STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
V	No. 293870 Calhoun Circuit Court
TONY BRENT BANKS, Defendant-Appellant.	LC No. 2009-001059-FH

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant was found guilty by a jury of unlawfully driving away an automobile, MCL 750.413, and was sentenced as a fourth habitual offender, MCL 769.12, to four to six years' imprisonment. Defendant appeals by right. We affirm.

Defendant first claims insufficient evidence supported his conviction. We disagree.

We review sufficiency of the evidence claims de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). When reviewing a sufficiency of the evidence challenge, this Court reviews the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *Id*. Reasonable inferences that arise from circumstantial evidence may constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750; 757; 597 NW2d 130 (1999). The jury determines the credibility of witnesses and the weight accorded to evidence; thus, we resolve in favor of the jury's verdict any conflict in the evidence. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005).

The elements of unlawfully driving away an automobile are (1) taking possession of a vehicle, (2) driving the vehicle away, (3) acting willfully, and (4) without authority or permission. MCL 750.413; *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). The statute is not aimed at preventing theft, but rather to prevent the unauthorized use of vehicles. *People v Hendricks*, 446 Mich 435, 448; 521 NW2d 546 (1994).

We conclude that sufficient evidence supported defendant's conviction of unlawfully driving away an automobile. Undisputed evidence established that defendant possessed the vehicle, and that he did so without the owner's permission or authority. Defendant's argument that the evidence does not support a finding that his possession of the vehicle was done

"willfully," is without merit. When defendant was forced to stop the car, he immediately ran from the scene. While defendant claimed he did so because he knew the police were being called, he did not have a driver's license, and he needed to throw away drugs he possessed, it was within the jury's discretion to either believe or not believe such testimony. A reasonable fact finder could also conclude that defendant ran from the scene when stopped due to guilty knowledge. Such a reasonable inference arising from the circumstantial evidence constitutes satisfactory proof of the elements of the crime. *Carines*, 460 Mich at 757.

Defendant next argues the trial court abused its discretion by denying his request to add a witness on the morning trial was scheduled to begin.

We review a trial court's decision to permit or deny the late endorsement of a witness for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Id*.

A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. US Const, Am VI; Const 1963, art 1, § 20. Although the right to present witnesses in defense is a fundamental precept of due process, the right is not absolute. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). 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.'" *Id*. at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Nevertheless, the sanction of preclusion is extreme and should be limited to only the most egregious case. *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976) (discussing whether the trial court erred when it precluded the defendant from presenting an alibi defense after the defendant failed to comply with the alibi notice requirements).

The trial court did not abuse its discretion when it denied defendant's day-of-trial motion to add a witness. *Yost*, 278 Mich App at 379. MCR 6.201(a)(1) requires parties to disclose their witness lists no later than 28 days before trial. In contravention of this requirement, defendant attempted to add a witness on the first scheduled day of trial. Defendant offered no reason for the failure to timely identify the witness. In addition, the timing of the disclosure was suspect since it occurred after the witness was moved into defendant's pod at the jail. Defense counsel informed defendant three months before trial that he needed the full name of the asserted witness and again reminded defendant of the necessity to identify the witness the month before trial. On these facts, the trial court's denial of defendant's request to add a witness on the morning of trial was not an abuse of discretion. *Yost*, 278 Mich App at 379.

Defendant next argues that he was incompetent to stand trial or help with his defense. This claim is without merit. Defendant failed to preserve the issue of competency to stand trial by filing a motion for new trial and an evidentiary hearing on this basis in the trial court. See *People v Lucas*, 393 Mich 522, 529; 227 NW2d 763 (1975). Accordingly, reversal is warranted only if defendant can show plain error affecting his substantial rights, i.e., the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Abraham*, 256 Mich App 265, 283; 662 NW2d 836 (2003). We find no such plain error.

The conviction of a defendant who is legally incompetent violates due process of law. *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000). So, a court must sua sponte hold a hearing regarding competency when the evidence raises a bona fide doubt about the competency of a defendant. *Id*. at 227-228. A defendant, however, is presumed to be competent to stand trial. MCL 330.2020(1); *Abraham*, 256 Mich App at 283.

Defendant argues that, because he testified repeatedly that he did not steal the car, which was not an element of the charged offense, he was clearly incompetent. Reading his testimony as a whole, defendant clearly understood the charges against him. Defendant stated several times that he had witnesses to support his testimony that the car had been rented for the night by a person named Bolo and two other persons. Further, he claimed that such rentals (made presumably in exchange for drugs) were common in his neighborhood. His emphasis on the rental aspect supports a finding that he understood the nature of the charge of unlawfully driving away an automobile. Accordingly, defendant has not established plain error affected his substantial rights on the basis that the trial court did not, sua sponte, conduct a competency hearing. *Abraham*, 256 Mich App at 283; *Carey*, 241 Mich App at 227-228.

Next, defendant argues he was denied the effective assistance of counsel when trial counsel failed to use reasonable diligence to discover and add Britton McNutt as a witness within the time limits of MCR 6.201(a)(1). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Generally, 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 that (2) there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, such that the resultant proceedings were fundamentally unfair or unreliable. *Yost*, 278 Mich App at 387. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Because defendant did not raise this issue in a motion for a new trial or request an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the existing record. *Matuszak*, 263 Mich App at 42.

Defendant in the instant case failed to provide defense counsel with Britton McNutt's name until the day of trial. Defense counsel noted on the record that defendant informed him in April 2009 that he had a witness to the agreement. Defendant's claim on appeal that defense counsel failed to ask for the witness's full name until the morning of the trial is unsupported by the record. Rather, defense counsel noted in his motion to add a witness that he requested defendant to give him a full name and telephone number for the asserted witness in April 2009, and again in June 2009. Defendant provided the name on the morning of trial, at which point defense counsel moved to add the late witness. While it is possible defense counsel failed to use reasonable diligence to discover the witness's given name at an earlier date, the existing record under review, without more, does not support such a finding. Moreover, there is no testimony

from the proposed witness to review. Accordingly, ineffective assistance of counsel cannot be established on this record. *Yost*, 278 Mich App at 387.

Finally, defendant asserts as ineffective assistance defense counsel's failure to object to the prosecutor's reference during closing arguments to informal car rentals as not legitimate, illogical, illegal, and used only for illegal business dealings. Taken in context, the prosecutor's comments were not improper and required no objection by defense counsel. The allegedly improper comments were made during rebuttal, and were in response to defense counsel's closing statements regarding the type of car rental agreement which occur in neighborhoods. The prosecutor's remarks were legitimate comments on the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), which need not be stated in the blandest form possible, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defense counsel was not ineffective in failing to object to these comments. *Yost*, 278 Mich App at 387.

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T.Wilder
/s/ Cynthia Diane Stephens