and (4) he was denied the effective assistance of counsel because defense counsel failed to object to the trial court's misleading instructions regarding state of mind, failed to file a motion for speedy trial, and failed to object to the prosecutor's comments during voir dire. We affirm.

I. STATEMENT OF FACTS

This case arises out of an encounter between Flint Police Department Officers Vincent Villarreal and Philip Fiebernitz, and defendant, after the officers were called to check on defendant's home. After a dispute with his neighbors, defendant allegedly screamed at his

neighbors' home repeatedly while running about in the neighborhood. A concerned friend of defendant's neighbors called the Flint Police Department to report defendant's conduct.

On November 17, 2017, Officer Villarreal responded to the dispatch call and arrived at defendant's residence. When Officer Villarreal spoke with defendant, defendant engaged in behaviors that caused him to be concerned for defendant's mental health. Officer Villarreal called for back-up, and Officer Fiebernitz arrived soon after. When Officer Fiebernitz approached defendant's front yard gate, defendant punched Officer Fiebernitz. A fight ensued between the three individuals while Officers Fiebernitz and Villarreal requested defendant put his hands behind his back in an attempt to put defendant in handcuffs. During this fight, defendant took Officer Villarreal's taser and deployed it on the officers. The officers were able to recover the taser and use it to immobilize defendant and complete the arrest.

In accordance with an order of the trial court on January 24, 2018, defendant underwent an evaluation at the Center for Forensic Psychology (CFP) to assess his competency to stand trial and criminal responsibility. After the CFP's evaluation was submitted on February 22, 2018, defendant was determined to be competent to stand trial. At the preliminary examination on March 28, 2018, the district court found probable cause, and defendant's case was bound over to the circuit court. The case was reassigned from Judge Richard B. Yuille to Judge Celeste D. Bell under MCR 8.111(D) on September 11, 2018. Defendant's trial commenced on April 9, 2019, approximately 17 months after his arrest.

Before jury deliberations began, the trial court instructed the jury for each of the five charged offenses using the language set forth in each charge's corresponding model criminal jury instruction. The trial court also instructed the jury regarding a peace officer's authorization to take an individual into custody for psychiatric examination. After deliberations, the jury found defendant guilty as previously noted. This appeal ensued.

II. DISCUSSION

Defendant offers four contentions of error: (1) the trial court erred in its jury instructions regarding defendant's state of mind; (2) defendant was denied his state and federal right to a speedy trial (3) the prosecutor engaged in misconduct; and (4) defendant was denied the effective assistance of counsel.

A. JURY INSTRUCTIONS

Defendant argues the trial court plainly erred in its jury instructions with regard to defendant's mental state. Specifically, defendant contends the jury instructions were collectively misleading and improperly shifted the burden of proof to defendant to establish he did not have an intent to kill at the time of the offense on which the charges were based. We disagree.

To preserve an error regarding jury instructions, a defendant must object to the jury instructions as given or request a particular instruction. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant did not object to the jury instructions, and failed to request a jury instruction clarifying whether mental illness was a defense to the charges at issue. Therefore, this issue is unpreserved.

Generally, claims of instructional error are reviewed de novo. *People v Wade*, 283 Mich App 462, 464; 771 NW2d 447, 449 (2009), rev'd 485 Mich 986 (2009), vacated on recon 486 Mich 909 (2010). "[W]e review for an abuse of discretion a trial court's determination that a specific instruction is inapplicable given the facts of the case." *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, because defendant's argument that the jury instructions regarding mental state were misleading and shifted the burden of proof is unpreserved, it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order for defendant to obtain relief, he must show that (1) an error occurred, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Id.* The third prong requires defendant to demonstrate prejudice, or that the error affected the outcome of the lower court proceedings. *Id.* Reversal is only warranted when the plain error "resulted in the conviction of an actually innocent defendant" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *Wade*, 283 Mich App at 467 (citations and quotation marks omitted). Jury instructions must contain every element of a charged offense "and any material issues, defenses, and theories if there is evidence to support them." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 421; 884 NW2d 297 (2015). "The pertinent rules governing jury instructions are set forth in MCR 2.512 and MCR 2.513." *People v Traver*, 502 Mich 23, 31: 917 NW2d 260 (2018). Use of the model criminal jury instructions is mandatory if the instruction is applicable, accurate, and requested. See MCR 2.512(D)(2); *People v Rosa*, 322 Mich App 726, 739; 913 NW2d 392 (2018). In addition, "[m]ere error alone in instructing the jury is insufficient to set aside a criminal conviction. Instead, a defendant must establish that the erroneous instruction resulted in 'a miscarriage of justice.' " *People v Schaefer*, 473 Mich 418, 441-42; 703 NW2d 774 (2005), mod by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), quoting MCL 769.26.

Defendant's argument on appeal challenges two facets of the trial court's jury instructions: (1) the trial court's statements during voir dire indicating legal insanity was not a defense to defendant's charges; and (2) the trial court's instruction before jury deliberation outlining a peace officer's power to take an individual into custody for psychiatric evaluation. Defendant argues the trial court collectively presented misleading instructions to the jury regarding defendant's mental state, initially informing the jury during voir dire that defendant's mental state was not at issue but later failing to address testimony given at trial that suggested defendant was experiencing mental illness at the time of the offenses. According to defendant, the trial court's instruction with regard to a peace officer's ability to take an individual into custody for psychiatric evaluation also improperly shifted the burden to defendant to prove that he did not have the intent to kill at the time of the offense. Because this instructional error pertained to the basic and controlling issue of whether defendant had an intent to kill, defendant contends the instructional error affected defendant's substantial right to a properly instructed jury, and resulted in prejudice.

As a preliminary matter, the trial court's statements during voir dire regarding defendant's inability to present an insanity defense comported with the statutory scheme setting forth the affirmative defense of legal insanity. Mental illness or intellectual disability, in and of themselves, do not constitute the defense of legal insanity; legal insanity requires proof that as a result of mental illness or intellectual disability, a defendant "lacked 'substantial capacity either to appreciate the

nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law.' " *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), citing MCL 768.21a(1). The defendant has the burden to establish legal insanity by a preponderance of the evidence. *Carpenter*, 464 Mich at 230-231, citing MCL 768.21a(3). A defendant who does not meet the legal definition of insanity is precluded from presenting evidence of mental illness or disability for the purposes of negating the specific intent required to commit a particular crime. *People v Yost*, 278 Mich App 341, 354-355; 749 NW2d 753 (2008), citing *Carpenter*, 464 Mich at 232.

In this case, defendant was found both competent to stand trial and criminally responsible at the time the crimes were alleged to have occurred after a court-ordered examination by a qualified professional was conducted in accordance with MCL 768.20a. Lacking the statutorily-required evidence that he was legally insane at the time of the conduct giving rise to the offenses, defendant could not have met his burden to prove the legal defense of insanity as an affirmative defense by a preponderance of the evidence. *Carpenter*, 464 Mich at 230-231.

However, defendant's inability to assert legal insanity as an affirmative defense did not preclude the introduction of evidence that suggested he may have a mental illness or disability. A defendant may introduce evidence of mental illness or disability if it is offered for a relevant purpose other than to establish lack of specific intent, subject to a limiting instruction. *Yost*, 278 Mich App at 354-355, citing *Carpenter*, 464 Mich at 232 and MRE 105. So, too, may the prosecution present such evidence when relevant.

This interplay between defendant's simultaneous inability to assert legal insanity and his ability to present relevant evidence raising questions regarding his mental health, is exactly what the trial court informed the jury during voir dire. The trial court informed the jury that, as a matter of law, legal insanity could not serve as a defense to defendant's charges. The trial court also warned the jury that there was a possibility that evidence suggesting defendant may have suffered from mental illness or disability would be presented at trial during the testimony of various witnesses. As part of the voir dire process, the trial court questioned the jury as to whether they would be able to follow the law as provided by the trial court regarding that unavailable defense even if evidence potentially indicating defendant suffered from mental illness were to be presented at trial. These questions were proper under voir dire, as they were "sufficiently probing . . . to uncover potential juror bias" and elicited "information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 609, 618; 518 NW2d 441 (1994). Therefore, defendant's contention that the statements made by the trial court during voir dire were misleading, is without merit. The trial court's statements during voir dire correctly informed the jury that defendant was unable to assert a legal insanity defense, but that evidence raising a question regarding defendant's mental health could nevertheless arise during the course of the trial—and, indeed, it did arise.

Defendant's argument concerning the trial court's instructions given before jury deliberation is also without merit. Defendant claims the trial court's final instructions failed to provide any instruction on defendant's state of mind beyond indicating the right of a peace officer to take an individual into custody for psychiatric evaluation. This contention is clearly contrary to the record. The jury was provided instructions for each of the five charged offenses that followed the language set forth in each charge's corresponding model criminal jury instructions. See M

Crim JI 17.3; M Crim JI 13.1; M Crim JI 13.18. Thus, the jury was specifically instructed regarding the mental state required for defendant to be found to have committed each offense, namely: (1) intent to kill for the AWIM charges; (2) intent to cause great bodily harm for the lesser included offenses of AWIGBH; (3) knowledge or reason to believe the person from whom the taser was taken was a peace officer; and (4) knowledge or reason to know that Officers Fiebernitz and Villarreal were police officers in the performance of their duties. The trial court additionally informed the jury how to evaluate intent, stating that "[t]he defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence." While the discussion regarding jury instructions between the trial court and counsel for both parties was held off the record, defendant submitted M Crim JI 17.3, M Crim JI 13.1, and M Crim JI 13.18 as proposed jury instructions before trial. Because M Crim JI 17.3, M Crim JI 13.1, and M Crim JI 13.18 were applicable to the facts of this case, accurate, and requested, their use was mandatory. See MCR 2.512(D)(2); *Rosa*, 322 Mich App at 739. Defense counsel also did not offer any objections for the record after the instructions were read; defense counsel's failure to timely object constitutes forfeiture of the issue. See *Carines*, 460 Mich at 772.

Nor did the trial court err in instructing the jury regarding a peace officer's ability to take a person into custody for psychiatric examination. Defendant was charged and convicted of DPO, which is governed by MCL 750.479(b)(1). MCL 750.479(b)(1) states:

> (1) An individual who takes a weapon other than a firearm from the lawful possession of a peace officer or a corrections officer is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,500.00, or both, if all of the following circumstances exist at the time the weapon is taken:
>
> (a) The individual knows or has reason to believe the person from whom the weapon is taken is a peace officer or a corrections officer.
>
> (b) The peace officer or corrections officer is performing his or her duties as a peace officer or a corrections officer.
>
> (c) The individual takes the weapon without consent of the peace officer or corrections officer.
>
> (d) The peace officer or corrections officer is authorized by his or her employer to carry the weapon in the line of duty.

Thus, the prosecutor was required to establish Officer Villarreal was performing his duty as a peace officer when defendant took Officer Villarreal's taser to convict defendant of DPO. The trial court accurately adapted M Crim JI 13.5, explaining the contours of a police officer's legal authority to act, for this purpose. See M Crim JI 13.5(4). Immediately after the instruction delineating the elements to convict defendant of the DPO charge, the trial court stated:

> In the State of Michigan, a peace officer may take a person into custody for psychiatric examination if they reasonably believe the person was a danger to themselves, a danger to others, or is incapable of taking care of their own needs. A peace officer may take an individual into protective custody with that kind and degree of force that is lawful for the officer to arrest that individual for a

> misdemeanor without a warrant. In taking the individual a peace officer may take reasonable steps to protect himself.

This instruction offered a summary of the relevant statutory provisions of the Mental Health Code (MHC) indicating a peace officer's ability to take an individual into custody for psychiatric examination on the basis of their own observations, as well as the degree of force appropriate for effectuating this act. See MCL 330.1427(1) (authorizing a peace officer to take a person into protective custody on the basis of the officer's own observations and determination that an individual requires treatment)[1]; see also MCL 330.1427a (outlining the degree of force that the officer may use in taking a person into protective custody as well as the extent to which an officer can take steps to protect himself during the process)[2]. Furthermore, this instruction was supported by evidence in the record: Officers Villarreal and Fiebernitz testified regarding their direct observations of defendant's erratic behavior and repeated threatening statements, as well as their belief that defendant may have required psychiatric evaluation on the basis of this conduct, before defendant took Officer Villarreal's taser. Jury instructions are to be read in their entirety rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Because the instruction at issue was read immediately after the instruction outlining the elements of DPO, it is clear that it related to the DPO charge by explicating an officer's duties with regard to taking an individual into custody for psychiatric examination.

Defendant also broadly asserts, without support, that the jury instruction regarding a peace officer's ability to take a person into custody for psychiatric examination improperly shifted to defendant the burden to prove he did not have the intent to kill. Defendant does not explain what portion of the instructions given allegedly shifted this burden to defendant, but rather, appears to base this contention on the idea that the collective instructions were misleading or confusing because the jury was misled as to whether defendant's mental state was "an issue." But defendant does not explain how the trial court's questioning during voir dire or the final jury instructions were contradictory. As discussed, the questioning and instructions properly outlined difficult legal principles applicable to the case at bar. Furthermore, the concepts explained in the voir dire

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[1] MCL 300.1427(1) states, in relevant part:

> Sec. 427. (1) If a peace officer observes an individual conducting himself or herself in a manner that causes the peace officer to reasonably believe that the individual is a person requiring treatment, the peace officer may take the individual into protective custody and transport the individual to a preadmission screening unit designated by a community mental health services program for examination under section 429 or for mental health intervention services.

[2] MCL 330.1427a states:

> Sec. 427a. (1) If a peace officer is taking an individual into protective custody, the peace officer may use that kind and degree of force that would be lawful if the peace officer were effecting an arrest for a misdemeanor without a warrant. In taking the individual into custody, a peace officer may take reasonable steps for self-protection.

questioning and final instructions were not mutually exclusive: it was logically consistent to instruct the jury that an officer was authorized to take an individual into custody on the basis of a reasonable belief that defendant needed psychiatric evaluation while nonetheless noting defendant was precluded from asserting the legal insanity defense. Therefore, the trial court did not err in its instructions to the jury. And, in any event, defendant was ultimately acquitted of the AWIM charges.

B. RIGHT TO A SPEEDY TRIAL

Defendant argues he was denied the right to a speedy trial in violation of the United States Constitution and the Michigan Constitution. Defendant claims the majority of the 17-month delay between his arrest and trial was because of the prosecution. Defendant admits the record in this case is silent as to whether the delay inhibited his ability to present a defense, but argues the question whether the delay affected his ability to present a defense should be remanded to expand the record. Additionally, defendant contends he suffered considerable personal deprivation from the lengthy incarceration. We disagree. Although the 17-month delay was lengthy, defendant presented no evidence of prejudice, such that the delay did not amount to a constitutional violation.

"The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). "The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo." *Id.* "In addition, this Court must determine whether any error was harmless beyond a reasonable doubt." *Id.*

A criminal defendant's right to a speedy trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The United States Supreme Court and the Michigan Supreme Court have expressly established a four-factor balancing test to determine whether a defendant's right to a speedy trial was violated. *Barker v Wingo*, 407 US 514, 523-529, 531-532; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Collins*, 388 Mich 680, 692-693; 202 NW2d 769 (1972). The four factors include: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013), quoting *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

The length of the delay is calculated from the date of the defendant's arrest until the commencement of trial. *Waclawski*, 286 Mich App at 665. "[T]here is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim." *Id.* "When the delay is less than 18 months, the defendant must prove that he or she suffered prejudice." *Rivera*, 301 Mich App at 193. In this case, defendant's arrest warrant was issued on November 17, 2017, and his trial began on April 9, 2019, resulting in a delay of approximately 17 months. Therefore, because the delay in this case is less than 18 months, it is not presumptively prejudicial. *Waclawski*, 286 Mich App at 665. Defendant has the burden to demonstrate he suffered prejudice resulting from this delay; additionally, this Court is not required to inquire into the remaining factors. See *Williams*, 475 Mich at 262 (finding that a delay of at least 18 months or greater "triggers" a review of the additional factors).

However, even if this Court evaluates the remaining factors, the balance of the factors as a whole do not weigh in defendant's favor. With regard to the second factor, when assessing the reasons for delay, each period of delay is attributed to the defendant or the prosecution. *Waclawski*, 286 Mich App at 666. "Unexplained delays are charged against the prosecution. Scheduling delays and docket congestion are also charged against the prosecution." *Id*., quoting *People v Walker*, 276 Mich App 528, 541-542; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008), overruled in part by *People v Lown*, 488 Mich 242; 794 NW2d 9 (2011). However, "[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." *Williams*, 475 Mich at 263 (quotation marks and citation omitted).

While the record does not indicate the reasons behind several of the delays in this case, a comprehensive review of the record does not indicate that this factor should weigh in defendant's favor. Defendant admits that he is responsible for the delay that occurred between defendant's motion for a forensic evaluation on January 17, 2018, and the release of the CFP report on February 22, 2018. Defendant claims the record fails to clarify what occurred between defendant's arrest on November 17, 2017, and the trial court's referral to the CFP on January 24, 2018, and that this unexplained delay is thus attributable to the prosecution. However, defendant's instant case was complicated by separate, unrelated charges of operating a motor vehicle while intoxicated (OUI), third offense, MCL 257.625(1)(a), against defendant that were pending at the time of defendant's arrest in this case (hereinafter, the "OUI proceedings"). A bench warrant had been issued for defendant's arrest after defendant failed to appear for trial in the OUI proceedings on April 21, 2017, which remained in effect at the time of defendant's arrest for the instant case on November 17, 2017. After defendant's arrest, he participated in pretrial hearings related to the OUI proceedings on November 22, 2017, and November 29, 2017, in preparation for a set trial date before Judge Archie L. Hayman in January of 2018. However, Judge Hayman retired from the bench in the interim, resulting in a reassignment of the OUI proceedings to the newly-appointed Judge Bell on February 12, 2018. Additionally, defendant had a rotation of multiple appointed defense counsel during the OUI proceedings and the instant case; at least one of these changes was at defendant's request on January 3, 2018. Therefore, while part of the delay in this timeframe pertained to court scheduling issues that are thus "technically attributable to the prosecution," it is nonetheless "given a neutral tint and . . . assigned only minimal weight" in this Court's evaluation. *Williams*, 475 Mich at 263 (quotation marks and citation omitted). Additionally, part of this delay is attributable to defendant as a result of his request for appointment of new defense counsel and failure to appear for the initial trial date in the OUI proceedings.

Portions of the record for the case at issue after the results of defendant's evaluation at the CFP were released on February 22, 2018, are less transparent regarding the reason for delays that occurred. There is no evidence in the record for the rationale behind the delay in proceedings from the filing of the preliminary examination on April 30, 2018, to the plea offer hearing on September 10, 2018, although there is evidence that a plea was offered to defendant during that time period. This unexplained delay must thus be attributed to the prosecution, though it is necessary to note the record is devoid of evidence that the delay was a result of negligence or bad faith. However, the record indicates on September 11, 2018, the case at issue was reassigned from Judge Yuille to Judge Bell under MCR 8.111(D), because Judge Bell was presiding over defendant's OUI proceedings; this resulted in the subsequent rescheduling of defendant's trial to April 9, 2019, four

months later than initially scheduled. Because this rescheduling was a result of court scheduling issues, this portion of the delay is "given a neutral tint and . . . assigned only minimal weight" in this Court's evaluation. *Williams*, 475 Mich at 263 (quotation marks and citation omitted).

With regard to defendant's assertion of the right to a speedy trial, defendant did not assert his right to a speedy trial until the pretrial hearing on April 8, 2019—the day before his trial began. While defendant claims to have requested defense counsel file a motion for speedy trial at his preliminary examination on March 28, 2018, there is no evidence of this in the record. Nevertheless, defense counsel stated on the record in the trial court that he had discussed the issue whether defendant's speedy trial rights were violated with defendant earlier in the proceedings, but informed defendant that the trial court had found good cause for every adjournment that had occurred in the course of this case proceeding to trial, making a motion for speedy trial inappropriate.

Finally, defendant has not demonstrated that he was prejudiced by the delay in this case. "There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense." *Williams*, 475 Mich at 264, quoting *Collins*, 388 Mich at 694. "Prejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. (quotation marks omitted). Defendant admits the record offers no evidence that defendant suffered actual prejudice as a result of the delay, but claims the question whether he was unable to present his defense as a result of the delay should be remanded to expand the record. Because the delay in this case was not presumptively prejudicial, defendant had the burden to demonstrate prejudice. *Waclawski*, 286 Mich App at 665. Defendant has offered no justification for his argument in favor of remand to expand the record in this instance. Considering the record is completely devoid of any indication that defendant's trial defense was impaired due to the delay, in conjunction with defendant's failure to make any specific claim of prejudice on appeal, defendant has not met his burden to show prejudice and has not demonstrated good cause for a remand on this issue. *Waclawski*, 286 Mich App at 665. Therefore, defendant was not deprived of his right to a speedy trial.

C. PROSECUTORIAL MISCONDUCT

Defendant claims the prosecutor engaged in misconduct with regard to statements made by the prosecutor during voir dire in response to a prospective juror's comments, which concerned the prosecutor's confidence regarding his involvement in previous criminal cases. We disagree.

Due process requires the prosecution to prove every element of a charged crime beyond a reasonable doubt. US Const, Am XIV; *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). When evaluating allegations of prosecutorial misconduct, the test is whether a defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64. "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial," and "[t]hey are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). While "[t]he prosecutor need not speak in the 'blandest of all possible terms,' " *People v Blevins*, 314 Mich App 339, 355; 886 NW2d 456 (2016), quoting *People v Cowell*, 44 Mich App 623, 628-629;

205 NW2d 600 (1973), a prosecutor "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Additionally, a prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id*. at 276.

"Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to the prosecutor's comments during voir dire. Therefore, the issue of prosecutorial misconduct is not preserved.

Generally, "[i]ssues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "[T]o avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id*. Reversal is only warranted when a plain error led to the conviction of an innocent defendant or when a plain error affects the "fairness, integrity or public reputation of judicial proceedings" generally. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), quoting *Olano*, 507 US at 736-737 (1993). A nonconstitutional error does not constitute grounds for reversal unless, after an examination of the entire case, it affirmatively appears more probable than not that the error was outcome-determinative. *People v Brownridge*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant highlights an exchange between the prosecutor and a prospective juror, labeled juror 3, during voir dire as evidence of prosecutorial misconduct:

> *The Prosecutor*: Does anybody have a belief that you should not sit here in judgment of another human, whether it is a religious or it's just a philosophical personal belief?
>
> Number 3, what would your thought (inaudible)—
>
> *Juror 3*: (inaudible) to judge anybody.
>
> *The Prosecutor*: Beg your pardon?
>
> *Juror 3*: How many times has somebody been wrongfully convicted and they were innocent? How many times? How many times have you actually done it accidentally? How many times has it been done? I don't—I don't want that burden on me.
>
> *The Prosecutor*: Okay. Well I'll give you an answer; me, never. I don't have any worry about the confidence of any case I've ever brought, number one.
>
> *Juror 3*: That's your choice to do it as an occupation.

The Prosecutor: Yes, sir.

Juror 3: I'm forced to be here to be put a burden on, and I don't know this guy. I didn't see the stuff go down.

The Prosecutor: You don't—right.

Juror 3: But I'm to bring, I'm going to listen to evidence? We don't know if it's wrong or right. We don't know who is—

The Prosecutor: That's absolutely—that's spot on. Thank you for raising your hand. That's absolutely the kind of reaction I hope and expect to hear from all of you. But when you sit together and hear just what is admissible from Her Honor, you weren't there because if you were you would be a witness. I'd be calling you and putting you on the witness stand. But if you are given the law and told just to listen to what comes from the witness stand, the items, exhibits that I put into evidence, and judge it just on the law, do you think you can put this general philosophical problem you kind of referred to aside to hear this case out? And I know you've got scheduling issues (inaudible).

Juror 3: No.

The Prosecutor: Do you think you can? And if you think you can't, we need to know that too and that's all right.

Juror 3: No, I'm not gonna put that burden on my shoulders.

The Prosecutor: All right.

Defendant asserts the effect of this comment was to deny defendant a fair and impartial trial, because it was extremely prejudicial to defendant. According to defendant, the prosecutor's response to the juror implied he would never prosecute an innocent defendant, and thus implied that he had some special knowledge that guaranteed defendant was guilty.

However, defendant's argument is unavailing. Defendant's argument mischaracterizes the prosecutor's statement when evaluated in its context. The tentative juror opined regarding the philosophical burden of participating in a criminal trial without having been a direct witness to the alleged events. Immediately before the prosecutor's statement at issue, the tentative juror asked the prosecutor about the number of occasions in which the prosecutor accidentally brought, or was involved in, a case where an individual was wrongfully *convicted*. Thus, the prosecutor's statement of "me, never[,]" expressed the prosecutor's belief that he himself had never previously brought a case *leading to a conviction* in which a defendant was actually innocent. The distinction is relevant: a conviction, by definition, indicates that the trier of fact found the prosecutor met his burden to prove every element of a charged crime beyond a reasonable doubt. The prosecutor's expressed confidence in the previous cases he had brought thus did not indicate the prosecutor would only pursue charges against guilty defendants, or otherwise indicate the prosecutor had some special knowledge of any individual defendant's guilt. Rather, the statement expressed the prosecutor's belief that, in his career, he had not personally brought charges that resulted in the

conviction of an innocent defendant. Or, alternatively stated, the prosecutor's "confidence" was because of the prosecutor's belief that he has always fulfilled the requirements of his duty as a prosecutor to only bring forth cases in which he has enough evidence to warrant bringing the charges in the first place. Such statements did not offer the prosecutor's personal views on defendant's individual guilt or otherwise denigrate defendant, suggest the prosecutor had personal knowledge of any defendant's supposed guilt, nor appeal to the jury to convict on the basis of their civic duty. *Bahoda*, 448 Mich at 282-283. Even if the prosecutor's statement invited the jury to speculate that the prosecutor was confident in the strength of his case against defendant, this does not by any means indicate that his confidence was on the basis of personal knowledge outside the context of the evidence to be presented once the trial began.

Furthermore, considering the prosecutor's comments as a whole and in context, the comment was isolated, brief, and likely did not deflect the jury's attention from the evidence presented. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *Unger*, 278 Mich App at 237. After this interaction, the prosecutor informed the jury that it was necessary to prove every element of a crime beyond a reasonable doubt in order to find defendant guilty and that "[w]hat we need here is you folks coming in factually as a blank slate." The trial court instructed the jury at the beginning and end of the trial that the prosecutor's commentary and statements are not evidence, the prosecutor was required to prove each element of the charges beyond a reasonable doubt, and that the jury was required to base their verdict on the properly-admitted evidence presented. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Furthermore, any particular influence this interaction may have had on the individual prospective juror involved and other prospective jurors was mitigated, because this juror was dismissed and did not serve on the finally-constituted jury. Therefore, there was no plain error affecting defendant's substantial rights, and defendant was not denied a fair trial. *Carines*, 460 Mich at 763.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel in violation of his federal and state constitutional rights. Specifically, defendant contends defense counsel rendered inadequate assistance in three ways: (1) his failure to object to the trial court's misleading instructions regarding defendant's state of mind; (2) his failure to bring a motion for speedy trial; and (3) his failure to object to the prosecution's comments during voir dire. Defendant further argues these acts resulted in prejudice and, thus, defendant's convictions should be reversed. We disagree.

Generally, a defendant preserves a claim for ineffective assistance of counsel by raising the issue in a motion for a new trial or motion for an evidentiary hearing in the trial court. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008), citing *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant did not move for a new trial or an evidentiary hearing. Therefore, the issue whether defendant was denied his federal and state constitutional right to the effective assistance of counsel is unpreserved. However, defendant may nonetheless assert a claim of ineffective assistance involving facts of record. *Id*. at 410.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "This Court reviews findings of fact for clear error and questions of law de novo." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). "However, because defendant failed to move for a new trial or an evidentiary hearing, this Court's review of his ineffective assistance of counsel claim is limited to errors apparent on the record." *Rosa*, 322 Mich App at 741.

To support a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "[T]he defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id*. "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-243. The cumulative effect of several minor errors involving defense counsel's performance can warrant reversal even when the individual errors would not. *Id*. at 258.

As discussed, defendant has not demonstrated that the trial court erred in its instructions to the jury, that defendant was deprived of his right to a speedy trial, or that the prosecutor's statements during voir dire constituted misconduct, such that he was denied a fair trial. Defendant therefore failed to meet his burden to establish the factual predicates underlying his claim that defense counsel was ineffective. See *Carbin*, 463 Mich at 600. Given the disposition of these issues, this Court rejects defendant's contention that defendant was denied the effective assistance of counsel through defense counsel's failure to object to the jury instructions, failure to file a motion for a speedy trial, and failure to object to the prosecutor's statement during voir dire. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because defendant's ineffective assistance of counsel claim is premised on failures to advance meritless arguments, defendant's claim fails.

III. CONCLUSION

The trial court did not plainly err in its presentation of the jury instructions at trial. Defendant's right to a speedy trial under the federal and Michigan constitutions was not violated, and defendant was not denied a fair and impartial trial on the basis of prosecutorial misconduct. Finally, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola