STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWARD JONES,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 181011
LC No. 93-012011

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. His twenty-five to seventy-five year sentence for the assault conviction was vacated, and defendant was sentenced to 50 to 150 years for the habitual offender conviction to be served consecutively to the two-year sentence for the felony firearm conviction. Defendant now appeals of right, and we affirm.

On August 10, 1993, around 3:00 a.m., Gerald Hagler became the victim of a drive-by shooting in Inkster, near the corner of Pine and Henry. Hagler testified at trial that shots were fired at him from a car as he walked down the street. Hagler was unable to see the occupants of the car. He saw one gun being fired from the passenger side of the car. He saw "fire" coming from two locations in the car, "like the front and the back." He heard two different sounds of gunshots. An eyewitness acquainted with defendant and codefendant Roy Harrington testified that he saw them in the car. Harrington was in the front passenger seat, and defendant was in the back seat on the passenger side. The witness did not recognize the driver. The witness testified that he saw the car at the corner of Henry and Pine, heard shots, and saw the muzzle flash from the front and back seats of the passenger side of the car. The witness gave the police the license plate number of the car. It was traced to

* Circuit judge, sitting on the Court of Appeals by assignment.

codefendant Harrington's mother. A search of the car produced shell casings on the floor of the back seat, on both the passenger and driver sides.

In his first issue on appeal, defendant argues that he was denied his right to a speedy trial by the nearly nine month delay between his arrest and the trial. The right to a speedy trial is guaranteed by the federal and state constitutions, US Const, Am VI; Const 1963, art 1, § 20, and also by MCL 768.1; MSA 28.1024. *People v Metzler*, 193 Mich App 541, 545-546; 484 NW2d 695 (1992). To determine whether a defendant has been denied his right to a speedy trial, this Court must balance the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) any prejudice to the defendant. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994). A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). When the delay is less than eighteen months, the burden is on defendant to prove prejudice resulting from the delay. *Id.*

We find that all four factors weigh against a finding that defendant's constitutional right to a speedy trial was violated. The nine month delay was not excessively long (compare the 4½ year delay in *Simpson*), and was primarily due to docket congestion. Although docket congestion is attributable to the prosecution, it is considered a neutral factor and given minimal weight. *Simpson, supra* at 563-564. Defendant's failure to assert this right in a timely fashion also weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

With regard to the fourth factor, because the length of delay was just under nine months, defendant carries the burden of proving prejudice. *Daniel, supra* at 51. This Court has recognized two types of prejudice: (1) prejudice to the defendant's person in the form of incarceration or anxiety over the pending charges; and (2) prejudice to the defense from loss of evidence or witnesses. *People v Holland*, 179 Mich App 184, 196; 445 NW2d 206 (1989). Although a defendant can be presumed to have suffered anxiety from awaiting the outcome of his case, greater specificity and harm must be demonstrated where the other factors weigh in the state's favor. *Id.* Defendant's complaints that he was prejudiced because he was incarcerated, separated from his "associations" and subjected to public ridicule are too general to constitute the specific harm that must be demonstrated where, as here, the other factors weigh in the prosecution's favor. Defendant has not specified how his ability to present a defense was prejudiced by the delay. Therefore, having evaluated each of the four factors, we conclude that defendant was not denied his right to a speedy trial.

In his second issue, defendant claims that his sentence violated the principle of proportionality. This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v Cervantes*, 448 Mich 620, 627, 630; 532 NW2d 831 (1995). Although an habitual offender's sentence must comply with the principle of proportionality, appellate review of an habitual offender sentence using the sentencing guidelines in any fashion is inappropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

The assault in this case was particularly egregious, totally unprovoked, and has left Hagler permanently injured. Defendant's criminal record dates back to 1983, and includes assault and battery, malicious destruction of property, and carrying a concealed weapon. He has escaped from prison twice and has violated parole. The trial court reasonably concluded that defendant is resistant to rehabilitation and should be incarcerated to protect society. Under these circumstances, we find no abuse of discretion. We also reject defendant's argument that a life sentence would have been less severe. See *People v Lino*, 213 Mich App 89, 95-98; 539 NW2d 545 (1995).

Defendant claims that he was denied the effective assistance of counsel because his attorneys failed to produce alibi witnesses. To raise an issue of ineffective assistance of counsel on appeal, a defendant must move for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Failure to make such a motion usually precludes appellate review unless the appellate record contains sufficient detail to support a defendant's claims. *Id.* In the instant case, defendant failed to move for a *Ginther* hearing and his motion for a remand was denied by this Court. Therefore, review is limited to the record. *Id.* Defendant has not supplied affidavits or other evidence indicating the identities or the proposed testimony of the purported alibi witnesses. Without this information, we conclude that defendant has failed to establish that he was prejudiced by his counsel's failure to present an alibi defense. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Defendant claims that the trial court failed to make sufficient findings of fact and conclusions of law on the record. When trial by jury has been waived, the court must state its findings of fact and conclusions of law on the record or in a written opinion made a part of the record. MCR 6.403. A trial court's findings of fact are sufficient "as long as it appears that the trial court was aware of the issues in the case and correctly applied the law." *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The court is not required to make specific findings of fact regarding each element of the crime. *Id.* A court's failure to find the facts does not require remand where it is manifest that the court was aware of the factual issue, that it resolved the issue, and that further explication would not facilitate appellate review. *Id.* at 134-135. Specifically, defendant claims that the trial court's findings of fact failed to indicate that it gave due consideration to the issue of identification in this case.

Although the trial court did not specifically discuss the identification issue in this case, it made a factual finding by stating that defendant committed the assault. We do not believe that the trial court's lack of specificity in the manner in which it resolved the alleged inconsistencies in the testimony of witnesses is indicative of lack of awareness of the issue. We also do not believe that appellate review would be facilitated by further explication on this matter.

Defendant also argues that the trial court's findings were inadequate because there is no indication that the court considered the lesser included offenses of assault with intent to do great bodily harm, felonious assault, and reckless discharge of a firearm resulting in injury. Defendant relies on *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988), in which this Court reversed a defendant's bench trial conviction because the court failed to address the possibility of the lesser included offenses. In this case, the trial court stated that defendant and codefendant "committed the

assault upon the complainant and did so with the intent to kill the complainant . . . ." Having explicitly found an intent to kill, the court was not obligated to specifically state why it was rejecting the lesser offenses suggested by defendant.

Finally, defendant claims that the prosecutor failed to produce all res gestae witnesses as required by MCL 767.40a; MSA 980(1). Defendant apparently relies on this statute as it was written prior to its amendment in 1986. In the 1986 amendment, the Legislature relieved the prosecutor of the obligation to use due diligence to produce res gestae witnesses and replaced it with "an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 287-289; 537 NW2d 813 (1995). Defendant makes no claim that the prosecutor failed to provide notice and reasonable assistance as required by the amended statute. His argument is thus based on obsolete authority.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D.Schaefer