

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN WAYNE ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

May 15, 2003

No. 235375

Macomb Circuit Court

LC No. 00-002145-FH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for delivery of less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), for which he was sentenced to five to twenty years' imprisonment as a third habitual offender, MCL 769.11. We affirm.

On appeal, defendant argues that there was insufficient evidence presented at trial to support his conviction for delivery of less than fifty grams of heroin. We disagree. When reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich 1202 (1992). Circumstantial evidence and reasonable inferences arising from that evidence may constitute sufficient proof to find all the elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of delivery of heroin are that (1) the defendant delivered a controlled substance, (2) the substance delivered was heroin, (3) the defendant knew he was delivering heroin, (4) the substance was in a mixture that weighed less than fifty grams, and (5) the defendant was not legally authorized to deliver this substance. See, generally, CJI2d 12.2; see, also, *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001) (the amount and nature of controlled substances are elements of a delivery offense). Delivery means the actual, constructive, or attempted transfer from one person to another. MCL 333.7105(1); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).

Here, there was sufficient evidence that defendant possessed and delivered heroin to the victim. First, the medical examiner stated that the presence of 6-mam and morphine in the victim's body indicated that heroin had been introduced into his body shortly before his death.

Second, defendant's friend testified that he saw defendant "cooking" heroin and preparing a needle just before the victim's death. The friend also heard defendant ask the victim, "Do you want to do one?" to which he responded, "Ah, what the hell, might as well," or "I know I probably shouldn't, but aw, what the hell." Third, the officer-in-charge testified that defendant made an oral statement admitting that he had heroin at the house, and that he had offered some to the victim. Fourth, defendant's sister testified that defendant told her that he had shot the victim up with heroin because he "couldn't hit a vein for the life of him." Viewed in the light most favorable to the prosecution, the evidence presented was sufficient for a rational trier of fact to have found the elements of delivery of less than fifty grams of heroin proved beyond a reasonable doubt. We also reject defendant's claim that he did not have the specific intent to deliver heroin because delivery of a controlled substance is a general intent crime, and the act of transferring the controlled substance to another person is sufficient to establish a delivery. *Id.* at 522.

Next, defendant claims that he was denied his constitutional and statutory rights to a speedy trial because he was incarcerated for 344 days before his trial commenced. We disagree. To determine whether a defendant has been denied his right to a speedy trial, this Court considers "(1) the length of delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citation omitted). A delay of more than eighteen months is presumed to be prejudicial and the prosecution bears the burden of proving lack of prejudice to the defendant. When the delay is less than eighteen months, the burden is on the defendant to show prejudice as a result of the delay. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). 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).

Here, the length of the delay between the date of defendant's arrest and the date of trial was just slightly under twelve months. While this delay triggers an inquiry into defendant's claim of a speedy trial violation, this delay is not presumptively prejudicial under Michigan law and defendant must establish prejudice. *Cain, supra; Daniel, supra*. In addition, part of the delay is attributable to defendant's request for, and receipt of, a new appointed trial attorney. The court granted additional time for the new attorney to file pre-trial motions. Therefore, the delay attributable to the prosecutor was 202 days, or less than seven months. This Court has found that a delay of fourteen and one-half months did not deny a defendant a fair trial when the defendant could not show prejudice from the delay. *People v Wickham*, 200 Mich App 106, 111-113; 503 NW2d 701 (1993). Therefore, the length of delay and reason for delay factors do not favor defendant.

Further, defendant's failure to timely assert his right to a speedy trial weighs against a finding that his right to a speedy trial was violated. See *id.* at 112. Although defendant argues that he asserted his constitutional right for a speedy trial through his 180-day motion, a defendant must make a formal demand on the record to preserve a speedy trial issue for appeal. See *Cain, supra* at 111.

Finally, while defendant argues that witnesses' memories could have faded over time, and thereby prejudiced his defense, this is wholly speculative. There was no offer of proof made or evidence produced to support this claim. Such general allegations of prejudice are insufficient

to establish that he was denied his right to a speedy trial. See *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Defendant also claims that he was personally prejudiced by his lengthy pretrial incarceration because he suffered mental anxiety. However, anxiety, alone, is insufficient to establish a violation of defendant's right to a speedy trial. *Id.* Therefore, we conclude that defendant was not denied his right to a speedy trial.

Defendant also argues that the trial court erred in denying his 180-day motion. However, defendant's 180-day motion related to defendant being released on personal recognizance under MCR 6.004(C), not MCR 6.004(D), as defendant claims on appeal. This issue is moot, since the remedy for a violation of that rule is release on personal recognizance, and defendant is presently incarcerated for the delivery charge. See MCR 6.004(C). Further, defendant's claims under MCR 6.004(D) and MCL 780.131 *et seq.*, also fail. The record indicates that defendant was not in the custody of the Department of Corrections on another sentence while he was waiting to go to trial on the present charges. Therefore, it appears that defendant was a pretrial detainee to whom the 180-day rule of MCR 6.004(D), MCL 780.131, and 780.133 do not apply. See *People v Chambers*, 439 Mich 111, 116; 479 NW2d 346 (1992).

Defendant next argues that the trial court erred in scoring Offense Variable (OV) 3 at one hundred points because there was no "victim" of his sentencing offense of delivery of less than fifty grams of heroin since he was acquitted of the involuntary manslaughter charge. We disagree. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Here, as previously discussed, there was evidence introduced at trial, including testimony from the medical examiner, that supported the trial court's finding that the act of defendant delivering heroin to the victim resulted in his death. See *id.* Further, since the trial court sentenced defendant within the guidelines, the sentence was not a departure.

Defendant raises several issues in his supplemental in persona propria brief. First, defendant argues that the jury's verdict finding him guilty of delivery of less than fifty grams of heroin is against the great weight of the evidence. We disagree. A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). This Court may not attempt to resolve credibility questions anew, but rather, credibility questions should be left to the trier of fact. *Lemmon, supra* at 646-647; *Gadomski, supra*.

Here, defendant claims that the medical examiner's testimony was impeached by his inconsistent preliminary examination testimony and that his concession that the 6-mam and morphine could have come from a variety of other sources presents reasonable doubt that the victim had heroin in his system. Although the medical examiner's opinion about the cause of the victim's death may have been slightly modified since the preliminary examination, i.e., from heroin and alcohol to just heroin, his conclusion that the 6-mam and morphine in the victim's body came from heroin remained consistent throughout the proceedings in the case. Further, testimony that heroin metabolizes quickly in the body supports the theory that heroin was the source of the 6-mam and morphine, since the victim died within a few minutes after the substance was introduced into his body.

Defendant also claims that questionable trial testimony offered by his friend, a police officer, and his sister was not persuasive. However, defendant's friend's testimony regarding the substance he saw defendant "cooking," and the victim's response to defendant offering him the substance, was not inconsistent with, or impeached by, the testimony of any other witness. See *Lemmon, supra* at 643-644. Further, while defendant's testimony and the officer's testimony conflict regarding defendant's statement, the officer's testimony was not potently incredible or defying physical realities, or so impeached that it was deprived of all probative value. See *id.* In addition, witness credibility, including that of defendant's sister, was properly considered by the jury. See *id.* at 646-647. Finally, the case is not so marked by uncertainties and discrepancies that there is a real concern that an innocent person was convicted. *Id.* at 644. In sum, the jury's verdict was not against the great weight of the evidence.

Next, defendant claims that he was denied the effective assistance of trial counsel. We disagree. Defendant timely moved for a new trial on this basis. However, since the trial court did not hold an evidentiary hearing, and this Court denied defendant's motion to remand, review is limited to the facts on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was 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 Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant alleges the following errors or omissions constituting ineffective assistance of counsel: (1) failure to interview the emergency room doctor whose report cited the cause of Ron's death as acute cardiac arrest, (2) "extremely ineffective, unprofessional, unacceptable and clearly harmful" conduct; (3) failure to move for separate trials for the two offenses; (4) preventing defendant from obtaining exculpatory evidence and failing to hire an expert witness, (5) failure to effectively cross-examine witnesses, (6) impairing defendant's right to freely testify on his own behalf, and (7) the court preventing defendant from using his own trial strategy.

We have reviewed the record and conclude that defendant has not demonstrated any error requiring reversal. Briefly, (1) trial counsel's failure to interview the emergency room doctor did not make a difference in the outcome of defendant's trial because the medical examiner's report explains the emergency room doctor's conclusion regarding the cause of the victim's death, see *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); (2) counsel's alleged unprofessional behavior does not warrant reversal of defendant's conviction because the attorney's alleged conduct occurred outside of the presence of the jury, and defendant has failed to show prejudice; (3) severance of the involuntary manslaughter charge and the delivery charge would have been inappropriate because the two charges arise from the same conduct and the evidence was relevant to both, see *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, mod in part 441 Mich 867 (1992); (4) defendant has failed to establish that exculpatory evidence existed, and that accessing medical records and hiring an independent medical expert would have changed the result of his trial; (5) contrary to defendant's allegations, counsel impeached the medical examiner at trial with his preliminary examination testimony and his

report, plus such decisions are matter of trial strategy; (6) defendant did testify on his own behalf in a narrative form after a lunch recess; and (7) the court properly instructed the jury to disregard any mention of defendant's prior convictions or arrests. In sum, defendant was not denied the effective assistance of counsel.

Next, defendant argues that the trial court's failure to halt the sentencing hearing and grant him a separate hearing regarding his sentence enhancement as a third habitual offender caused the court to lose jurisdiction to sentence him. We disagree. MCL 769.13(6) provides, in part:

The court shall resolve any challenges to the accuracy or constitutional validity of a prior conviction or convictions that have been raised in a motion filed under subsection (4) at sentencing *or at a separate hearing scheduled for that purpose before sentencing*. [Emphasis added.]

According to the plain language of the statute, a defendant can present evidence or challenge prior convictions either at sentencing *or* at a separate hearing scheduled for that purpose *before sentencing*. Therefore, it was within the trial court's discretion to decide any challenges at sentencing, instead of delaying sentencing until a further hearing could be held, and there was no error.

Defendant also argues that the magistrate abused his discretion in binding him over on the involuntary manslaughter and delivery charges, and the trial court erred in denying his motion to quash the information. We disagree. This Court's review of the circuit court's analysis of the bindover process is *de novo*. We review the magistrate's bind-over decision for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

Defendant claims that the magistrate erred in considering his alleged statements to his sister to establish the corpus delicti of the charges. The corpus delicti rule is satisfied and a defendant's confession may be admitted into evidence when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury, and (2) some criminal agency as the source of the injury. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). Once this showing is made, a defendant's confession may be used to establish identity, intent, or aggravating circumstances. *Id.* In this case, the medical examiner's testimony independently established that the victim died from the presence of 6-mam and morphine, the breakdown products of heroin, and alcohol in his body. Therefore, any extrajudicial statements made by defendant were admissible as relevant to establish identity, intent, or aggravating circumstances.

The magistrate also did not abuse his discretion in binding defendant over on the manslaughter charge because sufficient evidence supported the prosecutor's theory that the victim died as a result of defendant injecting him with heroin. Contrary to defendant's claim, the delivery of heroin is required only to be "a" proximate cause of the victim's death, not "the" cause of death. See *People v Bailey*, 451 Mich 657, 676; 549 NW2d 325, amended 453 Mich 1204 (1996). Further, any error in binding defendant over on the delivery charge would be harmless because sufficient evidence to convict him on that charge was presented at trial.

Defendant's final argument on appeal that the cumulative effect of the alleged errors during his trial denied him a fair trial is without merit because we have found no such errors. See *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra