STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
v	No. 306085 Wayne Circuit Court
JOHN ALLEN ALEXANDER, Defendant-Appellant.	LC No. 11-001669-FH

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of second-degree fleeing and eluding, MCL 257.602a(4), and resisting and obstructing, MCL 750.81d(1).[1] The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to life with the possibility of parole for the second-degree fleeing and eluding conviction and to five to fifteen years' imprisonment for the resisting and obstructing conviction. We affirm.

I. DEPARTURE FROM SENTENCING GUIDELINES

Defendant first contends that the trial court did not state any substantial and compelling justification for its departure from the sentencing guidelines and did not rely on objective and verifiable factors. Defendant further argues that the life sentence was not proportionate to the seriousness of the circumstances surrounding the offense and the offender. In addition, he argues that the court gave no explanation for the extent of the departure. See, e.g., MCL 769.34(3) and MCL 769.31(c) and (d).

We review the trial court's determination that the factors in a particular case are substantial and compelling reasons to depart from the sentencing guidelines for an abuse of discretion, but the trial court's factual findings are reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is reviewed as a matter of law. *Id*. at 264.

[1] A charge of receiving and concealing stolen property was dismissed before trial.

The trial court noted defendant's extensive and recidivistic criminal history, which began in 1978 and continued unabated. Defendant was aged 45 at sentencing and had incurred 13 prior felony convictions and one misdemeanor conviction. He also had a history of substance abuse. The court noted that defendant had reached habitual-offender-fourth status in 1991, "20 years ago, yet has continued his nefarious career as a habitual offender for another 20 years." The court emphasized several times how quickly defendant committed new crimes after being placed on parole. In one instance, the court noted, defendant had lasted only 39 days before being charged with a new felony, and in another instance he was on parole for 10 months before he committed his next felony. Finally, summing up defendant's criminal history, the court remarked that the crimes at issue in this case were committed only two months after defendant had been paroled for his most recent prior conviction.

The trial court also noted that the instant crimes made defendant, in reality, an habitual offender, *thirteenth* offense, rather than fourth. The court clearly stated that defendant's extensive criminal history made him the exact type of "candidate" envisioned by the Legislature when it provided for a sentence of parolable life under the habitual-offender-fourth statute. We find that the trial court sufficiently articulated a substantial and compelling reason to justify its guidelines departure and to enable this Court to undertake an effective appellate review. *Id*. at 259-260. The fact that defendant had reached habitual-offender-fourth status 20 years earlier and was now, in actuality, convicted of his thirteenth felony, was not taken into account in determining the appropriate sentence range and had not been given adequate or proportionate weight in the guidelines recommendation.

The trial court's reasons for departure were objective and verifiable, because they were based on defendant's extensive criminal history and were capable of being confirmed. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The trial court's statement concerning the legislative intent behind the habitual-offender-fourth "parolable life" sentence, and how far beyond his fourth offense defendant had gone, clearly explained why the departure was more proportionate than the sentencing guidelines recommendation. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). The court's reiteration of defendant's extensive criminal history of recurring and escalating acts demonstrated his dangerousness. Defendant's sentences were proportionate to the seriousness of his conduct and prior criminal history. *Id*. at 300, 305. Giving the deference that is due to the trial court, *Babcock*, 469 Mich at 270, we find that the trial court identified substantial and compelling reasons based on objective and verifiable facts to depart from the guidelines, did not make any factual errors, and did not abuse its discretion.[2]

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[2] Although his two sentences run concurrently, defendant briefly contends that the resisting and obstructing sentence also represented an unlawful departure. While there is some dispute over whether lower-class crimes must be assigned guidelines scores, see, generally, *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005), even if we take at face value defendant's argument that the court departed by 14 months in the resisting and obstructing case, this clearly would have been justified for the same reasons supporting the fleeing and eluding sentence.

II. IMPEACHMENT EVIDENCE

Defendant contends that the court abused its discretion[3] when it allowed impeachment of him with two prior convictions of receiving and concealing stolen property. See *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005), MRE 609(a), (b), and (c), and *People v Allen*, 429 Mich 558, 579, 605-606; 420 NW2d 499 (1988).

Defendant was impeached with his 2003 and 2007 convictions for receiving and concealing stolen property. These crimes contained elements of theft and were punishable by imprisonment in excess of one year. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006), and MRE 609(a)(2)(A). Both occurred within the 10-year time limit required by MRE 609(c). They were not similar to the remaining charges against defendant. See MRE 609(b). Moreover, the court made the determination that the probative value of the evidence outweighed the prejudicial effect. The court found that defendant's credibility was "paramount" to the issue and that the evidence was not "unduly prejudicial under MRE 403." In its determination of prejudice, the trial court needed to consider only "the similarity to the charged offense and the importance of the defendant's testimony to the decisional process . . . ." *Allen*, 429 Mich at 606. The record reveals that the court's ruling did not deter defendant from testifying. *Meshell*, 265 Mich App at 636. Finally, the court gave a limiting instruction to the jury.

We find that the trial court did not abuse its discretion in permitting impeachment of defendant with his prior convictions. We find no merit to defendant's contention that the trial court erroneously "created a new standard" under MRE 403 when it found that the evidence was not "unduly prejudicial." MRE 609(a)(2)(B) requires the court to determine whether "the probative value of the evidence outweighs its prejudicial effect." The court's "unduly prejudicial" statement did not create a new standard; the court was simply paraphrasing the applicable standard.

Defendant also takes issue with impeachment evidence consisting of aliases, different birth dates, and different social security numbers allegedly used by him. However, under the circumstances here, where defendant admitted to lying and implied, in his answers to the prosecutor, that his use of false identifying information was for the purpose of escaping trouble, the trial court cannot be deemed to have abused its discretion in admitting the evidence. See, e.g., *People v Thompson*, 101 Mich App 609, 614; 300 NW2d 645 (1980), and *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

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[3] We review the admission of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

III. SUFFICIENCY OF THE EVIDENCE

A. FLEEING AND ELUDING

Defendant contends that there was insufficient evidence to establish the requisite element of identification to convict defendant of fleeing and eluding. See MCL 257.602a(1) and (4).

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *Id*. at 514-515.

There was sufficient evidence to convict defendant of fleeing and eluding. The jury was presented with two opposing theories and chose to believe the prosecution's theory, presented through the testimony of the police officer. Although there were discrepancies in the officer's description of defendant's clothing, these were matters for the jury to resolve. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The jury found the police officer's identification of defendant credible, and, again, this Court will not interfere with the jury's role of determining the credibility of the witnesses. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). A rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

B. RESISTING AND OBSTRUCTING

Defendant also contends that there was insufficient evidence to prove the essential elements of the crime of resisting and obstructing because the evidence did not establish beyond a reasonable doubt that defendant resisted or obstructed the police officer. MCL 750.81d(1).

To establish the offense of resisting and obstructing a police officer, the prosecution was required to prove that: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010). Failure to obey a police officer's order to stop, flight or attempted flight from the scene that actively interferes with a stop and investigation, and wrestling with a police officer amount to conduct constituting resisting and obstructing a police officer. See, generally, *People v Nichols*, 262 Mich App 408, 411-413; 686 NW2d 502 (2004); see also *People v Wess*, 235 Mich App 241, 242, 247; 597 NW2d 215 (1999), and *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994) (analyzing the analogous statute of MCL 750.479). Here, the fact that defendant fled from the scene and interfered with the officer's attempted stop and investigation was sufficient to establish the first prong of the crime.

The word "obstruct" in the statute "includes . . . a knowing failure to comply with a lawful command." MCL 750.81d(7)(a). In particular, the "has reason to know" language can be

interpreted as "has reasonable cause to believe" and requires the fact-finder to analyze whether the facts indicate that when resisting, the defendant had "reasonable cause to believe" the officer was performing his or her duties. *Nichols*, 262 Mich App at 414. The "prosecution could sustain its burden by proving defendant had constructive, implied, or imputed knowledge, or by using the record evidence to show that a defendant should have had knowledge on the basis of the facts and circumstances of the case." *Id*.

The police officer testified that he was dressed in his police uniform, driving a marked police vehicle, and activated his lights; when the targeted vehicle sped up, the officer activated his siren, and the vehicle sped up even more. Then, the vehicle slowed a bit and the passenger jumped out; it slowed a bit more and the driver jumped out while the vehicle was still running, and the vehicle crashed into a parked vehicle. The officer chased the driver, lost sight of him for a few seconds as he turned a corner, and then found defendant hiding behind some bushes. The jury determines the credibility of each witness and what weight to give that testimony, and the reviewing court should not disrupt that role. *Wolfe*, 440 Mich at 514-515. Viewed in the light most favorable to the prosecutor, the officer's testimony was sufficient to create a reasonable inference that defendant had "reasonable cause to believe" that the person chasing him was a police officer performing an investigation and that defendant hindered him. See *Nichols*, 262 Mich App at 414, and *Pohl*, 207 Mich App at 333. Thus, all the essential elements of the crime were proven beyond a reasonable doubt.

IV. DEFENDANT'S STANDARD 4 BRIEF

A. PROSECUTORIAL MISCONDUCT

In a brief filed in propria person, pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant first contends that he was denied a fair trial because of prosecutorial misconduct when the prosecutor elicited improper evidence from the police officer concerning the stolen nature of the targeted vehicle. Defendant did not preserve this issue by a timely objection or a request for a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Therefore, to obtain appellate relief, defendant must demonstrate plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

"[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Testimony that is isolated and unsolicited does not require reversal, even if it is deemed improper. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). A review of the record reveals that the officer's testimony concerning the fact that the targeted vehicle was stolen was clearly not responsive to the prosecutor's question about whether the lights and sirens of his

police vehicle were operating. The officer's answer was unsolicited and volunteered. We find no prosecutorial misconduct in this instance, and reversal is not warranted.[4]

Defendant further contends that the prosecutor's use of his aliases, birth dates, and social security numbers was unfairly prejudicial and not probative of any material fact at issue. However, the trial court held that this evidence was admissible, and thus the prosecutor was not acting in bad faith in attempting to elicit it. See, e.g., *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007) ("[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct").

B. INEFFECTIVE ASSISTANCE OF COUNSEL

We find no merit to defendant's claim of ineffective assistance of counsel based on his counsel's failure to object to evidence that the vehicle was stolen, that the vehicle was damaged, and that a screwdriver was found on defendant's person when he was arrested. Defendant did not preserve this issue for appeal by moving for a new trial or an evidentiary hearing in the trial court. Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

When raising a claim of effective assistance of counsel, a defendant, to obtain relief, must show that counsel's performance fell below professional norms and that, but for counsel's ineffectiveness, the ultimate result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Michigan courts have held that "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Where, as here, the comment about the vehicle being stolen was fleeting and unsolicited and the prosecutor did not pursue the issue or mention it again, objecting may have served to draw more unwanted attention to the comment. Similarly, defense counsel may not have wanted to highlight, by way of objection, the damage to the vehicle or the fact that defendant was carrying a screwdriver. Defendant's trial strategy was to deny having had anything to do with the vehicle and to assert that he had been misidentified, and therefore it arguably made sense to refrain from objecting. Moreover, it is not clear that an objection would have been successful,

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[4] We note that, in the context of this issue, defendant makes no specific argument regarding the officer's testimony about the damage to the vehicle (for example, the ignition was "punched out"). At any rate, given the need for the prosecutor to tell a coherent story about the events, we would find no plain (i.e., clear or obvious, see *Carines*, 460 Mich at 763) error requiring reversal even if defendant had done so. See, generally, *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

given that the prosecutor needed to provide a coherent narrative of the events and that the stolen nature of the car was relevant to this narrative. See footnote 4, *supra*. Under the circumstances, defendant has not met his burden of demonstrating ineffective assistance of counsel.

C. SPEEDY-TRIAL VIOLATION

Defendant next contends that the trial court abused its discretion when it denied defendant's in pro per motion to dismiss based on a speedy-trial violation.[5] "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 de novo review." *Id*.

The United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. US Const, Am VI; Const 1963, art 1, ¶ 20; *People v Patton*, 285 Mich App 229, 235 n 4; 775 NW2d 610 (2009). The relevant period for determining whether a defendant was denied a speedy trial begins on the date of the defendant's arrest, *id*. at 236, but a formal charge or restraint of the defendant is necessary to invoke the speedy-trial guarantees, *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987).

This Court reviews a defendant's claim of a speedy-trial violation by balancing the following four factors: "(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 Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). Where the delay is less than 18 months, the defendant bears the burden of showing prejudice, but the prosecutor has the burden to prove that the defendant was not prejudiced when the delay is more than 18 months. See *id*. at 262. When considering the reasons for a delay, a court must determine the extent to which the prosecutor or the defendant caused the delay. *People v Walker*, 276 Mich App 528, 541-542; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059; 743 NW2d 914 (2008) and overruled in part on other grounds by *People v Lown*, 488 Mich 242; 794 NW2d 9 (2011). "Unexplained delays" and "[s]cheduling delays and docket congestion" are charged against the prosecutor. *Walker*, 276 Mich App at 542. "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." *People v Waclawski*, 286 Mich App 634, 665-666; 780 NW2d 321 (2009) (internal citations and quotation marks omitted). "[T]here is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim." *Id*. at 665. However, "[a] delay of six months is necessary to trigger an investigation into" a claim that a defendant has been denied a speedy trial. *Walker*, 276 Mich App at 541.

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[5] Defendant makes a brief mention of the 180-day rule but does not present a reasoned argument with respect to it; instead, his argument repeatedly refers to the speedy-trial guarantee. Even if he had, we would find no violation of that rule.

In this case, trial was held six months and 20 days from defendant's arrest, sufficient to "trigger an investigation." *Id*. Fifteen days of the delay were attributable to defendant because defense counsel failed to appear. The delay by the court, two business days, was "inherent in the court system," because the court was scheduled to be in another location. The delay attributable to the prosecutor, because a prosecution witness was on furlough, was approximately 33 days. Although defendant asserted his right by filing a motion to dismiss based on an alleged speedy-trial violation, the delay was less than 18 months and therefore defendant bears the burden of showing prejudice. *Williams*, 475 Mich at 262. Defendant has provided no information or statement to demonstrate any prejudice, other than the fact that he was incarcerated pending the trial. He has stated no claim of prejudice to his defense strategy. *Id*. at 264. He does not allege that any witness he intended to call to support his alibi, or any evidence, was lost because of the delay. Therefore, we conclude that defendant was not prejudiced by the short delay in his trial. The record demonstrates that defendant failed to establish a violation of his constitutional right to a speedy trial.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter