STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAJUAN TREMAIN BENSON,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 352972
Washtenaw Circuit Court
LC No. 19-000306-FH

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions for six counts of delivery of a controlled substance less than 50 grams. Defendant challenges his convictions on appeal, arguing that his trial counsel rendered ineffective assistance in several respects, that the trial court erred in failing to grant his request for substitute appointed counsel, and that the lapse of time between the crimes and the filing of criminal charges against him violated his due-process rights. Finding no merit in these arguments, we affirm defendant's convictions. Because an error is apparent on the judgment of sentence, however, we vacate defendant's sentences and remand to the trial court for correction of the error on the judgment of sentence.

I. BACKGROUND

The Criminal Charges. On January 16, 2019, the prosecutor filed a felony complaint, setting forth six counts against defendant for delivery of a controlled substance less than 50 grams, MCL 333.7401(1),(2)(iv). The trial court issued a felony warrant that same day, which was marked as cancelled on January 25, 2019, indicating that defendant had been arrested on or about that date. On April 11, 2019, the prosecutor filed a habitual-offender notice, placing defendant on notice that he had been previously convicted of three or more felonies and that the prosecutor intended to seek the enhanced penalties provided by MCL 769.12.

Initial Pre-Trial Proceedings. On January 26, 2019, defendant filed a request for court-appointed counsel, which the trial court granted the same day. On February 6, 2019, the Washtenaw County Public Defender's office filed an appearance of counsel on behalf of defendant.

On February 7, 2019, the trial court held a probable-cause conference. At that hearing, defendant stated that he had informed the magistrate previously that he wanted to represent himself, but that the magistrate "basically silenced me and blew me off," and the magistrate then appointed the Public Defender's office as defense counsel. Defendant stated, "I want to represent myself." Defendant also argued that the appointment of the Public Defender as his defense counsel was a violation of his "Fourteenth Amendment right to due process." But the transcript of the hearing makes clear—from the outset of the hearing—that the Public Defender's office was acting simply as stand-by counsel, and that defendant was representing himself at that conference.

At this probable-cause conference, defendant argued that the prosecutor was required to provide him with a copy of a probable-cause affidavit, appearing to believe that this criminal prosecution was based on a controlled-buy of drugs through a confidential informant. The prosecutor inquired on the record whether defendant wanted to discuss a potential plea, and defendant indicated that he was willing to "talk about a settlement," which led the trial court to schedule another probable-cause conference and to postpone the preliminary examination by an additional week.

On February 14, 2019, the trial court held a second probable-cause conference. Defendant once again represented himself at that conference, with the assistance of stand-by counsel from the Public Defender's office, and he reiterated to the trial court that "I'm alright ma'am. I can represent myself." The prosecutor stated that he had met with defendant and his stand-by counsel in person at the county jail to discuss a possible plea agreement. Defendant had requested that he be allowed to plead to misdemeanor charges, rather than six 20-year felony charges. The prosecutor conveyed that request to the lead investigating officer, who rejected defendant's request. The trial court inquired whether the prosecutor was extending any type of plea offer, and the prosecutor stated, "I don't think he's interested in [a] multiple felony offer, given the parole [tail] that he has, at this juncture."

The trial court again told defendant that, if he intended to represent himself, he could "talk to the Prosecutor about the case and see if there's some type of resolution or plea offer," or the case would be set for a preliminary examination the following week. Defendant asked the trial court to "push the hearing back at least three weeks" because he wanted transcripts of the two probable-cause conferences. The trial court agreed to delay the preliminary examination for four additional weeks, given the amount of time necessary for trial-court staff to prepare the transcripts that defendant had requested.

On March 14, 2019, defendant filed a second request for a court-appointed attorney, and the trial court—for the second time—appointed the Washtenaw County Public Defender as defendant's counsel. On March 28, 2019, the prosecutor and defendant filed a written stipulation to adjourn the preliminary examination from March 28, 2019 to April 4, 2019. The stipulation stated, "This adjournment [is] due to the request of the Defense as Mr. Benson wanted his Preliminary Exam be handled by Senior Assistant Public Defender Sheila Blakney." The trial court granted the stipulated request for adjournment of the preliminary examination.

Preliminary Examination. On April 4, 2019, the trial court held defendant's preliminary examination. At the outset of the preliminary examination, Senior Assistant Public Defender Sheila Blakney indicated that defendant "wants a certain motion written . . . prior to preliminary

examination" and that the Public Defender's office was not willing to pursue that motion because it was not "warranted or required legally," leaving the Public Defender's office "at an impasse" with defendant. The Public Defender's office therefore requested permission to withdraw as defendant's counsel and requested that the trial court appoint substitute counsel to represent defendant. Defendant stated on the record that there had been a "complete breakdown" of "communication" with the Public Defender's office.

The prosecutor opposed the motion to withdraw as appointed counsel and for appointment of substitute counsel, citing the number of times he had already met with defendant and his various attorneys, and the number of times he had been prepared to proceed with witnesses at a preliminary examination. The prosecutor also argued that the trial court should not grant a motion to allow defense counsel to withdraw and appoint substitute counsel simply because the defendant wanted his appointed counsel to file a motion that counsel was unwilling to file because she thought it was factually and legally unwarranted.

Defendant and the Senior Assistant Public Defender indicated that the motion that defendant desired was premised on MCR 6.202, concerning the disclosure of forensic laboratory reports. The trial court examined the file and stated that "a notice of intent to use the laboratory technician's report [was] filed appropriately" on January 8, 2019, and that the notice had been served on defendant. The trial court treated defendant's comments and argument as an oral motion on the issue, and indicated that defendant was representing himself for purposes of arguing that motion. The trial court then ruled that—for purposes of the preliminary examination—the prosecutor could use the forensic laboratory report. The trial court also informed defendant that he could raise the issue again, in a written pretrial motion, if the case was bound over. Given that ruling on the motion, defendant indicated that he would allow the Public Defender's office to continue to represent him for purposes of the preliminary examination.

The Senior Assistant Public Defender then stated the following regarding a plea offer made to defendant by the prosecutor:

> In addition, the previous conflict, which was waived was, um, had to do with Mr. Reiser [the prosecutor] making him [defendant] an offer on the case. Uh, and Mr. Benson believed it was plea and a sentence offer. Mr. Reiser said it was a plea off—offer and not an offer, uh, for credit for time served, which is what Mr. Benson allege[s].
>
> And, Ms. Dudley, from our office, who was also present, said that Mr. Reiser, in fact, did not say the offer was credit for time served. So obviously, um, Mr. Benson still feels that, that was said. And that did put us, I thought, in a position of possible conflict, which is why I put it on the record. Um, and he [defendant] waived it.

The preliminary examination proceeded, and the prosecutor called Michigan State Police Trooper Thomas Proffitt to testify regarding the facts of the case, subject to cross-examination by defense counsel. At the close of testimony, defendant was bound over for trial on all counts.

At the end of the preliminary examination, the Senior Assistant Public Defender indicated that defendant was renewing his request that "different counsel be assigned to him in light of, um, our disagreements." The trial court entered a written order granting the motion, permitting the Public Defender's office to withdraw as counsel for defendant, and appointing Huron River Legal, PLLC as defense counsel.

Pre-Trial Conferences. On May 13, 2019, the trial court held a pretrial conference. Attorney Walter A. White of Huron River Legal, PLLC appeared on behalf of defendant. At the outset of that hearing, White indicated that defendant wanted to discharge him. Defendant stated that he believed White had rendered ineffective assistance of counsel because White had not visited him in jail between the preliminary examination and the pretrial conference, and because his first visit to see defendant in jail on the day of the pretrial conference was not timely:

> [*Mr. White*]: Your Honor, for the record, Walter White with Mr. Benson. Uh, Mr. Benson tells me he'd like to discharge me.
>
> [*Defendant*]: Oh, yes. Ms.—Mr.—Judge Swartz, he hasn't came to see me in a whole month. Comes 20 minutes before we about to come out here and tries to talk. That's ineffective assistance of counsel. You haven't—you haven't come to talk about motions, any of that stuff.

White reported that his law firm had just been appointed on this case and that he had received the police report earlier that morning. Based on White's representation that he had just received the police report, the trial court stated that defendant's motion "for new counsel is denied." Defendant continued to object, and the following exchange occurred:

> [*The Court*]: —motion to—for new counsel is denied.
>
> [*Defendant*]: Well, I'm gonna let you know off the—
>
> [*Mr. White*]: I mean, we—
>
> [*Defendant*]: —bat, I'm not about—I'm not about to—we—we—we have a attorney-client breakdown.
>
> [*The Court*]: I don't care.
>
> [*Defendant*]: I would not—I refuse—
>
> [*The Court*]: I don't care.
>
> [*Defendant*]: —to talk to him.
>
> [*The Court*]: I don't care.
>
> [*Defendant*]: Okay. And I just—
>
> [*The Court*]: See, here's—

[*Defendant*]: All I—

[*The Court*]: —the way it works, Mr. Benson.

[*Defendant*]: Talk to me.

[*The Court*]: The constitution says you're entitled to a lawyer. If you cannot afford one, one would be appointed. Not one of your choosing but one would be appointed. Mr.—

[*Defendant*]: Okay. But—

[*The Court*]: —White's been—

[*Defendant*]: —if a person is not gonna get—

[*The Court*]: —doing this for—

[*Defendant*]: —give me their—

[*The Court*]: —about 40 years. So, I think he's well qualified. So your motion for a new attorney is denied.

White then requested to adjourn the pretrial conference for a "couple weeks" so that he could consult with defendant and prepare a defense. Defendant interjected that he would refuse to work with White, and that he would be contacting the Attorney Discipline Board and the Attorney Grievance Commission to complain about White.

The trial court held a second pretrial conference on June 3, 2019. At the outset of that hearing, White indicated that defendant was still refusing to talk to him. Defendant confirmed that he was refusing to speak with White, and reiterated that he would continue that refusal. The trial court informed defendant that he was entitled to appointed counsel, but that he was not entitled to choose the counsel who was appointed:

[*Mr. White*]: Your Honor, when we were here on the 25th, Mr. Benson, uh, asked to terminate our service. Uh, I went to see him this morning. He declined to see me. Uh, I leave what happens next to Your Honor and Mr. Benson. I would indicate though that I—I'm gonna have a hard time representing him if he won't talk to me.

[*The Court*]: Well, that's at his peril. He can choose, I guess, not to talk to you if he wants to. But I'm not gonna do anything. Like I said last week, I wasn't gonna grant—you have a—he has a right to a lawyer but not one of his own choosing. Mr. White has plenty of experience. Long time criminal defense attorney. And Mr. Benson, if you choose not to want to talk to him about how you're gonna do your defense then I guess that's . . . on you.

Defendant asked the trial court, "How is he gonna defend me if we have a breakdown of communication? And I understand that you got, you know, absolute immunity but, like, you basically abusing it right now. If me and him have a breakdown of communication, that's a violation of my Six-Sixth Amendment right." The trial court indicated that any breakdown in communication was caused by defendant's unwillingness to speak with his attorney. Defendant then stated that he was unhappy with his attorney because he had not visited defendant far enough in advance of the pretrial conference:

> How you gonna come a hour before we come to Court and try to talk to me? And then the other . . . court date, you talking about some—you just got the ca—case load that morning. And they up there prescribing—they up there, uh, put me on your caseload at the prelim. Come on now.

Defense counsel explained that he had been at the jail at 11:00 a.m. that morning, and that defendant had refused to speak with him. Defendant countered by stating, "How we gonna . . . put a proper defense together within two hours?" When the trial court explained that this was not the trial, but just a pretrial conference, defendant stated that defense counsel should be working on filing motions. Defendant also reaffirmed, "I refuse to work with him." The trial court indicated, "[T]hat's at your peril as I said. You—you either work with him or not work with him. But I'm—you don't get to choose your lawyer." Defendant again stated, "I'm just letting . . . it be known I'm not . . . gonna work with him." The trial court then set dates for the final pretrial conference and trial, and adjourned the hearing.

On October 7, 2019, the trial court held a third pretrial conference, and White appeared on defendant's behalf. The trial-court record contains no further indication of any difficulty between defendant and White as his appointed counsel. White indicated that he had met with defendant, and that he was requesting an additional adjournment because he wanted to obtain surveillance videos of the drug buys, if any videos existed.[1] The prosecutor did not object defendant's request for an adjournment, and the trial court put the matter over for a new date.

On October 21, 2019, the trial court held a fourth pretrial conference, and White appeared on defendant's behalf. White indicated that trial was scheduled to occur the following week, and that he would be filing a motion later that day. He requested that the motion be heard as a motion in limine before trial the following week. The prosecutor did not object to that procedure, and the trial court adjourned the conference.

Criminal Jury Trial. Defendant's jury trial began on October 28, 2019, and White appeared on defendant's behalf. The trial lasted two days. On the first day, the parties argued a motion in limine, selected a jury, presented opening statements, and the prosecutor presented testimony from Trooper Thomas Proffitt. On the second day, the parties presented closing arguments, the trial court read the jury instructions, and the jury rendered a verdict.

[1] The trial-court record indicates that no video existed of the undercover trooper's drug purchases.

Before trial began, the prosecutor placed on the record the plea offer extended to defendant, and defendant rejected the plea offer by stating that he wished to go forward with the trial:

> [*The Prosecutor*]: Your Honor, one last thing that I'll put on the record is the offer that was conveyed to the Defendant through his attorney. And, uh, it's my understanding it's being declined but the offer was to plead as charged to all six counts. The People would dismiss the habitual offender notice. That's a fourth offense habitual. The counts would not be consecutive and that's discretionary for the sentencing court. But the People would agree that they would not be consecutive. A sentence agreement to 1 to 20 years [sic] Michigan Department of Corrections. The People have scored the guidelines at 10 to 46 [months] with the habitual offender fourth notification.
>
> [The Court]: Mr. White?
>
> [*Mr. White*]: Mr. Benson, did I convey that offer to you?
>
> [*Defendant*]: (no verbal response)
>
> [*Mr. White*]: Do you wish to accept that offer? Do you wish to go to trial?
>
> [*Defendant*]: Let's go to trial.

After the prosecutor's opening statement, defendant's trial counsel made an opening statement in which he laid out his theory of the case—misidentification. As defense counsel stated:

> It is our contention that the person that delivered those drugs was not Mr. Benson.
>
> The issue in this case is identification. The issue is not whether somebody sold narcotics or cocaine to the undercover officers. The question is whether it was Mr. Benson who sold those narcotics to the undercover officers, uh, three years ago or two years ago in a case which just has come before the courts this year.
>
> * * *
>
> . . . we're not contesting that somebody sold the police drugs. We don't know whether somebody sold the police drugs. We just know that he [defendant] didn't sell them drugs.

The prosecutor called a single witness—Trooper Proffitt. Trooper Proffitt testified that he met with a confidential informant in October or November 2016, and the informant told him that an individual named Dejuan [sic] Benson, who went by the nickname "Freddy B," was dealing drugs. On November 28, 2016, the trooper went with the informant to meet "Freddy B," and he observed the informant pay "Freddy B" $120 in exchange for crack cocaine. During that purchase, the informant introduced the trooper to "Freddy B." The trooper asked "Freddy B" if he could reach out in the future for purchases, and "Freddy B" agreed that he could. After that transaction, the trooper returned to his office, ran the full name given to him by the informant through a police database, and came up with the photograph from defendant's driver's license. The trooper

indicated that the photograph was "100%" the person he had observed selling drugs to the informant.[2] The trial court admitted into evidence, without objection, the driver's license photograph that the trooper had printed of the man from whom the informant had purchased drugs. The trooper identified that person as defendant, and described defendant as the person in the courtroom who was "wearing a white, uh, T-shirt. He has a beard and, uh, some tattoos on his arms." The trooper later testified that he was 100% certain that defendant was the individual who sold him drugs.

The trooper testified that, after their initial in-person meeting, he contacted defendant by cell phone and arranged to purchase more drugs, without going through the confidential informant as an intermediary. On December 2, 2016, he met defendant and purchased crack cocaine for $120. The trooper stated that the transaction was "face to face, hand to hand." He field-tested the drugs, which tested positive for cocaine. On December 13, 2016, he met defendant and purchased crack cocaine for $220. He field-tested the drugs, which tested positive for cocaine. On January 24, 2017, he met defendant and purchased crack cocaine for $240. He field-tested the drugs, which tested positive for cocaine. On February 3, 2017, the trooper again met defendant face-to-face and purchased crack cocaine for $120. He field-tested the drugs, which tested positive for cocaine. On March 6, 2017, the trooper again met defendant face-to-face and purchased crack cocaine for $120. He field-tested the drugs, which tested positive for cocaine. Finally, on April 24, 2017, the trooper met defendant face-to-face and purchased crack cocaine and heroin for $350. He field-tested the drugs, which were positive for cocaine and heroin.

When asked why he continued to purchase drugs from defendant, rather than arrest him, the trooper stated that he was "trying to get the bigger fish" and trying to find the "stash house" where the narcotics were kept. The trooper thought that defendant was moving from residence to residence, and he decided that defendant was "not as big of a fish" as he had thought initially. The trooper admitted that police did not arrest defendant during any of the seven occasions on which the trooper witnessed defendant sell narcotics.

On cross examination, defendant's trial counsel asked Trooper Proffitt about defendant's tattoos, in an effort to create reasonable doubt that the trooper had correctly identified defendant as the person who had sold him drugs:

> *Q.* Now, you might notice that Mr. Benson here has some tattoos on his arm. Was he ever dressed in such a way that you could see whether or not he had tattoos on his arm?
>
> *A.* No. Typically, uh—no.
>
> *Q.* You couldn't see it? Or you don't recall whether they were there?

[2] Defendant was not charged with a crime for his sale of cocaine to the informant.

A. I don't 100 percent recall his, uh, clothing on each—each deal but, uh, I mean, common sense tells me we—we're dealing with December, uh, and—January and February—

Q. So you're spec—

A. So, I'm guessing—

Q. You're—

A. —he was wearing a coat.

Q. —speculating, not remember really at this point; correct?

A. Yeah. The—his tattoos on his arms didn't stand out to me.

On redirect, the trooper stated that on all seven occasions when he interacted with defendant, he got a clear look at defendant, as they met face-to-face.

In closing arguments, defendant's trial counsel told the jury, "The issue in this case is, of course, identification" and defendant "can't add anything to what happened because he wasn't there." Defendant's trial counsel continued:

> Now, the Trooper says he's 100 percent sure that this is the man that he saw on six occasions almost four years ago. Three, almost four years ago he saw supposedly this man on six occasion[s] and he remembers him 100 percent.
>
> * * *
>
> Now, the interesting thing is, the Trooper said, hey, I'm a 100 percent sure that's the guy. But he didn't describe any particular features of his face. He didn't describe any scars. He didn't describe whether or not, uh, for example, uh, there were tattoos and the reason, of course, when I asked him about the tattoos were that, uh, he—it was in the winter and he was wearing a long shirt. But my client has tattoos that go right on down to his hands. And there's no testimony, none about the person that sold the drugs having tattoos all over his hands. This would be an important identifying feature.
>
> * * *
>
> I'm not saying that the drug sales didn't happen. I'm not saying the Trooper is lying. I'm saying the Trooper is mistaken on the issue of identification.

The jury deliberated for 35 minutes, and returned with a guilty verdict on all counts.

Sentencing. On November 25, 2019, the trial court conducted a sentencing hearing. Defendant's trial counsel stated that the guidelines range for defendant's minimum sentence was 10 to 46 months. The probation department recommended a minimum sentence of 46 months, in

part because defendant had refused to speak with the probation officer who was preparing the report. Defendant stated that he had been too sick to see the probation officer on the day that he arrived at the jail to see defendant. The trial court granted defendant's request to adjourn the sentencing to provide the probation officer another opportunity to interview defendant and prepare a report.

On January 13, 2020, the trial court conducted a second sentencing hearing. Defense counsel reported that the probation officer had recommended a sentence of 46 months to 20 years in prison. The prosecutor added that the probation officer recommended that the sentences run consecutively to the sentence defendant was then serving for his parole violation. The trial court noted that defendant had 14 felony convictions, and as a fourth-offense habitual offender, each conviction in this case carried a maximum sentence of life in prison. In addition, the trial court noted that the six convictions in this case occurred while defendant was on parole, and that these convictions marked his seventh overall felony committed while on parole. For each conviction, the trial court imposed a sentence of 46 months to 20 years in prison, each to be served concurrently to each other but consecutively to the sentence defendant was then serving for his parole violation.

The judgment of sentence contained in the trial-court record, however, states that defendant's conviction for Count I carries a sentence of 46 months to 20 years in prison, while his convictions for Counts II-VI each carry a sentence of 48 months to 20 years in prison. Because the parties agreed that the sentencing guidelines range for defendant's minimum sentence topped out at 46 months, a minimum sentence of 48 months would be an upward-departure sentence, and there was no indication in the sentencing transcript that the trial judge thought he was departing from the guidelines.

Motion for Remand. On appeal to this Court, defendant filed a motion to remand, arguing that he was entitled to a new trial because his trial counsel had rendered ineffective assistance of counsel. Specifically, defendant argued that his trial counsel "did not meaningfully review discovery with him, did not subpoena the employment records of the undercover officer even though Mr. Benson asked him to do so, and did not engage in meaningful discussions about the plea offer with him prior to trial." Defendant argued that he "made these complaints to the lower court and asked for a new attorney" at "numerous pretrial hearings." Defendant also argued that "Mr. White assured him that he would bring civilian clothing for him to wear at trial, but that he refused to do so, forcing Mr. Benson to go to trial wearing his prison-issued thermal undershirt that exposed his tattoos and make him look as though he did not take the trial seriously." The motion to remand did not mention any issue regarding pre-arrest delays.

In a signed statement attached to his motion to remand, defendant stated the following regarding his trial attorney:

> 5. Prior to my trial, my lawyer spent very little time with me, did not develop a trial strategy with input from me, and did not discuss with me possible plea offers from the State.
>
> 6. Prior to my trial, my lawyer did not show me the police reports or review other discovery.

> 7. My lawyer promised me that he would bring clothing for me to wear at trial, but failed to do so and claimed that he "forgot" them. I was therefore forced to go to trial wearing a white thermal undershirt that exposed my tattoos. This made me look unpresentable and as if I did not take the proceedings seriously to the jury.
>
> 8. I asked my lawyer to subpoena or otherwise obtain the employment records of the undercover officer and review them with me but as far as I know, he did not obtain the records and if he did, he did not review them with me.

This Court denied defendant's motion to remand "for failure to persuade the Court of the necessity of a remand" at that time. *People v Benson*, unpublished order of the Court of Appeals, entered November 18, 2020 (Docket No. 352972).

Defendant's appeal as of right from his convictions now comes before this Court for decision.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant argues that his trial counsel was ineffective because he failed to obtain employment records of Trooper Proffitt that could have been used during cross-examination, and because he failed to review discovery or discuss plea offers with defendant in any meaningful way.

To preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move in the trial court for a new trial or an evidentiary hearing, *People v Head*, 323 Mich App 526, 538-539; 917 NW2d 752 (2018), or file a motion to remand in this Court, *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. In this case, defendant filed a motion to remand in this Court, raising these issues. These issues are therefore preserved for appellate review.

A defendant claiming ineffective assistance of counsel must demonstrate: "(1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Randolph*, 502 Mich 1, 8; 917 NW2d 249 (2018). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 9 (cleaned up). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *People v Traver*, 328 Mich App 418, 422; 937 NW2d 398 (2019) (cleaned up). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*. (cleaned up). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *Id*. at 422-423 (cleaned up).

1. FAILURE TO CONDUCT DISCOVERY

Defendant argues that his trial counsel rendered ineffective assistance because he failed to obtain employment records for Trooper Proffitt. Defendant's entire appellate argument on this point is as follows:

> Mr. Benson also alleged that trial counsel failed to seek to obtain employment records for Trooper Proffitt in order to assist with cross examination or strengthen his position during plea negotiations. The records may or may not have advanced Mr. Benson's defense, but failing to even look at them could not have been a reasonable strategical decision.

Defendant has not shown, however, a reasonable probability that the outcome of the trial would have been different but for his trial counsel's alleged failure to obtain the now-sought employment records. Defendant does not even attempt to make this argument, stating in his appellate brief, "The records may or may not have advanced Mr. Benson's defense . . . . " Therefore, we conclude that defendant is not entitled to relief on this claim.

Defendant next argues that his trial counsel was ineffective because counsel "failed to come visit [defendant] to discuss and strategize with him," and defendant argues that he "repeatedly complained" about this issue to the trial court. We conclude that defendant's argument is without merit. Defendant represented himself at the first and second probable-cause conferences, with the assistance of stand-by counsel from the Public Defender's office. The Public Defender's office represented defendant at the preliminary examination, with the exception of an oral motion, on which the trial court permitted defendant to represent himself. At the close of the preliminary examination, defendant asked the trial court to appoint different counsel to represent him, and the trial court granted the motion. At the next hearing, which was a pretrial conference, the trial court was informed that defendant had refused to speak with his newly appointed counsel, Mr. White. Defendant confirmed this on the record at the pretrial conference, stating that he would continue his refusal to speak with his attorney. At the second pretrial conference, the trial court was once again informed that defendant continued in his refusal to speak with his attorney.

Defendant's appellate argument that he "repeatedly complained" to the trial court about his trial counsel's failure to visit and consult with him is disingenuous—defendant's complaints were made during the time period when defendant admitted that he was refusing to speak with his trial counsel whenever his trial counsel attempted to visit him. "[A] party may not harbor error at trial and then use that error as an appellate parachute." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). That is, a party cannot create the very error that it wishes to correct on appeal. *Id*. To do so is a waiver of the party's right to raise the issue on appeal. *Id*. at 726, n 41. Therefore, we conclude that defendant is not entitled to relief on this claim.

Defendant next argues that his trial counsel failed to discuss plea offers with him. There is no such error apparent on the record. In fact, the record indicates that defendant discussed several plea offers with the prosecutor.

Defendant first discussed a plea offer with the prosecutor while defendant was representing himself and while he had the assistance of the Public Defender's office. This included defendant

offering to the prosecutor a potential plea deal that would have involved defendant pleading to unspecified misdemeanor charges, rather than six 20-year felonies as a fourth-habitual offender. The transcript from the February 14, 2019 probable-cause conference indicates that the prosecutor conveyed defendant's request to the lead investigating officer, who rejected the request. When the trial court asked the prosecutor whether he was extending any other plea offer, the prosecutor indicated that defendant was not interested in an offer involving pleading guilty to multiple felonies, given defendant's incarceration for his parole violation. At the end of that hearing, the trial court expressly encouraged defendant to talk to the prosecutor to discuss plea offers.

At the preliminary examination, the parties discussed the fact that the prosecutor had extended defendant a plea offer. Although the record does not indicate the details of that offer, it is clear that defendant portrayed the prosecutor's offer as if it involved a jail sentence with credit for time served, which was contrary to the recollection of the attorney from the Public Defender's office who was then representing him.

At trial, the prosecutor offered defendant the opportunity to plead guilty to all six of the charged felonies, in exchange for dismissal of the fourth-offense habitual offender notice. The prosecutor also agreed to recommend sentences of 1 to 20 years in prison, with all six sentences to be served concurrently with one another. The prosecutor's comments indicated that defendant had already been advised of the offer, because it was the prosecutor's "understanding it's being declined." Defendant rejected the offer by stating on the record, "Let's go to trial."

There is no indication in the record that the prosecutor made any plea offers of which defendant was not fully advised. Furthermore, defendant repeatedly demonstrated his capacity to complain to the trial court if he felt that his appointed defense counsel's services were unsatisfactory to him. At the outset of trial, when defendant was asked about the prosecutor's plea offer, defendant did not object that he was previously unaware or inadequately advised of the implications of the plea offer. We conclude that defendant has not overcome his heavy burden of demonstrating ineffective assistance of counsel.

2. TRIAL ATTIRE

Defendant next argues that his trial counsel rendered ineffective assistance of counsel because he failed to ensure that defendant was appropriately dressed for trial. Defendant argues that he was wearing a "jail-issued thermal undershirt that exposed his tattoos and made him appear unprofessional and unkempt before the jury." Defendant does not argue that his attire was recognizable as jail-issued clothing, but only that it exposed his tattoos.

The United States Supreme Court has ruled that, when a defendant makes a timely request to wear civilian clothing at a jury trial, the trial court must grant his request. *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Id*. at 504 (citation omitted).

The Michigan Supreme Court has also adopted the rule that a criminal defendant has the right to be dressed in civilian clothing at a jury trial. See *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969).

> Since the defendant, pending and during his trial, is still presumed innocent, he is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial jury will be drawn, clothed as a convict. [*Id*. at 474, quoting 21 Am Jur 2d, Criminal Law, p 275, § 239.]

Yet, when a defendant fails "to make timely protest of the denial of such right," he is not deprived of this right. *Id*. at 475. As the United States Supreme Court explained in *Estelle*:

> [C]ourts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire. The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.
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> Courts have therefore required an accused to object to being tried in jail garments, just as he must invoke or abandon other rights. The Fifth Circuit has held: "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." [*Estelle*, 425 US at 507-508 (citations omitted).]

In this case, defendant makes no argument that he made a request of the trial court regarding his attire. There is no such request on the trial-court record. Therefore, the record does not support a conclusion that defendant made a timely request to wear civilian clothing for trial or that the trial court deprived defendant of that opportunity. Because defendant did not "make timely protest" regarding the clothing in which he appeared for trial, he was not deprived of his constitutional rights. See *Shaw*, 381 Mich at 474-475.

Further, defendant does not argue that his attire was recognizable as jail or prison clothing. Defendant simply describes his trial attire as a white thermal undershirt. He does not argue that the jury would or could have perceived the clothing as jail-issued clothing, and there is no indication in the record that his clothing was recognizable as such. Therefore, defendant's "right to be dressed in civilian clothing," see *id*., was not abridged.

Finally, defendant cannot overcome the presumption that his trial counsel's actions regarding defendant's trial attire were a matter of sound trial strategy. The record indicates that

defendant's trial counsel used defendant's tattoos as a tool for attacking Trooper Proffitt's identification of defendant as the person who sold him drugs. On the first day of trial, when the trooper identified defendant, the trooper described defendant as "wearing a white, uh, T-shirt. He has a beard and, uh, some tattoos on his arms." On cross-examination, defendant's trial counsel asked the trooper about the tattoos, and pointed out that the trooper did not notice any tattoos on the person who sold him drugs. In closing arguments, defense counsel emphasized this issue as part of his argument that the trooper had misidentified defendant as the person who sold him drugs. Defendant's trial counsel argued: "But my client has tattoos that go right on down to his hands. And there's no testimony, none about the person that sold the drugs having tattoos all over his hands. This would be an important identifying feature."

Defendant's trial counsel advanced a defense that was based, in part, on the existence of defendant's tattoos. This was part and parcel of trial counsel's strategy of pursuing a defense of misidentification. Based on this record, defendant has not overcome the strong presumption that counsel's performance was born from a sound trial strategy. See *Traver*, 328 Mich App at 422. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *Id*. at 422-423 (cleaned up). Defendant has not overcome his heavy burden of demonstrating ineffective assistance of counsel.

B. APPOINTMENT OF SUBSTITUTE COUNSEL

Defendant next argues that the trial court abused its discretion when it refused to grant his request for substitute counsel. We conclude that defendant's argument is without merit.

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *Id*.

In this case, defendant made several different requests for the appointment of counsel and substitute counsel. Defendant requested the appointment of counsel within 10 days of the filing of the felony complaint, and the trial court appointed the Public Defender's office to represent him. Defendant then elected to represent himself, and argued that the trial court's appointment of the Public Defender as stand-by counsel was a deprivation of his Sixth Amendment right to represent himself. Two months after the filing of the felony complaint, defendant filed a renewed request for appointed counsel and the trial court granted that request, reappointing the Public Defender's office—for the second time—to represent defendant.

Both before and after the preliminary examination, defendant expressed dissatisfaction with the Public Defender's office and moved the trial court for the appointment of substitute counsel. The trial court granted that request, allowed the Public Defender's office to withdraw as counsel, and appointed White as defendant's trial counsel. Both the first and second occasions when White tried to visit defendant to discuss the case, defendant refused to see or speak with him. Defendant repeatedly insisted on the record that he would refuse to cooperate with White, even though the record contains no indication that defendant had ever spoken with White in person before deciding that he did not want to work with White. When defendant requested that the trial court appoint yet another substitute counsel—which would have been the fourth time the trial court appointed counsel to represent defendant—the trial court declined to do so.

Defendant did not articulate any reason why good cause existed for the trial court to replace White as defendant's trial counsel. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id*. Defendant did not inform the trial court of any trial tactic on which he and White disagreed. Defendant simply refused to speak with White on the first two occasions that White attempted to meet and speak with him. The trial court indicated that White was an experienced criminal defense attorney, and declined defendant's request to appoint new counsel for the fourth time. We conclude that the trial court did not abuse its discretion in denying defendant's motion for substitution of appointed counsel.

C. PRE-ARREST DELAY

In his Standard 4 brief, defendant argues that the delay between the crimes in question and his arrest for those crimes violated his due-process rights. Defendant argues that the delay impaired his defense because he could no longer remember the details regarding where he was and who he was with on the dates and times when the trooper claimed to have purchased drugs from him. "A challenge to pre-arrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). In this case, defendant did not file a motion in the trial court, arguing that the trial court was required to dismiss the charges against him because of the pre-indictment or pre-arrest delay in this case. Therefore, this issue is not preserved for appellate review, and this Court reviews this issue for plain error affecting defendant's substantial rights. See *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169 (2014).

"The United States Supreme Court established that the Due Process clause plays a limited role in preventing unjustified preindictment or prearrest delay." *Cain*, 238 Mich App at 109 (cleaned up). "Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case." *Id*. at 108. "A defendant has the burden of coming forward with evidence of prejudice resulting from the delay while the prosecutor has the burden of persuading the reviewing court that the delay was not deliberate and did not prejudice the defendant." *Id*.

> In order to establish a due process violation in the context of prearrest delay a defendant must first demonstrate prejudice. The prosecutor then bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice results. In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. [*Id*. at 109 (cleaned up).]

The critical point in the analysis of this issue is that a defendant must show prejudice from the pre-arrest delay:

> Mere delay between the time of commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process. [*People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009).]

"Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *Id*. at 237 (cleaned up). "Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected." *Id*. "Actual and substantial prejudice requires more than generalized allegations." *Id*. (cleaned up). "Defendant must present evidence of actual and substantial prejudice, not mere speculation." *Woolfolk*, 304 Mich App at 454. "A defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, even if the delay was an especially long one." *Id*. (citations omitted).

In this case, defendant argues that the 21-month delay between the last date on which Trooper Proffitt purchased cocaine from defendant (on April 24, 2017) and the date of defendant's arrest (in January 2019) violated defendant's due-process rights because he was no longer able to remember precisely where he was or who he was with on the various dates when the trooper purchased the drugs. We conclude that defendant's argument is without merit.

In *Woolfolk*, the defendant argued that a delay of nearly five years in arresting him and charging him with murder violated his due-process rights, or, alternatively, that he was denied the effective assistance of counsel because his trial counsel did not object to the pre-arrest delay. *Woolfolk*, 304 Mich App at 453. On appeal, the defendant offered an affidavit asserting that he was at a party at his father's residence "the entire night" in question, that he was not driving and did not have access to a black car that evening, and that no one could testify with certainty regarding either of these circumstances because of the long delay. *Id*. at 454. The defendant's affidavit, however, did not "purport to identify any witnesses who would have testified on his behalf but for the delay." *Id*. at 455.

In this case, defendant offers no affidavit asserting that he had a defense or an alibi for all or any of the seven separate dates on which the trooper testified to the purchase of cocaine from defendant. Furthermore, defendant identifies no potential witnesses who could have testified on his behalf, such as a person or persons with whom he was living during the six-month period over which the drug sales took place. As in *Woolfolk*, defendant "does not purport to identify any

witnesses who would have testified on his behalf but for the delay" and "does not allege that he asked his trial counsel to contact any specific person in an attempt to obtain alibi testimony." *Id*. Therefore, we conclude that defendant has not established actual and substantial prejudice resulting from the pre-arrest delay in this case. See *id*.

Furthermore, the prosecutor presented evidence regarding the reason for the delay in charging and arresting defendant. The trooper testified at trial that he did not attempt to arrest defendant because he was trying to locate the "stash house" where defendant kept the drugs that he sold on the street, and because he was trying to locate the "bigger fish," i.e., defendant's suppliers. Although there was no evidence in the record regarding any investigative efforts that occurred between the last drug sale and defendant's arrest, that issue was simply unexplored at trial. Although defendant claims that the police knew his whereabouts (because he was incarcerated), he presented no evidence tending to indicate that the prosecutor's decision about when to bring criminal charges was designed to gain a tactical advantage for the prosecutor. As in *Woolfolk*, we conclude that the pre-arrest delay was reasonable and justified under the circumstances, and that defendant has failed to show plain error.

Because we conclude that no error occurred regarding pre-trial delay, we need not address defendant's related claim of ineffective assistance of counsel.

D. SENTENCING

As stated earlier, the record is clear that the prosecutor, defense counsel, and the trial court all understood and agreed that the minimum-sentence range of 10 to 46 months applied to each of defendant's convictions. The transcript of the second sentencing hearing is also clear that the trial court imposed a sentence of 46 months to 20 years in prison for each of defendant's convictions, and that those sentences were concurrent to each other but consecutive to the sentence defendant was then serving for his parole violation. Yet, the judgment of sentence contained in the trial-court record indicates that defendant's sentence for Count I was 46 months to 20 years in prison, while his sentences for Counts II-VI were each 48 months to 20 years in prison. A minimum sentence longer than 46 months would have required justification as an upward-departure sentence. *People v Dixon-Bey*, 321 Mich App 490, 524-525; 909 NW2d 458 (2017). Because the transcripts of the sentencing hearings do not include any discussion of a departure from the sentencing guidelines, we conclude that the judgment of sentence contains a clerical error.

III. CONCLUSION

We affirm defendant's convictions, but vacate defendant's sentences and remand to the trial court for correction of the clerical error on the judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle