

Court of Appeals, State of Michigan

ORDER

People of MI v Jerry Allen Blackwell Jr

Docket No. 320995

LC No. 13-020172-FC

Michael J. Riordan
Presiding Judge

Pat M. Donofrio

Jane M. Beckering
Judges

The Court orders that the opinion issued in this case is hereby AMENDED to correct a clerical error. The opinion is corrected to read June 16, 2015 as the date of the opinion.

In all other respects, the opinion remains unchanged.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 29 2015

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 16, 2016

v

JERRY ALLEN BLACKWELL, JR.,

Defendant-Appellant.

No. 320995
Eaton Circuit Court
LC No. 13-020172-FC

Before: RIORDAN, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant, Jerry Allen Blackwell, Jr., was convicted following a jury trial of one count of assault with intent to murder, MCL 750.83; one count of felon in possession of a firearm, MCL 750.224f; and one count of felony firearm, MCL 750.227b. He was sentenced as a third habitual offender to prison for 394 to 843 months for assault with intent to murder, 60 to 120 months for felon in possession, and 24 months for felony firearm. Defendant appeals as of right. We affirm.

I. BACKGROUND FACTS

The victim testified that on March 16, 2013, he agreed to sell two ounces of marijuana for \$500 to an acquaintance, Julius Young. The victim arranged to meet with Young in the parking lot of the Lansing Mall. When Young arrived, however, the victim saw that he had brought two other individuals with him, defendant and Vabian Ford. Young testified that he had agreed to set up a sham drug deal at defendant's request so that he and his cohorts could steal marijuana from the victim, whom Young described as passive and unaggressive. Despite the additional participants, the victim decided to proceed with the transaction, and allowed defendant to get into the passenger side of his vehicle for that purpose. Ford and Young waited outside.

According to the victim, defendant brandished a handgun as soon as he got into the vehicle and took the two ounces of marijuana. The victim testified that he tried to grab the gun from defendant, but instead grabbed onto defendant's clothing. Defendant backed out of the car while the victim was still holding onto defendant's clothing, causing the victim to fall partially out of the car, with the top half of his body leaning out of the passenger side of the car and his hands on the ground. Young testified that while the victim was in this position, defendant shot the victim in the back. Defendant, Ford, and Young fled the scene on foot, while the victim climbed back into his vehicle and drove to an adjacent parking lot where he called 911.

II. SPEEDY TRIAL

Defendant argues that he was denied his constitutional right to a speedy trial when his trial did not commence within 180 days.¹ In so arguing, defendant appears to conflate the statutory 180-day rule, MCL 780.131(1), with the constitutional right to a speedy trial, which is guaranteed by US Const Am VI; Const 1963, art 1, § 20. The constitutional right to a speedy trial, unlike the 180-day rule, is not predicated on a fixed number of days. *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). In evaluating this issue, we separate a 180-day rule claim under MCL 780.131(1) from a constitutional speedy trial claim. Defendant did not raise either a 180-day rule claim or a speedy trial claim in a timely objection. Thus, our review is for plain error affecting substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A. 180-DAY RULE

The statutory right to a speedy trial, guaranteed by the 180-day rule, is set forth in MCL 780.131(1), which provides, in pertinent part:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against *any inmate of a correctional facility of this state* a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. [Emphasis added.]

As stated in the emphasized language above, “the statute applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail.” *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). In this case, the record reveals that defendant was awaiting trial in county jail. The plain language of MCL 780.131(1) reveals that the 180-day rule does not apply in this case. See *id.* Moreover, we note that defendant waived any argument that his trial was not held within the time specified by the 180-day rule when he stipulated to an adjournment requested by the prosecutor, in exchange for being granted a longer period of time to consider a plea deal offered by the prosecution. See *People v Lown*, 488 Mich 242, 259-260; 794 NW2d 9 (2011) (a defendant can waive alleged violations of the 180-day rule by consenting to adjournment).

B. CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

¹ The 180-day requirement of MCL 780.131(1) is triggered upon the prosecution receiving written notice from the Michigan Department of Corrections that the defendant is incarcerated and awaiting trial on pending charges. *People v Rivera*, 301 Mich App 188, 192; 835 NW2d 464 (2013). As noted below, the 180-day rule does not apply to defendant in this case.

“Aside from the 180-day rule, a defendant’s right to a speedy trial is guaranteed by the United States and Michigan Constitutions.” *Rivera*, 301 Mich App at 193, citing US Const Am VI; Const 1963, art 1, § 20. The constitutional right to a speedy trial is not concerned with a fixed number of days. *Id.* Whether a defendant’s constitutional right to a speedy trial was violated requires consideration of four factors, sometimes referred to as the “*Barker*”² balancing 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). “When the delay is more than 18 months, prejudice is presumed, and the prosecution must show that no injury occurred. When the delay is less than 18 months, the defendant must prove that he or she suffered prejudice.” *Rivera*, 301 Mich App at 193 (internal citation omitted). The time for judging whether a defendant’s constitutional right to a speedy trial has been violated “runs from the date of the defendant’s arrest.” *Williams*, 475 Mich at 261.

Defendant was arrested on March 27, 2013, and his trial was originally scheduled to begin on September 23, 2013. However, the prosecutor requested an adjournment on September 17, 2013, and trial did not begin until December 9, 2013. Thus, the time period between defendant’s arrest and trial was approximately nine months. Defendant claims that the length of delay factor weighs in his favor because his trial was approximately two and a half months beyond a 180-day period after his arrest. Again, this argument is misplaced, as the constitutional right to a speedy trial is not violated simply because a certain number of days has expired. *Rivera*, 301 Mich App at 193. A delay of less than nine months is not particularly lengthy or noteworthy. See *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999) (discussing much longer delays).

In *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972), the United States Supreme Court explained that “[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” As noted, we presume prejudice after a delay of 18 months. *Rivera*, 301 Mich App at 193. And, with regard to prejudice, defendant has made no effort to argue that the delay was prejudicial. We could end our analysis here, particularly where defendant has not even made an effort to allege that he was prejudiced by the delay in this case. See *Barker*, 407 US at 530. See also *Williams*, 475 Mich at 262. Nevertheless, we have briefly considered the remaining factors, and conclude that defendant cannot establish plain error affecting substantial rights.

As for the reason for delay, defendant focuses only on one delay in particular. Notably, he focuses on the prosecutor’s request for an adjournment in September 2013, before trial was scheduled to begin, when the prosecutor took “full responsibility” for requesting that particular adjournment, stating that it was “completely [her] fault.” She also stated that adjournment was necessary, in part, to provide defendant with certain materials that had been sought in discovery. In *Barker*, 407 US at 531, the United States Supreme Court stated that “different weights should be assigned to different reasons” for delays in determining whether a defendant’s right to a

² *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

speedy trial was violated: “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government,” whereas more “neutral” reasons like “negligence or overcrowded courts should be weighted less heavily,” but still weighted against the government “since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.* The Court further held that “a valid reason, such as a missing witness, should serve to justify appropriate delay” and would not be weighted against either party. *Id.* Here, we agree with defendant that the prosecutor was responsible for this delay, and at least this portion of the delay should be credited in his favor. However, there is no evidence that the delay was meant to hinder the defense. In fact, the prosecutor stated that the reason for the delay was, in part, for the prosecutor to obtain materials defendant sought in discovery. Thus, although this delay should be credited to the prosecution, we do not find that it should weigh heavily in defendant’s favor. See *id.*

In making his argument, defendant ignores other delays in the proceedings. Namely, he ignores that his trial counsel requested, and received, an adjournment of the preliminary examination. This request delayed the proceedings and it weighs against defendant. Defendant also ignores that, after the prosecutor requested an adjournment in September 2013, trial had to be delayed because of docket congestion. Although “technically attributable to the prosecution” delays caused by docket congestion “are given a neutral tint and are assigned only minimal weight” *Williams*, 475 Mich at 263 (citation and quotation marks omitted).

In sum, we find that the second factor—the reason for the delays—does not weigh heavily in favor of either defendant or the prosecution. Defendant was responsible for a portion of the delays in the proceedings, as was the prosecutor. Some of the delay can also be attributed to docket congestion, and should not be assigned significant weight.

As to the third factor, we note that defendant did not assert his right to a speedy trial prior to trial, nor did he express that he believed his right had been violated until his sentencing hearing. In fact, the record reveals that defendant consented to one adjournment in this case and asked for another. Once again, defendant relies on the 180-day rule in arguing that this factor should weigh in his favor; defendant argues that he was given incorrect information³ as to when the 180 days expired and that he would have asserted his right to a speedy trial if he had been provided with correct information. This claim is not persuasive, as the record contains no indication that defendant would have asserted his right under different circumstances. See *Williams*, 475 Mich at 263 (finding that the trial court did not clearly err in finding that the third factor weighed “heavily against defendant” when he did not assert his right to a speedy trial).

Lastly, concerning prejudice, defendant does not assert that he was prejudiced by the delay between his arrest and his trial. Instead, he simply claims that lack of prejudice should not be fatal to his claim. Where defendant makes no effort to argue this factor, much less to argue that the relatively short delay in this case—less than nine months—hindered his defense, this factor weighs against defendant. See *id.* at 263-264.

³ Moreover, we disagree with defendant’s assertion that the 180-day rule expired, thereby depriving the circuit court of jurisdiction, as the rule did not apply in this case.

We conclude that defendant has not demonstrated under the four-factor balancing test that his right to a speedy trial was violated by the delay in this case, and he is not entitled to relief. Defendant never raised any objections or attempted to assert his rights. Moreover, the delay in this case was relatively short, and defendant consented to the adjournment of trial and himself requested adjournment of the preliminary examination. He also makes no effort to argue that he was prejudiced in any fashion. We find no error, let alone plain error affecting substantial rights.

III. RIGHT TO PRESENT A DEFENSE

Before trial, defendant sought to introduce evidence that the victim had a conviction for carrying a concealed weapon. Defendant sought to introduce the evidence to argue that the victim normally carried a gun while selling drugs. The challenged evidence was a record of the victim's conviction for carrying a concealed firearm; the conviction was nearly two years old and concerned conduct that was even older. According to defendant, evidence that the victim had a nearly two-year-old conviction for carrying a concealed firearm would have allowed the jury to infer that defendant brought a gun to the drug sale for his own protection, thereby negating the prosecution's theory that defendant had the intent to commit murder at the time of the assault. The trial court denied defendant's request to introduce such evidence. According to defendant, the court's decision not to allow this evidence denied him "a meaningful opportunity to contest the evidence" against him.

An appellate court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Defendant's claim that he was denied his constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Under the federal and state constitutions, a criminal defendant has the right to present a defense. *Id.* See also US Const Ams VI, XIV; Const 1963, art 1, § 13. Our Supreme Court has clarified that "[a]lthough the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

In this case, the evidence defendant sought to admit was not relevant, and he was not denied his right to present a defense. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence is relevant if: (1) it is material, meaning that it pertains to a fact that is at issue, and (2) it has probative value, meaning that the evidence tends to make any fact that is of consequence more probable or less probable. *People v Crawford*, 458 Mich 376, 389-390; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). Evidence that the victim had a prior conviction for carrying a concealed firearm was not relevant in this case. That the victim had been convicted of carrying a concealed firearm nearly two years before the shooting at issue had little, if any, bearing on defendant's claim that he possessed a handgun during the shooting for his protection from the victim. Further, the evidence would only be relevant if defendant

established that *he knew* the victim had the conviction or otherwise carried a firearm when he sold drugs. Defendant did not establish as much when arguing for the relevancy of the evidence at trial, and on appeal, he makes no assertion that he ever knew the victim had a conviction for carrying a concealed weapon. Moreover, even if defendant knew that the victim was convicted of carrying a concealed handgun in the past, such knowledge was of little relevance to defendant's intent at the time of the shooting in this case, given the evidence produced at trial. Indeed, the trial testimony indicates that the victim was unarmed at the time of the incident, and that defendant likely shot him in the back. Defendant's assertion of error is meritless.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel was ineffective for failing to ask the court to instruct the jury on the necessarily lesser included offense of assault with intent to do great bodily harm. Defendant did not preserve this issue by requesting an evidentiary hearing based on trial counsel's performance. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Where a defendant fails to request a *Ginther* hearing, this Court's review is limited to mistakes apparent on the record. *Id.*

To prevail on his ineffective assistance of counsel claim, defendant must show "that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). Defendant must overcome the strong presumption that counsel's decisions were the product of sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant cannot overcome the presumption that trial counsel employed reasonable trial strategy in failing to request an instruction on the necessarily included lesser offense of assault with intent to commit great bodily harm less than murder.⁴ Defendant's theory of defense was that he was not guilty of any offense at all. During closing argument, counsel asserted that the victim's and Young's testimony that defendant was the shooter was not credible, and maintained that the evidence did not support the prosecution's theory of the case. Defense counsel suggested that, given video surveillance showing where Young was standing during the incident and inconsistencies in witness testimony, Young may have been the person who shot defendant. It was reasonable for defense counsel to argue, based on the medical and forensic evidence, that defendant was not the shooter, or at least that the shooting did not happen as described by Young and the victim. The witnesses' testimony about the position of the victim's body at the time of the shooting was complicated, and could have given rise to different conclusions about how the victim was shot. Defense counsel's decision not to request a lesser included offense instruction in favor of persuading the jury that defendant did not shoot the victim was not constitutionally deficient. "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). See also *People v Sardy*, 216

⁴ Assault with intent to commit great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder. *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005).

Mich App 111, 116; 549 NW2d 23 (1996). Further, “[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

V. SUPPRESSION OF ALLEGED PLEA DEAL

Defendant asserts that he was denied the right to a fair trial based on his belief that the jury was misled about whether Young received a deal from the prosecution to dismiss his charges in exchange for his testimony. Because defendant never raised this issue before the trial court or otherwise sought to make a record, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

There is no support for defendant’s assertion that the jury was misled about any alleged consideration Young received in exchange for his testimony. At trial, Young testified that he had been charged with several felonies for his role in this offense and that he had not received any promises from the prosecution in exchange for his testimony. Defendant argues that the jury was thus led to believe that Young would be prosecuted and “convicted for his involvement” in the victim’s shooting. However, according to defendant’s “information and belief,” Young has not yet been convicted of any felony. Defendant asserts that if Young’s case was in fact dismissed, the prosecution’s failure to inform him of a deal between Young and its office was a violation of defendant’s right to due process. Defendant’s argument is based entirely on speculation, as he acknowledges that it is only his “belief” that Young testified pursuant to a deal with the prosecution. There is no evidence that there was such a deal and therefore, defendant cannot demonstrate that he was denied his right to due process. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (“As the appellant [], defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated.”).

VI. SENTENCING GUIDELINES

Defendant argues that the sentencing court erred by scoring offense variables 4, MCL 777.34, and 9, MCL 777.39. This issue is not preserved as to offense variable (OV) 4 because defense counsel agreed that this variable was properly scored at ten points.⁵ We review this issue for plain error. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), citing *Carines*, *supra*, at 763. “[R]eversal is only appropriate when the plain error that affected substantial rights

⁵ In fact, defense counsel raised the scoring of OV 4 before the trial court for the purpose of advocating *for* a score of 10 points under OV 4. Defense counsel stated that the facts of this case, based on case law, warranted a score of 10 points under OV 4. Defense counsel stated:

I don’t want to be perceived as though I am not a zealous advocate on behalf of my client, but I am also an officer of the court and if I see what I believe to be clearly an error, whether typographical or an oversight, it seems to me I have a responsibility to bring it to the court’s attention and ultimately leave it to the discretion of the court as to award the points.

seriously affected the fairness, integrity, or public reputation of the proceedings or when the defendant shows actual innocence.” *Id.* at 283 (quotation marks omitted).

Defendant objected to the scoring of OV 9 at sentencing; therefore, this issue is preserved as to this variable. We review for clear error the trial court’s factual determinations; those determinations must be supported by a preponderance of the evidence. *People v Rhoades (On Remand)*, 305 Mich App 85, 88; 849 NW2d 417 (2014). “However, we review de novo whether the facts found by the trial court are adequate to satisfy the trial court’s scoring decision.” *Id.* “When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination.” *People v McChester*, __ Mich App __; __ NW2d __ (Docket No. 318145, issued May 5, 2015), slip op at 3.

A. OV 4

A sentencing court must score 10 points for OV 4 where “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). MCL 777.34(2) explains that treatment is not a prerequisite to scoring OV 4: “(2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.”

Defendant argues that the court scored the variable in error because there was no indication in the record that the victim suffered any psychological injury, let alone “serious” psychological injury requiring professional treatment. Based on the record, we do not agree. After the victim was robbed at gunpoint and shot in the back at close range, he attempted to drive to the hospital. While en route, he determined that he could no longer go on, so he pulled over to a parking lot to call 911. He testified that he was fading “in and out” of consciousness while waiting for officers and medical personnel to respond. A police officer who rode to the hospital with the victim testified that the victim did not verbally respond to any of his questions on the ride to the hospital, and that the only time the victim spoke, he said “please don’t let me die.” The victim testified at trial that he was in a “lot of pain” after the shooting and that he was afraid “[o]f dying in the parking lot.” He also testified that he suffered numerous injuries, had a “long scar” from surgery, and that he was hospitalized for “[a]lmost a month” after the shooting. The victim’s treating physician testified that the victim suffered gunshot entrance and exit wounds to the back and to the stomach, and that the injuries were life threatening in nature. Another police officer who testified at trial was asked to describe the victim’s demeanor several days after the shooting, while he was in the hospital. The officer testified that the victim “was not doing well. He was in a lot of pain . . . he just wasn’t doing very well at all. He could barely talk to us.”

In light of the foregoing, we find that there was a preponderance of the evidence establishing that the victim suffered a serious psychological injury. A police officer testified that the only words victim spoke while en route to the hospital were “please don’t let me die.” The victim confirmed at trial that he was afraid he was going to die. According to a police officer who interviewed the victim at the hospital several days after the shooting, the victim’s demeanor was such that he could barely talk to the officers and “he just wasn’t doing very well at all.” Under the circumstances, we find this was enough evidence to support a score of 10 points for OV 4. Cf. *McChester*, __ Mich App at __, slip op at 3 (finding that the record was “essentially

barren on the issue” of OV 4, because the only evidence of the victim’s mental state was a preliminary observation by a responding police officer that the victim looked “visibly shaken” after a robbery).

Defendant also argues that trial counsel was ineffective for informing the court that he believed that ten points was the appropriate score for OV 4. Defendant’s claim is apparently based only on his belief that counsel’s position on the proper scoring of OV 4 was erroneous. Since we find that the sentencing court’s decision to score ten points for OV 4 was not erroneous, defendant is not entitled to relief on this claim. We also note that defense counsel had a duty of candor toward the court, even if adherence to that duty adversely affected defendant. See MRPC 3.3. Defense counsel was not ineffective for upholding this duty.

B. OV 9

Next, defendant argues that the court erred by scoring 10 points for OV 9, number of victims, MCL 777.39. The offense variable directs the trial court to score 10 points where two to nine victims were placed in danger of physical injury or death. MCL 777.39(c). The offense variable contains a broad definition of the word “victim.” See *People v Laidler*, 491 Mich 339, 347 n 4; 352; 817 NW2d 517 (2012). MCL 777.39(2)(a) directs the trial court to “[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim.”

Assuming without deciding that the trial court erred by scoring 10 points for OV 9 despite a situation where defendant’s accomplices were in the same general area as the victim during the shooting, defendant is not entitled to relief because the scoring of 10 points does not affect the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Defendant’s sentencing offense was assault with intent to commit murder, a Class A offense. See MCL 777.16d. With 10 points scored for OV 9, defendant’s OV score is 110, which places him in OV Level VI for a Class A offense, the highest OV Level. See MCL 777.62. Subtracting 10 points from defendant’s OV score reduces his total OV score to 100 points. This score still warrants placement in OV Level VI for a Class A offense. See MCL 777.62. Thus, even assuming error, defendant would not be entitled to relief. See *Francisco*, 474 Mich at 89 n 8.

Finally, defendant asserts that none of the facts in OV 4 or 9 “were ever admitted by Defendant and were not found by the jury and/or trial court beyond a reasonable doubt,” which he maintains was required by *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013). In *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), lv held in abeyance __ Mich __; 846 NW2d 924 (2014), this Court rejected a similar argument. We are bound to follow *Herron*. MCR 7.215(J)(1).

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Jane M. Beckering