

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ROBERT SHELTON,

Defendant-Appellant.

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UNPUBLISHED

January 9, 2007

No. 261971

Oakland Circuit Court

LC No. 2004-196608-FH

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of unlawfully driving away a motor vehicle (UDAA), MCL 750.413. This case stems from the taking of a motor vehicle that was parked outside a party store in Auburn Hills owned by Thamin Jindo and his wife. Defendant was found in possession of the vehicle several hours after it disappeared from the parking lot. Mr. Jindo positively identified defendant in a photo line-up as being a person he had seen at a bus stop near the party store shortly before the vehicle went missing. Defendant was sentenced as a third habitual offender, MCL 769.12, to 18 months to 20 years in prison. Defendant appeals as of right and we affirm in part and remand for resentencing.

Defendant first argues that he was entitled to assistance from the prosecutor in producing two witnesses—Mrs. Jindo and Auburn Hills Police Department Detective Bolton—but was deprived of that constitutional and statutory right by the trial court’s refusal to grant defendant’s request for assistance. We disagree. We review for an abuse of discretion that portion of defendant’s claim asserting that his statutory rights under MCL 767.40a were violated. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). His assertion that his right of compulsory process under the Sixth Amendment was violated is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

**Sixth Amendment**

The Compulsory Process Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” US Const, Am VI. However, “[a] criminal defendant’s right to compulsory process, though fundamental, is not absolute. To the contrary, it requires both a showing that the witness’ testimony would be both material and favorable to the defense.”

*People v McFall*, 224 Mich App 403, 408-409; 569 NW2d 828 (1997); see also *People v Holguin*, 141 Mich App 268, 271; 367 NW2d 846 (1985), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973) (observing that a criminal defendant's right to present witnesses at trial to establish a defense must "be weighed against the need for 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence'").

Defendant failed to clearly articulate why Mrs. Jindo's testimony would have been material and favorable. After noting the discrepancy between Mr. Jindo's testimony about leaving the store for about 20 to 25 minutes at around 11:30 p.m. and the testimony of a police officer that Mr. Jindo was in the store when the officer arrived at 11:39 p.m., defendant argued that Mrs. Jindo was never in the store. We assume defendant was arguing that because Mr. Jindo's credibility is undermined by the time discrepancy, then it is reasonable to postulate that his testimony about his wife relieving him in the store was also erroneous, and thus Mr. Jindo could not have seen defendant at the bus stop. This speculative argument does not provide a basis on which to conclude that Mrs. Jindo's testimony would have been material or favorable. Defendant provided no indication of what the substance of Mrs. Jindo's testimony would have been; he simply seems to assume that it would have contradicted Mr. Jindo's testimony. Thus, defendant fails to establish plain error affecting substantial rights with respect to Mrs. Jindo's testimony.

Defendant also fails to establish that Detective Bolton's testimony would have been material and favorable to his defense. Defendant argued for the production of Detective Bolton as a witness as follows:

And Detective Bolden's [sic] case was dismissed and the reason I want him here is to tell you what evidence he lacked 'cause I heard him say as they was putting me back in the cell tell—tell someone on the phone that he lacked no witness (sic)—it was no witness.

So, now all the sudden the next day officer Gagnon's report give a positive description from the prior night of the incident. . . .

\* \* \*

The reason I wanted Detective Bolden [sic] here is I want to question him as to why his case was dismissed. What evidence did he lack? . . .

As with Mrs. Jindo, defendant's argument in support of calling Detective Bolton is entirely speculative. He provides no indication what Detective Bolton might have said about the inability to charge defendant with receiving and concealing stolen property, and thus provides no basis to conclude that such testimony would have been material or favorable. He argued that he overheard the detective telling some unspecified person over the telephone that he "lacked no witness," but he failed to show how this nebulous statement was relevant to the crime charged. That the police may not have had a witness needed to establish a charge of receiving and concealing does not mean that Mr. Jindo's positive identification was perjurious, which is the

clear import of defendant's argument. Thus, defendant fails to establish plain error affecting substantial rights with respect to Detective Bolton's testimony.

#### **MCL 767.40a**

Defendant argues that by statute, upon request, the prosecution must provide "reasonable assistance" to locate and serve process upon a witness. The statute defendant relies upon, MCL 767.40a, provides in pertinent part as follows:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

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(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney . . . shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

In denying defendant's request for assistance from the prosecution to produce Mrs. Jindo, the trial judge stated she saw "no reason to bring Ms. Jindo here. I don't see where she can add anything. . . . [S]he wasn't listed on the information as a witness by the prosecutor so I'm not going to require them to produce her." We agree with this analysis.

Detective Bolton was listed by the prosecutor as a witness, but was not produced at trial even though he remained on the prosecution's witness list.<sup>1</sup> As noted above, defendant failed to establish that Detective Bolton's testimony would be material. Cf. *People v Kevorkian*, 248 Mich App 373, 442-443; 639 NW2d 291 (2001) (observing that an alternate basis for excluding res gestae testimony was that the "testimony was inconsequential to the determination of the

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<sup>1</sup> Plaintiff argues that the question of producing Detective Bolton should be analyzed as if plaintiff had sought leave to delete the detective from its witness list. However, plaintiff never specifically sought leave to delete the detective from its list. Rather, plaintiff simply responded to defendant's request to have the witness produced.

case”). While the receiving and concealing case and the UDAA case arise out of the same alleged incident, defendant failed to show below that any insight that Detective Bolton could provide on why the former case was not pursued would be relevant to the present prosecution. Thus, the court did not abuse its discretion in denying defendant’s request for the prosecution to help in producing Detective Bolton as a witness.

In any event, in light of the weight of the evidence actually adduced at trial, any error in the handling of either Mrs. Jindo or Detective Bolton was harmless. Mr. Jindo specifically identified defendant as the person he saw at a nearby bus stop just prior to the disappearance of the vehicle, and defendant was found in the vehicle hours later in Oak Park. The trial court specifically found Mr. Jindo to be a credible witness despite some inconsistencies in his trial and preliminary examination testimony, and the trial court’s credibility determination is given deference because it is in a superior position to assess witness credibility than this Court. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

Defendant also argues that he should not have been assessed 25 points under offense variable (OV) 13. We agree. OV 13 provides that “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2). Defendant was assessed 25 points under MCL 777.43(1)(b), which is assessed if the offense committed by defendant “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” Defendant’s prior felonies occurred between 1987 and 1989, with the sentencing offense occurring in 2004.

Defendant’s sentence was handed down prior to our Supreme Court’s decision in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). *Francisco* overruled *People v McDaniel*, 256 Mich App 165; 662 NW2d 101 (2003). The *McDaniel* Court allowed OV13 to be scored when felonies occurred during any five-year period, not just the period inclusive of the sentencing offense. *Francisco* held that “only those crimes committed during a five-year period that encompasses the sentencing offense can be considered” for purposes of scoring OV 13. *Francisco*, *supra* at 86.

*Francisco* also addressed the issue of resentencing. Under MCL 769.34(10), remand for resentencing is in order where there has been “an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” *Francisco* held that a defendant is entitled to be sentenced “on the basis of accurate information,” *id.* at 88, and “in accord with the law . . . by a judge who is acting in conformity with such law,” *id.* at 90-91. As in *Francisco*, defendant in the instant case is entitled to remand for resentencing on the basis of an accurate calculation under the guidelines.

Finally, defendant asserts that he is entitled to remand upon the issue of whether he should have received credit from the court for time served while awaiting sentencing. Defendant contends that his case should be remanded for a factual determination as to whether the parole board intended that he be required to serve an additional portion of his previous sentence for violating parole. We disagree.

A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field

services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served. [MCL 791.238(2).]

Further, "[a] prisoner committing a crime while at large on parole and being convicted and sentenced for the crime shall be treated as to the last incurred term as provided under section 34." MCL 791.238(5).

By statute, defendant is not entitled to remand for a factual determination on this issue.

We affirm defendant's conviction and the fact that he did not receive jail credit on his sentence for the current offense. We remand for resentencing on the basis of *Francisco*. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood