

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL STEVENS,

Defendant-Appellant.

UNPUBLISHED

October 2, 2012

No. 304033

Wayne Circuit Court

LC No. 10-010745-FH

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating while under the influence of a controlled substance, third offense, MCL 257.625(1)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 3 to 15 years' imprisonment for his conviction. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

I. FACTS

This case arises out of the arrest of defendant for operating under the influence of a controlled substance. While assisting a fellow officer on a traffic stop, Officer Michael Nichols observed defendant driving directly towards his fellow officer's parked patrol car. Nichols testified that he noticed a white van which was being driven by defendant strike his fellow officer's vehicle on the rear driver's side door. Nichols got into his patrol vehicle and pursued defendant. Nichols activated his overhead lights, but defendant did not stop until a tow truck blocked defendant's vehicle. Prior to stopping, Nichols observed the vehicle which was being driven by defendant swerve on numerous occasions, strike the curb at least three times, and vary in speed from 25 to 40 miles per hour. Following the stop, Nichols testified that defendant refused to exit his vehicle and had to be forcibly removed. When Nichols questioned defendant about whether he had consumed alcohol that evening, defendant denied consuming alcohol, however, defendant stated that he was a diabetic and was taking two prescription medications, Vicodin and Soma. During a search of defendant's vehicle, Nichols found two pill bottles with defendant's name on each bottle: one for Vicodin and one for Soma.

Nichols then arrested defendant and took him to the police station where he performed a variety of field sobriety tests. Defendant failed each test, to varying degrees. In addition, Nichols testified that defendant's speech was slurred.

During trial, defendant testified that he was a Type I diabetic and that because of this disease he occasionally suffers from blackouts, memory loss and a general lack of coherency and motor skills. Defendant did not recall many, if any, of the details surrounding the events that led to his arrest. Rather, defendant testified that he recalled working a plumbing job at a church and then waking up in the Allen Park police station. He attributed this loss of memory to a significant decrease in his blood sugar.

Defendant was found guilty of the charge listed above and sentenced as a fourth habitual offender to serve 3 to 15 years in prison. This appeal ensued.

II. DENIAL OF REQUEST FOR STAY OF PROCEEDINGS

On appeal, defendant first argues that he was deprived of his Constitutional right of due process when his motion for a continuance was denied. Defendant contends that the trial court should have granted his request for a stay of proceedings, in order to pursue an interlocutory appeal on his motion to dismiss the charge of operating under the influence of a controlled substance.

Defendant's motion to dismiss was premised on his argument that the State had failed to have a second, independent chemical test performed. Defendant argued that the proper remedy was dismissal of the charges. The trial court denied that motion to dismiss as well as the motion for stay stating, in part, that if there was error, the legal remedy was an appropriate jury instruction. Defendant did not pursue an interlocutory appeal in this Court.

This Court has long held that absent an abuse of discretion, we will not interfere with a trial court's decision to grant a continuance or adjournment. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988). Here, the record reveals that defendant did not bring his motion to dismiss until the day before trial. Further, the record reveals that defendant did not have an independent test performed. In addition, the trial court had suppressed the results of the chemical tests conducted by the State. Defendant is thus left to argue that "[h]ad the jury been informed of the police dereliction in not permitting an independent test it could raise a reasonable doubt as to how much controlled substance was in Mr. Stevens's system, negating his intent to violate the law." Defendant's assertion is premised on speculation and an inaccurate nature of the intent necessary for the State to prove a violation of MCL 257.625.

Furthermore, our Supreme Court has specifically held that dismissal is not an appropriate remedy when an officer fails to give a defendant a reasonable opportunity for an independent chemical test. The appropriate remedy is a jury instruction upon the request of defense counsel. *People v Anstey*, 476 Mich 436, 449, 450; 719 NW2d 579 (2006). Because defendant was not entitled to dismissal of the charges under *Anstey*, the trial court did not abuse its discretion by denying his request for dismissal or a stay of proceedings to pursue an interlocutory appeal.

Defendant has failed to establish any Constitutional violation to the orders of the trial court denying his motions.¹

Defendant also argues in his brief on appeal and supplemental brief that the trial court erred by not instructing the jury that the police denied defendant the reasonable opportunity for independent chemical testing. Our review of the record indicates that defendant did not request such an instruction and expressed his satisfaction of the proposed jury instructions. Our Supreme Court, citing *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000) held: “This Court has defined ‘waiver’ as ‘the intentional relinquishment or abandonment of a known right.’ ‘One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.’” *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (internal citations omitted). Accordingly, defendant has waived any error on this issue.

III. DIRECTED VERDICT

Immediately after the State had rested, defendant brought a motion for directed verdict which was denied by the trial court. On appeal, defendant argues that he was denied his due process rights when the trial court denied his motion for a directed verdict.

This Court reviews a trial court’s decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecution, viewed in a light most favorable to the prosecution, could persuade a rational fact-finder that the essential elements of the offense were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Under MCL 257.625(1), operating while intoxicated requires proof of three elements: (1) the defendant operated a motor vehicle (2) on a highway or other place open to the general public or generally accessible to motor vehicles (3) while under the influence of liquor or a controlled substance, or a combination of the two, or with a blood alcohol content of 0.08 grams or more per 100 milliliters of blood. *People v Hyde*, 285 Mich App 428, 448; 775 NW2d 833 (2009).

¹ In a supplemental pleading, defendant argues that the results of the blood draw were “illegal” and thus “must be suppressed.” To reiterate, the trial court suppressed the blood results prior to trial. Defendant then argues in his supplemental brief that trial counsel was ineffective for not pursuing an interlocutory appeal on this issue. Based on our Supreme Court’s ruling in *Anstey*, such an appeal would have been frivolous. Failure to file a frivolous appeal is not a basis on which this Court can make a finding that counsel’s performance fell below an objective standard of reasonableness. Accordingly, defendant has failed to satisfy the first prong necessary to prove ineffective assistance of counsel. See, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), cert den 552 US 1071; 128 S Ct 712; 169 L Ed 2d 571 (2007).

On appeal, defendant argues that insufficient evidence existed at the time the State finished presenting its evidence that he was operating a motor vehicle while under the influence of a controlled substance. He asserts that the central issue presented was whether defendant was under the influence of a controlled substance or suffering from symptoms of Type I diabetes.

Viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, we conclude that sufficient evidence existed at the time of defendant's motion for a rational trier of fact to find defendant guilty beyond a reasonable doubt.

Officer Nichols watched as defendant drove his vehicle directly into a parked patrol car and then, without stopping or appearing to slow down, drive away. Nichols followed defendant for approximately one and a half miles through a construction zone where he witnessed defendant swerve, strike the curb numerous times, and vary his speed. Officer Nichols also testified that he activated his overhead lights in his marked patrol car but defendant did not stop until his route was blocked by a tow truck.

After Nichols stopped defendant, he refused to exit his vehicle. Defendant's speech was slurred and he told the officer that he had not consumed alcohol but he was taking prescription medications. Nichols retrieved two prescription bottles, one containing Vicodin and the other containing Soma. Defendant also informed Nichols that he was a diabetic, though the officer did not find any insulin in defendant's vehicle.

Following his arrest, defendant was given field sobriety tests and was unable to pass a majority of the tests. Nichols testified that defendant's speech continued to be slurred.

Reviewing the evidence presented, we conclude that ample evidence existed at the time of defendant's motion for a directed verdict for a reasonable trier of fact to conclude beyond a reasonable doubt, that defendant was guilty of operating under the influence of a controlled substance. Defendant's assertions that his behavior prior to and after his arrest was a result of diabetes, simply put forth an alternative theory which the trier of fact could reasonably accept or reject. It is the province of the jury to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

VI. GREAT WEIGHT OF THE EVIDENCE

Defendant contends that the evidence presented at trial was insufficient to satisfy the State's burden of proving the elements of the crime beyond a reasonable doubt. Hence, defendant argues that the verdict was against the great-weight of the evidence.

To preserve a great-weight claim, a party must move for a new trial in the trial court. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Defendant did not move for a new trial in the trial court, therefore, this issue is unpreserved. This Court reviews unpreserved issues for plain error affecting the defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A "new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would

otherwise result.” *Lemmon*, 456 Mich at 642. In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial. *Id.* at 643.

Defendant argues that the evidence failed to show that he was under the influence of prescription drugs, rather than affected by his diabetes. As previously stated, testimony from Officer Nichols was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of the charged offense. Defendant argues that it was his diabetes and not his ingesting of a controlled substance that led to his erratic driving, blackouts, and slurred speech. This question was presented to the jury, and it was within their province to decide whether it was the ingestion of a controlled substance or diabetes that led to defendant’s actions and behavior. The jury came to the conclusion that controlled substances were at fault and made this decision based on legally sufficient evidence. Thus, defendant has failed to establish that the evidence presented in this case “preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.” *Lemmon*, 456 Mich at 642. Accordingly, defendant is not entitled to a remand or a new trial on this issue.

VI. SPEEDY TRIAL

In a supplemental brief, defendant alleges that he was denied his right to a speedy trial. Defendant argues that he was not arraigned until 86 days following his arrest, and that he did not have a preliminary examination until 63 days from the date of his arraignment. Defendant asserts that 100 days lapsed from the date of arraignment until defendant’s trial date and that the only delays attributable to him were on January 12, 2010 and November 16, 2010. Defendant also argues that this issue has been preserved by trial counsel raising the issue in district court and in defendant’s motion to dismiss.

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). We review the trial court’s factual findings for clear error and review constitutional questions de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *Williams*, 475 Mich at 261. The delay period commences at the arrest of the defendant. *Id.* “In contrast to the 180-day rule, a defendant’s right to a speedy trial is not violated after a fixed number of days.” *Id.* In determining whether a defendant has been denied a speedy trial, a court must weigh the following relevant factors: (1) the length of the 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. *Id.* at 261-262.

In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to defendant or the prosecution. “Unexplained delays are charged against the prosecution. Scheduling delays and docket congestion are also charged against the prosecution.” However, “although 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.” [*Waclawski*, 286 Mich App at 666 (citations omitted).]

Delays sought by defense counsel, whether counsel is retained or assigned, are ordinarily attributable to the defendant. *Vermont v Brillon*, 556 US 81; 129 S Ct 1283, 1290-1291; 173 L Ed 2d 231 (2009). In this case, the delay between defendant's arrest and trial was approximately eight months. The reasons for the delay varied. Defendant was responsible for at least one delay in November 2010 when he brought a motion to suppress. Assuming all other delays are attributable to the State, because the delay was less than 18 months, the burden was on defendant to prove prejudice. *Williams*, 475 Mich at 262. A defendant can experience two types of prejudice while awaiting trial, prejudice to his person and prejudice to the defense. *Id.* at 264. The first type results when pretrial incarceration deprives an accused of civil liberties. The second type, which is more crucial, occurs when the delay affects a defendant's ability to adequately prepare for trial and defend his case. *Id.*

Defendant asserts prejudice as follows: "There is always a potential for unreliability of witness' recollection attendant on a lengthy delay as here. Indeed, the most obvious prejudicial factor resulting from a long delay is the potential for lost or even false memories." Defendant fails to assert that there exists any evidence of false or lost memories; rather he makes general allegations of the potential for prejudice. General allegations of prejudice such as the unspecified loss of evidence or memories as a result of the delay is insufficient to establish that a defendant was denied his right to a speedy trial. *People v Walker*, 276 Mich App 528, 544-545; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008); *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Defendant's unsupported assertions of prejudice fail to establish that his ability to prepare or defend was prejudiced by the delay. Considering the relevant factors as a whole, the trial court did not err in finding that defendant's constitutional right to a speedy trial was not violated. Therefore, the trial court did not err in denying defendant's motion to dismiss.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering