No. 25 - 6149

IN THE SUPREME COURT OF THE UNITED STATES

BYRON JONES,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIRST DISTRICT CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

Byron Jones #779413
In Propria Persona
Kinross Correctional Facility
4533 West Industrial Park Drive
Kincheloe, Michigan 49788-1638

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PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Byron Jones, In Propria Persona, and prays this Court to grant Rehearing to Rule 44, and thereafter, Grant him a Writ of Certiorari to review the Opinion of the First District Circuit Court of Appeals. In support of Petition, Mr. Jones states the following:

STATEMENT OF FACTS

There are two diametrically opposed yet plausible versions of this story. On the one hand there is Cassandra Riley who on May 31, 2020, is peacefully sitting on the front porch of her Aunt's house at 19726 Teppert in the City of Detroit. (T. 7/25/22, P., 110, 114). She sees the Petitioner Mr. Byron Jones whom she has known for fifteen (15) or more years. He's walking, and he walks right into the house directly across the street which is 19718 Teppert which is her grandmothers house. (T. 7/25/22, P. 111). She gets up and walks across the street and knocks on the door.

Mr. Jones comes to the door, and she tells him to get out of her grandmother's house. He said he was just using the bathroom. He comes out and leaves the house berating her by calling her a bitch and that she "don't even live here no more." (T. 7/25/22, P, 113). Now her son hears this and comes over and tells Jones not to disrespect his mother. Jones says he will beat up both of them. "I'll beat both of ya'll Motherfuckin' asses," Then Jones and her son whose name is Lamont get into fist fight. (T 7/25/22, P. 114). The fist fight ends with no serious damage, at which time Mr. Jones runs across the street and breaks the windows of Cassandra's car. (T. 7/25/22, P. 115). Then all of a sudden according to Cassandra he has a gun in his hand and he's waving it at Cassandra and her son Lamont and says, "I'll Kill Ya'll Motherfuckers." Lamont runs away and Jones goes after him and jumps on him and starts beating him on the head with the gun inflicting a gash in his head and the gun accidentally goes off. (T. 7/25/22, P. 117-118). After that Cassandra and Lamont are standing on the porch. Jones somehow has possession of Lamont's cellphone. He jumps in a car and leaves the scene with Lamont's cellphone. The police have been called at this point. They arrive and five minutes later Mr. Jones comes back. (T. 7/25/22 P. 119).

The Officers who responded to the scene helped Lamont recover his cell phone in a nearby garage thanks to an app he had on his phone called "Find my I Phone." (T. 7/25/22, P. 139), and (T. 7/25/22, P. 149). One of the Officers searched Mr. Jones' car and found a gun box but no gun. (T. 7/25/22, P. 150).

According to Mr. Jones he remembered that day well. He was there with his friends George, Jamal and Lamont. They were fixing go carts, riding go carts. They were all drinking too, and smoking. At one point he had to go to the bathroom and so he asked Jamal Riley, who is Cassandra's nephew if he could go in the house - which would have been 19718 Teppert - and use the bathroom. Jamal said, "go ahead." (T. 7/26/22, P. 26). She was still fussing because it was her deceased Aunitie or something like that and she was mad about people going in and out without permission. As he's walking to his car to leave the area he said, move to himself than for anyone else to hear," . . . bitch, you don't even stay over her no more." (T. 7/26/22, P. 27). Then Lamont confronted him because of what he said and Lamont spit on him. Jones got mad and grabbed a wrench and broke out the windows of what he thought was Lamont's car. Lamont in retaliation went over to Jones' car windows when Jones ran after him and the two started fighting. They got tried and stopped fighting. They started gathering up their stuff to leave. He said it was George Russell who hit Lamont over the head with a gun and it went off. Jones gathered up his stuff and left. While he was driving, he tried to unlock his phone when he realized he had taken Lamont's phone.

He got out of his car and located his own phone under the car seat. He said he left Lamont's phone in the garage of a friend's house. He wasn't that far away when he stopped and so he walked back to apologize to everyone at which time he was arrested. (T. 7/26/22, P. 28-31).

The jury disbelieved Mr. Jones' version and found him guilty of unarmed robbery, felonious assault, felon in possession and felony firearm. (T. 7/26/22, P. 79).

Mr. Jones was sentenced on August 15, 2022, to 15 to 30 years for unarmed robbery, 4 to 15 years for felonious assault, 5 to 20 years for felon in possession, and 5 years consecutive for felony firearm and 6 months for malicious destruction of property. (T. 8/15/22, P. 9-10).

REASONS MERITING REHEARING

1. The Michigan Court of Appeals decision is clearly in conflict with Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182; 53 L.Ed. 2d 106 (1972); and People v. Rivera, 301 Mich. App. 188, 193; 835 NW2d 464 (2013), emphasizing that in determining Barker prejudice, the court must weigh the Barker factors to determine whether a Sixth Amendment violation has occurred, in that when the length of delay is more than 18 months prejudice is presumed, and the prosecution must show that no injury occurred.

The Court of Appeals is an error - correcting court, the court generally reviews only matters actually decided by the lower court. It was inappropriate for the court of appeals to address Jones speedy trial violation issue, since the lower court failed to address the issue. On top of that error, the Court of Appeals decision of the weighing of the Barker factors resulted in both an unreasonable determination and unreasonable application of law. Specifically, for not shifting the burden upon the prosecution to show no injury occurred to the petitioner person or defense, after a 18 month delay. No prosecutorial evidence overcoming the presumption of prejudice exist.

As such all of the Baker factors weigh heavily in Jones' favor, the only relief for a speedy trial violation is dismissal of the charges.

2. The Michigan Court of Appeals decision is clearly in conflict with Strickland v. Washington, 466 U.S. 668, 687; 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and Williams (Terry) Taylor, 529 U.S. 362 (2000), emphasizing that in determining Strickland prejudice, the court must examine both the trial testimony and post-conviction evidence to determine whether, had the omitted evidence been presented, there is a reasonable probability of a different outcome, in that the Court of Appeals failed to review the trial record de novo when they claimed that the claim of right defense rest on limited reading. For example, the trial court's opinion states:

"Therefore, even if we presume that defense counsel's failure to raise the claim of right defense constituted ineffective assistance of counsel, contrary to his assertions on appeal, the jury believed the testimony offered by Cassandra and Murray, and did not believe the testimony of defendant." The Court of Appeals completely ignored the fact that Lamont Murray testified that he and Jones had a fight and he ran slipped and his phone fell out his pocket, and that he was inside the home when Jones picked up the phone. He testified that Jones did not say anything to him when he picked up the phone and Jones returned 5 minutes later.

The Court of Appeals completely ignored Jones testimony. Jones testified that he was approached by Riley and Murray, that Murray spit in his face during the COVID-19 pandemic. Jones and Murray mutually fight. Jones testified that he mistakenly took Murray phone after the fight. Furthermore, the Court of Appeals states: "Because the record is clear that the jury did not believe defendant's testimony that he mistakenly believed the phone was his, he cannot demonstrate a reasonable probability that the outcome would have been different. Accordingly, defendant has failed to demonstrate the requisite prejudice for relief."

Although from the testimony at trial, the jury was never given the claim of right instruction to know that a honest belief was petitioner actual defense, inclusion of the claim of right jury instruction, it was highly likely of a different outcome at trial, had the Court of Appeals examined this claim of error in its entirety, utilizing available record evidence, the outcome on appeal would also be different.

3. The Court of Appeals decision is clearly in conflict with Jackson v. Virginia, 443 US 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979); and People v. Hampton, 407 Mich. 354; 285 NW2d 284 (1979), emphasizing that in determining the Jackson standard, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand, in that if sufficient evidence is not introduced, a directed verdict of acquittal should be entered. After the close of the prosecution proofs, defense counsel requested a direct verdict of acquittal based on insufficient evidence.

The trial court agreed with the prosecution notion that the case is not a typical armed robbery during the motion. The significance of the judge opinion is that the evidence was not sufficient to be an armed robbery. The trial court denied the direct verdict motion based on testimony alone, the standard is if the elements of the charge were proven beyond a reasonable doubt. The trial court states: "but based upon the testimony itself the question does go to the jury."

In the opening statement to the jury, the prosecution states: "This is not going to be your typical armed robbery or what you would think of as your typical armed robbery." At the prosecution close of proofs, the prosecution reiterated the same notion: This is not going to be your typical armed robbery when you think of what takes place. The prosecution notion established doubt itself, it is reasonable to believe that the prosecution notion is the reason the jury decided on the lesser offense during deliberations. The Court of Appeals acknowledged that their was some discrepancies in Riley and Murray testimony. The Court states: "Finally a rational trier of fact could have found defendant was armed with a weapon described in the statute when he took Murray's phone, because Murray and Cassandra, with some discrepancies, testified that defendant had a gun, and used it to hit Murray on the head just before defendant walked away with Murray's phone."

The Court of Appeals completely ignored Jones testimony. Jones testified that he took Murray phone by mistake and wanted to give it back to him.

4. The Michigan Court of Appeals decision is clearly in conflict with People v. Ziegler, 343 Mich. App. 406, 410; 997 NW2d 493 (2022); and Townsend v. Burke, 334 U.S. 736; 68 S.Ct. 1252; 92 L.Ed.2d 1690 (1948), emphasizing that in determining the circuit courts factual determinations pertaining to sentencing guidelines are reviewed for clear error and must be supported by a preponderance of the evidence, in that Due process provision afford a defendant the right to be sentenced based on accurate information and in accordance with the law.

The Court of Appeals' opinion's that petitioner is correct numerous of times throughout their opinion. For example, the Court states: Defendant argues that felon-in possession cannot be counted as part of a pattern of felonious criminal activity under OV 13 because it is a crime against public safety. Defendant's assertion on appeal is correct." Furthermore, the court states: "Defendant also argues that the charge of first-degree home invasion (stemming from another unresolved case) could not be counted under OV 13 because when defendant was sentenced, the only evidence of the first-degree home invasion was the prosecutor's comment, stating that defendant had been charged therewith. Again, defendant's argument on appeal is correct."

The Court of Appeals made both an unreasonable application of law and unreasonable determination to the facts of the case. The court took it upon themselves to go beyond the purview and contours of law, and the issue presented. The Court made their own independent scoring analysis, and essentially resentenced the petitioner based upon their own interpretation of the facts on the record. After conceding to the lower court error the reviewing courts rationale for doing so was and is not a matter of the record that was presented for appellate review.

5. The Court of Appeals decision is clearly in direct conflict with People v. Kiss, Mich. App. LEXIS 387 (2022), which case is similar, legally, that the same result reached in Kiss must also be reached in this case. This Court MUST grant Rehearing and issue a Writ of Certiorari because the failure to do so would allow the Court of Appeals to continue to apply the wrong standard in deciding the Barker prejudice prong of speedy trial violation claims, and deny justice to those it is entitled to.

6. The Court of Appeals decision is clearly in direct conflict with Commonwealth v. Gelpi, 625 NW2d 543 Mass (1994), which case is similar, legally, that the same result reached in Gelpi

must also be reached in this case. This Court MUST grant Rehearing and issue a Writ of Certiorari because the failure to do so would allow the Court of Appeals to continue to apply the wrong standard in deciding the Strickland prejudice prong of ineffective assistance claims, and deny justice to those it is entitled to.

7. The Court of Appeals decision is clearly in direct conflict with People v. Hampton, 407 Mich. 354; 285 NW2d 284 (1979), which case is similar, legally, that the same result reached in Hampton must also be reached in this case. This Court MUST grant Rehearing and issue a Writ of Certiorari because the failure to do so would allow the Court of Appeals to continue to apply the wrong standard in deciding the insufficient evidence claims, and deny justice to those it is entitled to.

8. The Court of Appeals' decision is clearly in direct conflict with People v. Ziegler, 343 Mich. App. 406, 410; 997 NW2d 493 (2022), which case is similar, legally, that the same result reached in Zielger must also be reached in this case. This Court MUST grant Rehearing and issue a Writ of Certiorari because the failure to do so would allow the Court of Appeals to continue to apply the wrong standard in deciding the offense variables and deny justice to those it is entitled to.

9. This Court has an ethical duty by the United States Constitution to establish the law of the land to assure the Citizens of the United States of America that the lower court's apply that law. When they do not, it is this Court's obligation to hold THAT COURT ACCOUNTABLE and see to it that justice is administered fairly. This Court must hear this case and hold the Michigan Court of Appeals accountable for failing to properly apply the law of this Court and relief where relief is do.

SUGGESTIONS IN SUPPORT OF REHEARING

(A) The Michigan Court of Appeals' decision that Jones right to a speedy trial was not violated resulted in both an unreasonable determination and an unreasonable application of Barker v. Wingo, because a 18 month delay, prejudice is presumed and the burden shifts upon the prosecution to show no injury occurred to Mr. Jones person or defense, the Court of Appeals' failure to shift the burden upon the prosecution was unreasonable and no prosecutorial evidence overcoming the presumption of prejudice met the prejudice prong of Barker. As in People v. Rivera, 301 Mich. App. 188, 193; 835 NW2d 464 (2013); "When the delay is more than 18

months, prejudice is presumed, and the prosecution must show that no injury occurred." As the Court put it in People v. Den Uyl, 320 Mich. 477, 31 NW2d 699 (1948); "The presumption of prejudice shifts the burden to the prosecution after a 18 month delay to show no injury occurred." The prosecution offered no reason for the delay. The Court of Appeals decision to conduct the Barker test was unreasonable and inappropriate.

As in People v. Kiss, Mich. App. LEXIS 387 (2022); "The parties have numerous disputes related to the Barker factors some factual, other legal - and these disputes were not decided by the trial court. As an error - correcting Court, this Court generally reviews only matters actually decided by the lower court, see Jawad A. Shah, MD, PC v. State Farm Mut. Auto Ins. Co., 324 Mich. App. 182, 210; 920 NW2d 148 (2018). In light of these principles, it would be inappropriate at this time for this Court to address the mix of legal and factual questions posed by the parties related to the Barker factors." The result reached in Kiss is also required here. The Court of Appeals decision was unreasonable all across the board.

As such, all of the Barker factors weigh heavily in Mr. Jones favor. The trial court was required under law to make factual findings and weigh competing factors where prejudice was presumed. It failed to do so. It's as simple as that. And because the trial court did not make any relevant factual findings in this case, this Court need not afford its decision and deference.

It is clear that Mr. Jones has suffered substantial prejudice as a result of these consistent and egregious violations of his Constitutional right. Mr. Jones is entitled to a dismissal of the charges for the violations of his right to a speedy trial.

(B) The Michigan Court of Appeals' decision that Jones cannot demonstrate a reasonable probability that the outcome would have been different for counsel's failure to raise the claim or right defense resulted in both an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of Strickland v. Washington, because counsel's failure to present a viable defense was unreasonable and Jones' evidence that he informed counsel of the clam of right defense met the first prong of Strickland, see Appendix (C). As in Commonwealth v. Anslono, 9 Mass. App. Ct. 867-868; 401 NE2d 156 (1980); "The defendant argues that, based on the evidence tending to prove that he had no intent to steal because he had a honest belief that the property was his, the jury should have been instructed of the claim of right defense." As the court put it in Commonwealth v. Gelpi, 625 NE2d 543, "The defendant was entitled to have the jury consider this evidence of his honest belief they would have found him not guilty of armed robbery, because the required element of intent to steal would have been missing.

Counsel's failure in this regards was a serious omission."

Under the circumstances here, counsel's failure to raise the claim of right defense or any defense at all, Jones has met the "performance prong" of Strickland v. Washington, 466 US 668, 687-688 (1984) test. The question for this Court to answer is whether Jones was prejudiced by Counsel's ineffectiveness.

The Court of Appeals held that Jones had not determined prejudice from counsel's failure to raise the claim of right defense. The Court suggested that the jury believed the testimony offered by Cassandra and Murray, and did not believe the testimony of the defendant.

This conclusion is likewise an unreasonable interpretation of Strickland and its progeny. Williams (Terry) v. Taylor, 529 US 362 (2000), emphasizing that in determining Strickland prejudice, the Court of Appeals MUST EXAMINE both the trial testimony and the post-conviction evidence to determine whether, had the omitted evidence been presented, there is a reasonable probability of a different outcome.

To the extent that inferior federal courts have decided factually similar case, reference to those decisions is appropriate in assessing the reasonableness...of the Court of Appeals treatment of the contested issue. Copeland v. Washington, 273 F.3d 969, 974 (8th Cir. 2000). As was the case in Jones, the issue is not whether Jones is innocent, but whether if he had a competent lawyer he would have had a reasonable chance "it needed to be a 50 percent or greater chance;" Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001)), of being acquitted, given that guilt must be proved beyond a reasonable doubt, guilty people are often acquitted.

Similarly, had the Court of Appeals thoroughly done its review as prescribed by law the Court of Appeals decision would have been different. Instead of the Court's "limited reading" it should have performed a more unlimited reading, had they done so they would have discovered that it was impossible to convict Mr. Jones of any robbery at all. A more inclusive reading is as follows:

> Q: Now when all this is going on you removed Mr. Murray's phone, you grabbed it off the ground, correct? (T. 7/26/22, P. 36, 1).

Petitioner clearly grabbed what he believed to be his phone (not from another person) but off of the ground, and this narrative continues below, from other sources, not just the Petitioner's.

A: I grabbed my phone and left, yes. (T. 7/26/22, P. 37, 251).

The Court also heard testimony that as Mr. Murray slips, his phone falls out. (T. 7/25/22, P. 17, 21).

Q: Okay, and when you slip on the grass where are you located at that time?

A: In the grass.

Q: So your in the front yard?

A: Yes.

Q: Okay, and when you slip on the grass what happens from there?

A: My phone falls out of my pocket. . . So, what we have so far is an individual who unknowingly drops his phone, or it falls out his pocket rather during fist a cuff's, a wrestling match, not someone demanding that someone give someone else their property at gunpoint or by way of any other threat of violence.

Q: Okay, now you said your phone slips out of your pocket?

A: Right. (T 7/25/22, P. 137, 16).

Q: And when he reached down and grabbed your phone does he say anything to you?

A: No. (T 7/25/22, P. 138, 7)

Q: Are you able to retrieve your phone?

A: No. He picks it up.

Q: When you say picks it up are you talking about the defendant?

A: Byron Jones.

Q: Okay. And where you located at when the defendant grabs your phone? Inside the home. (T. 7/25/22, P. 137-138, 16-25 & 1).

The above colloquy during trial from the so-called victim of an alleged armed robbery, is being robbed of his phone while he is inside the home, and the petitioner is picking a phone up off of the ground outside? This notion of a robbery based on these facts defies the laws and statutes or any robbery. Petitioner had a viable defense to the charge of any robbery. Had counsel presented this defense it was highly likely that the outcome would have been different. The result reached in Gelpi is also required here. The record is clear, Jones picked up the wrong phone by mistake before leaving the scene but returned with hopes of returning the phone.

(C) The Court of Appeals' decision that a rational trier of fact could have found all of the essential elements of the crime were proven beyond a reasonable doubt, the trial court did not err

by denying defendant's motion for a directed verdict resulted in an unreasonable determination of the facts in light of the evidence most favorable to the prosecution because the prosecution never ever established that Jones was in a course of committing a larceny, an essential element of armed robbery. MCL 750.529(1). As in People v. Hampton, 407 Mich. 354; 285 NW2d 284 (1979); "Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense. See Jackson, supra."

As the court put it in Jackson v. Virginia, 443 US 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979), "After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Under the circumstances here, the State had the burden to show that Jones was in a course of committing a larceny beyond a reasonable doubt. It failed to do so, thus Mr. Jones suffered lack of due process based on insufficient evidence.

The question left for this Court to answer is whether the trial court determined the credibility of the witnesses, in deciding a motion for a directed verdict of acquittal, being that it is not permitted for the Court to assess the credibility of the witness. In this particular case, the Court did not deny the direct verdict of acquittal motion based on the correct standard. The denial was not based upon the elements of the crime charged but based on testimony instead. This conclusion is likewise an unreasonable application of Mehall and its progeny. The trial court is on the record as follows:

"But I'm looking back at my notes. With Ms. Riley:

a). "She says" In 5

b). "She alleges." In 5

c) "She talks about her son." In 7

d) "and then she says." In 11

e) "She did say." In 17

f) "then on redirect she said. In 18-19.

The trial court while making this decision to deny Petitioner's motion for a direct verdict is adequately continued in the record and the record clearly reflects the court's confusion,

apprehension and misapplication of law to the facts presented. A careful read also very clearly illustrates that the court is fully aware that the prosecution has not presented the requisite elements necessary to prove armed robbery, yet in spite of this fact the court passes on its legal duty, and decided to gamble with the jury instead, the trial court states: "based upon her testimony the jury is going to have to make what they make of it." See (T. 7/26/22, P. 19, 21-23).

Further the court states: "So, when you look at the elements of armed robbery charge I don't - I think to the standard in the light most favorable to the people, I'm not saying that the jury will - would convict on it, I have no way of knowing what the jury would do, but based upon the testimony itself the question does go to the jury." See: (T. 7/26/22, P. 20, 5-11). As in People v. Mehall, 454 Mich. 1; 557 NW2d 110 (1997), emphasizing that it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.

As was the case in Mehall, the issue is not whether or not Jones was guilty, but if the evidence is insufficient to support a conviction due process requires that the trial court direct a verdict of acquittal.

Similarly, given Murray's testimony that he ran and fell and his phone fell out his pocket. Murray was in the house when Jones picked his phone up and Jones did not say anything to him when he picked the phone up, the jury easily could have disbelieved his account of the day of the alleged crime. The prosecution opening statement to the jury was that: "this crime was not your typical armed robbery or what you would think of as your typical armed robbery."

It is unclear what part of these allegations is not a typical armed robbery because the prosecution has not proved Jones was in the course of committing larceny. The trial court would not address the elements head on, instead the court sidesteps the motion and makes the fatal mistake of hanging its decision to deny, on the flimsy peg of; "based on testimony alone." Testimony which the court itself claimed was inherently suspect.

The result reached in Mehall is also required here. The prosecution failed to prove every element of armed robbery beyond a reasonable doubt. No evidence of Jones being in the course of committing a larceny appears on record. The trial court agreed with the prosecution notion about the government evidence; "its not your typical armed robbery." It was an abuse of

discretion for the Court to deny Jones direct verdict motion of acquittal based on insufficient evidence.

C). The Michigan Court of Appeals' decision that Jones convictions for unarmed robbery, felonious assault, along with his uncharged acts of first-degree home invasion were all applicable to OV 13 and constituted separate criminal acts, albeit during a single criminal episode, the trial court did not err by assessing 25 points under OV 13 resulted in an unreasonable determination because felon - in - possession cannot be counted as part of a pattern of felonious criminal activity under OV 13 becauseit is a crime against public safety.

The Court of Appeals simply conceded to the error and stated: "Defendant's assertion on appeal is correct." (Panel opinion p. 3). Petitioner also presented: the charge of first - degree home invasion (stemming from another unresolved case) could not be counted under OV 13. And again, the Court of Appeals concluded that: "defendant's argument on appeal is correct." (Panel Opinion p. 3).

The Circuit Court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. As in People v. Ziegler, 343 Mich. App. 406, 410; 997 NW2d 493 (2022); "Whether the facts, as found are adequate to satisfy the scoring conditions prescribed by statute; the application of the facts to the law."

The trial court concluded that after defendant's convictions for unarmed robbery and felonious assault that under OV 13 either, defendant's felon - in - possession of his first - degree home invasion charge would be applied to OV 13 for a score of 25 points.

The lower court was not entirely convinced that the "Felon - in - possession" charge could not be used in scoring OV 13. On August 15, 2022, during sentencing two very important statements were made which warrant mention:

1. THE COURT: "Now, if you show me something that says you don't count it, and then I guess my question would be, do pending charges count.

2. THE COURT: "So, your objection to OV 13, which I said I think it is appropriate for 25 points, but I have your objection for the record.

At the end of the day the trial court was still unclear as to matters of the applicable law pertaining to the scoring of OV-13, and the third crime necessary to score 25 points ended up being tossup. The record is unclear as to which crime constituted the third felony? Either way,

counsel was clear and preserved the record for appellate review with the objection.

Petitioner presented this error on appeal and the court concluded that Jones is correct in the matter of law, that the lower court could not score 25 points for OV 13 by utilizing either crime of felon in possession or the home invasion charge. But what happened next was unfathomable; the Court of Appeals took it upon themselves to go beyond the purview and contours of law, and the issue presented. After conceding to the lower court error the reviewing court in hyperbole reconstructed the entire sentencing in order to justify the scoring of OV 13, yet the Court of Appeals rationale for doing so was and is not a matter of the record that was presented for appellate review.

Simply put, the Court of Appeals cannot arbitrarily dismiss the issue presented by violating the party presentation principle. The court cannot concede to the error and then go and say that if you do it this way then it's not an error. Case law very clearly states: "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law." Hardy, 494 Mich. at 438. The Court of Appeals states: "defendant assertion on appeal is correct." As in People v. Antwine, 293 Mich. App. 192, 194; 809 NW2d 439 (2011); "a finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with definite and firm conviction that a mistake has been made."

The error presented necessitates REMAND in order for the court to resentence Petitioner based upon accurate scoring of the Offense Variables, as the Court of Appeals has determined that the Petitioner's argument that felon - in - possession cannot be counted as part of a pattern of felonious criminal activity under OV 13, because it is a crime against public safety. Also, there was no other evidence in the record suggesting Jones committed first - degree home invasion, therefore as argued to the court, Jones was wrongly scored 25 points.

The Court of Appeals continued its assessment when it took this position which is also in error and causes this Petitioner irreparable harm. The court states: "However, our inquiry does not end with finding defendant's legal assertions correct as the record reveals there was a preponderance of evidence that defendant committed multiple felonious assault during the incident.

Then the court misplaces its reliance on People v. Golba, 273 Mich. App. 603, 614; 729 NW2d 916 (2007), in order to justify its rationale for up ending defendant's rights. Golba, Id., states: "That a sentencing court can consider uncharged offenses so long as they are supported

by a preponderance of evidence." Golba, did not say that the Court of Appeals could make an independent consideration on appeal and disregarded countless cases by the Court of Appeals and many more that the trial court nor the Court of Appeals can rely upon facts not admitted by the Petitioner or found by the jury in order to calculate sentencing guideline ranges. The judicially found facts by the Court of Appeals as such violated Petitioner's Sixth Amendment rights.

The Court of Appeals continued in making error when it disregarded the holding of People v. Carll, 327 Mich. App. 690, 915 NW2d 387 (2018) holding that a single felonious act cannot constitute a continuing pattern of criminal's behavior under MCL 777.43. Then the Court of Appeals misapplied People v. Gibbs, 299 Mich. App. 473, 477, 488; 830 NW2d 821 (2013).

By completely ignoring key facts of the case, the Court of Appeals states: "The defendant committed three separate acts that constituted a pattern of criminal activity when he robbed a store and received convictions for armed robbery, unarmed robbery, and one count of conspiracy to commit armed robbery, MCL 750.157.

Through Gibb's convictions all arose from a single robbery, they were considered separate acts under OV 13. "The key word which the Court ignores is "convictions" Gibb's was convicted of the numerated crimes above. Jones was convicted of unarmed robbery and one count of felonious assault, yet the Court of Appeals has utilized uncharged offenses in order to help justify the error committed by the lower court. Nowhere, in Gibb's does it mention uncharged offenses.

And to the point previously mentioned, the Court of Appeals has engaged in it's own form of judicial fact - finding process over extending its judicial authority by using crimes not admitted to by Petitioner nor found guilty of by a jury.

Relief is forthcoming, both State and Federal Due process provision afford a defendant the right to be sentenced based on accurate information and in accordance with the law. U.S. Const. Amends. VI, XIV; Const. 1963, Art 1, § 11; Townsend v. Burke, 334 U.S. 736; 68 S.Ct. 1252; 92 L. Ed. 2d 1690 (1948); People v. Lee, Mich 618, 636-637; 218 NW2d 655 (1974); People v. Malkowski, 385 Mich. 244; 188 NW2d 599 (1971).

In addition, MCR 2.613(A) requires a sentence to be consistent with "substantial justice", and the Michigan Supreme Court has found that "it is difficult to imagine something more inconsistent with substantial justice than requiring a defendant to serve a sentence that is based upon inaccurate information." People v. Fransisco, 474 Mich. 82, 89; 711 NW2d 49

(2006)(quoting MCR 2.613(A)).

Defendant asks this Honorable Court to reverse his Conviction.

CONCLUSION

For the reasons stated, this Court MUST grant Rehearing of its judgment entered on January 20, 2026, and issue a Writ of Certiorari to hold the Michigan Court of Appeals accountable for failing to properly apply the law or this Court and Grant Mr. Jones relief.

Should Jones' cry for justice not be heard and denied relief; may this Court also cry and not be heard "For whoever shut their ears to the cry of the poor will also cry themselves and not be heard." Proverbs 21:13.

Respectfully submitted,

Byron Jones

Byron Jones, #779413
In Propria Persona
Kinross Correctional Facility
4533 West Industrial Park Drive
Kincheloe, Michigan 49788-1638

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, this 12th day of February, 2026, to: KYM WORTHY, Wayne County Prosecutor, 5301 Russell Street, Room 200, Detroit, Michigan 48211.

Byron Jones 2/12/26
Petitioner

Appendix A.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 20, 2026

Mr. Byron Jones
Prisoner ID #779413
4533 W. Industrial Park Dr.
Kincheloe, MI 49788

Re: Byron Jones
v. Michigan
No. 25-6149

Dear Mr. Jones:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Appendix B.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2024
v	No. 365393 Wayne Circuit Court
BYRON JONES, Defendant-Appellant.	LC No. 21-002548-01-FC

Before: BORRELLO, P.J., and SWARTZLE and YOUNG, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] his jury trial convictions of unarmed robbery, MCL 750.530, assault with a dangerous weapon (felonious assault), MCL 750.82, felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, and malicious destruction of personal property ($200 or more but less than $1,000), MCL 750.377a(1)(c)(*i*). Defendant was sentenced to 15 to 30 years' imprisonment for unarmed robbery, 4 to 15 years' imprisonment for felonious assault, 5 to 20 years' imprisonment for felon-in-possession, five years' imprisonment for felony-firearm, second offense, and six months' for malicious destruction of property. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, for unarmed robbery, felonious assault, and felon-in-possession. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. BACKGROUND

This appeal arises from a series of events that occurred on May 31, 2020. At trial, Cassandra Riley testified that she knew defendant for almost 15 years, and on the date in question,

[1] *People v Jones*, unpublished order of the Court of Appeals, entered July 31, 2023 (Docket No. 365393). The parties filed a prior appeal in this case that this Court dismissed pursuant to a stipulated order of dismissal. *People v Jones*, unpublished order of the Court of Appeal, entered March 16, 2023 (Docket No. 365283).

she was outside her aunt's house in Detroit when she witnessed defendant walk into her grandmother's house. She told defendant that he needed to exit the house because he did not live there to which defendant replied that he was using the bathroom, but Cassandra insisted that he could not be inside the house. Defendant then exited the house.

As they were both walking down the driveway, defendant said, "b****, you don't even live over here no more." Cassandra's son, Lamont Murray, overheard what defendant said and told defendant to "stop disrespecting" Cassandra. Defendant replied, "I'll beat both of y'all motherf***ing asses." Defendant and Murray then engaged in a physical fight. They eventually stopped fighting, at which point defendant ran to Cassandra's car, and smashed her car windows, causing $350 in repairs. After smashing the windows, defendant came back toward Cassandra and Murray, while pointing a gun at them,[2] stating that he would "kill y'all motherf***ers." Murray tried to run, but he slipped on the grass. Defendant jumped on Murray and hit him on the head with his gun, causing it to fire into the air. When this happened, defendant jumped up, grabbed Murray's phone, and got into his car. Murray yelled, "give me my phone!" Shortly thereafter, the police arrived at the scene and defendant returned thereto. The police later found Murray's phone at a nearby house.

Murray's testimony was, for the most part, similar to Cassandra's. He testified that, when defendant walked toward the house, Cassandra followed him. Murray could not hear what Cassandra and defendant were saying to each other, but Cassandra's voice was low and respectful, while defendant's voice was hostile. Murray then told defendant to stop talking disrespectfully to Cassandra. Defendant became upset and retorted, "who do you think you're talking to?" Murray replied, "you think you're tough because you have a gun on you." Murray did not see a gun on defendant, but was aware he might have one. Defendant reached for his hip, pulled out his gun, and gave it to a bystander. Subsequently, Murray and defendant engaged in a physical fight.

When the fight ended, defendant took back the gun, pointed it at Murray and Cassandra, and said he was about to kill them. Murray began running, but slipped on the grass, causing his phone to fall out of his pocket. According to Murray, defendant then hit Murray on the head with the gun. The gun went off, and defendant stopped hitting Murray. Murray ran toward the house, and defendant picked up Murray's phone. When defendant grabbed the phone he said, "it's my phone now." Defendant drove away, but he later returned without Murray's phone. Murray located his phone at a garage nearby, using the Find My application.

Officer Steven Brandon, of the Detroit Police Department, testified that he responded to the scene of the incident and arrested defendant. Subsequently, he walked to a nearby house and recovered Murray's phone from inside the garage. Officer Brandon found a gun box inside defendant's vehicle, but did not find a gun.

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[2] Cassandra testified both that defendant had the gun when he took Murray's phone, and that he did not have the gun "during the fight."

Officer Kyle Arella, of the Detroit Police Department, testified that, when he arrived at the scene of the incident, he began speaking with defendant. Defendant said there was a little fight that did not amount to anything. Officer Arella looked for a shell casing on the lawn where the fight occurred and defendant's gun allegedly went off, but he did not find one.

Defendant testified that, prior to the incident, he was "hanging out" with Murray, George Russell, and Jamal Riley ("Jamal")—Cassandra's nephew. Jamal gave permission for defendant to go use the bathroom at his relative's house, however, once defendant entered the house, he heard Cassandra outside "fussing," so he came to the door. Cassandra told him to get out, so he left the house and headed home. As he was leaving, defendant muttered to himself, "b****, you don't even stay over here no more." Murray overheard defendant say this. Consequently, Murray spit in defendant's face, and then defendant picked up a wrench and smashed the windows in the car he thought belonged to Murray.

Defendant saw Murray attempting to break the windows in defendant's car, so defendant ran over and tackled Murray. When they were tired of fighting, they stopped. Defendant testified that Russell then hit Murray on the head with a gun, causing the gun to discharge. Defendant claimed he never had a gun. Subsequently, defendant drove off to cool down. Defendant eventually pulled over, and when he tried to unlock his phone, he realized he had grabbed Murray's phone. Defendant testified that he thought the phone he grabbed was his phone. Defendant denied saying that he was going to beat up Cassandra and Murray while also denying taking a gun from his waistband and handing it to someone before fighting with Murray. Defendant also denied ever pointing a gun at Cassandra and Murray, or stating that he would kill them. Defendant denied ever stating: "this is my phone now." Defendant testified he did not know why he left the phone in a garage, but maintained he wanted to return the phone to Murray.

At sentencing, the trial court scored Offense Variable 13 (OV 13) (continuing pattern of criminal behavior) at 25 points, counting defendant's convictions for unarmed robbery, felonious assault, and felon-in-possession as the three criminal acts necessary to score OV 13 at 25. The trial court also noted that defendant's charge for first-degree home invasion could count as the third offense under OV 13 if felon-in-possession was not applicable. Defendant objected to the latter two criminal acts being applied under OV 13, but the trial court erroneously maintained that one or both were applicable.

II. ANALYSIS

In his appeal, defendant argues that felon-in-possession cannot be counted as part of a pattern of felonious criminal activity under OV 13 because it is a crime against public safety. Defendant's assertion on appeal is correct. Defendant also argues that the charge of first-degree home invasion (stemming from another unresolved case) could not be counted under OV 13 because, when defendant was sentenced, the only evidence of the first-degree home invasion was the prosecutor's comment, stating that defendant had been charged therewith. Again, defendant's argument on appeal is correct.

For issues pertaining to sentencing guidelines scoring on appeal, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Ziegler*, 343 Mich App 406, 410; 997 NW2d 493 (2022) (citation omitted).

"Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* at 411 (citation omitted). "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Sanford v State*, 506 Mich 10, 14-15; 954 NW2d 82 (2020) (quotation marks and citation omitted). "If the language of a statute is plain and unambiguous, the statute must be enforced as it is written." *Ziegler*, 343 Mich App at 411 (citation omitted).

Pursuant to MCL 777.43, "[a] trial court properly scores OV 13 if there was a continuing pattern of criminal behavior." *People v Carll*, 322 Mich App 690, 704; 915 NW2d 387 (2018) (quotation marks and citation omitted). "Specifically, the trial court is instructed to score OV 13 at 25 points when the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." *Id.* (quotation marks and citation omitted). MCL 777.43 "further provides that for 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." *Id.* (quotation marks and citation omitted). After counting defendant's unarmed robbery and felonious assault convictions under OV 13, the trial court concluded that either defendant's felon-in-possession conviction or his first-degree home-invasion charge could be applied as the third offense necessary to score OV 13 at 25 points.

As previously stated, defendant is correct in his assertion that convictions for felon-in-possession are not applicable to OV 13 because felon-in-possession is a crime against public safety, and public safety crimes cannot be used to establish a pattern of felonious criminal activity under OV 13. *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011); see also MCL 777.16m (designating felon-in-possession as a public safety crime). However, the trial court also held that defendant's charge for first-degree home invasion was applicable under OV 13. "A sentencing court may consider all record evidence before it when calculating the guidelines, including . . . a presentence investigation report." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (citation omitted). Defendant's Presentence Investigation Report (PSIR) noted that he had a charge related to another case for first-degree home invasion pending in the circuit court. When scoring OV 13, a sentencing court can consider a defendant's prior offenses, crimes, and criminal activity, regardless of whether such conduct resulted in a conviction. *Carll*, 322 Mich App at 704; MCL 777.43. It is important to bear in mind that there still needs to be a preponderance of evidence in the record demonstrating that the criminal activity took place. *Johnson*, 298 Mich App at 131; see also MCL 777.43(2). Here, the only evidence in the record suggesting defendant committed first-degree home invasion was the PSIR, which simply indicated that defendant's charge for first-degree home invasion was pending in the circuit court, revealing that the district court already found probable cause to bind the case over to circuit court. However, since probable cause is a less demanding standard of evidence than the preponderance of evidence standard applicable under OV 13, and there was no other evidence in the record suggesting defendant committed first-degree home invasion, we conclude that there was insufficient evidence to count defendant's first-degree home invasion charge as the third offense under OV 13.

However, our inquiry does not end with finding defendant's legal assertions correct as the record reveals there was a preponderance of evidence that defendant committed multiple felonious assaults during the incident. See *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007) (explaining that a sentencing court can consider uncharged offenses so long as they are supported

by a preponderance of evidence). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (citation omitted). "The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Henry*, 305 Mich App 127, 143; 854 NW2d 114 (2014) (citation omitted). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (citations and quotation marks omitted). At trial, the prosecutor argued that defendant's act of hitting defendant on the head with his gun, a dangerous weapon, supported a conviction for felonious assault. This act constituted a felonious assault because defendant put Murray in reasonable fear of receiving a battery when he chased Murray with a dangerous weapon and seemingly intended to injure Murray when he hit him on the head with the gun.

We conclude that defendant committed two additional felonious assaults when he earlier pointed his gun at Murray and Cassandra and told them that he was going to kill them. Defendant's unlawful act of pointing the gun at Murray and Cassandra, while telling them he was going to kill them, was sufficient to cause reasonable apprehension of receiving an immediate battery. Further, defendant used a dangerous weapon while doing this, and intended to place Murray and Cassandra in reasonable apprehension of receiving an immediate battery given the circumstances. Accordingly, there was a preponderance of evidence that defendant committed felonious assaults during separate criminal acts than the one he received a conviction for, thereby providing a third offense applicable under OV 13. Therefore, the trial court's error in counting either the first-degree home invasion offense or the felon-in-possession offense as the third criminal act necessary to assess 25 points under OV 13 was harmless, and does not require resentencing. See *People v Jones*, 270 Mich App 208, 212; 714 NW2d 362 (2006) (noting that a trial error does not merit reversal unless it appears more probable than not that the error was outcome determinative); see also *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006) (explaining that scoring errors which change the sentencing guidelines range require resentencing).

Defendant also argues that his convictions for unarmed robbery and felonious assault should not both count under OV 13 because they constituted a single felonious act. See *Carll*, 322 Mich App at 704 (holding that a single felonious act cannot constitute a continuing pattern of criminal behavior under MCL 777.43). In *Carll*, this Court held that the defendant's reckless driving constituted a single act, despite the fact that there were multiple victims. *Id.* at 705. However, as is the case here, crimes which arise from the same criminal episode, but do not originate from a single felonious act, are individually applicable under OV 13. *Id.* at 705. In *People v Gibbs*, 299 Mich App 473, 477, 488; 830 NW2d 821 (2013), this Court held that the defendant committed three separate acts that constituted a pattern of criminal activity when he robbed a store and received convictions for armed robbery, unarmed robbery, and one count of conspiracy to commit armed robbery, MCL 750.157. Though Gibbs's convictions all arose from a single robbery, they were considered separate acts under OV 13.

Here, defendant's convictions should be scored separately under OV 13 because, while defendant's unarmed robbery and felonious assault convictions were part of the same criminal episode, they did not constitute a single felonious act. Defendant hit Murray on the head with a gun, and after the gun went off, defendant stood up, took Murray's phone, and left. These

constituted separate acts. Furthermore, defendant pointed the gun at Cassandra and Murray while threatening to shoot them before he began chasing Murray, making this another separate criminal act. Therefore, because defendant's convictions for unarmed robbery, felonious assault, along with his uncharged acts of felonious assault, were all applicable to OV 13 and constituted separate criminal acts, albeit during a single criminal episode, the trial court did not err by assessing 25 points under OV 13.

Next, defendant argues that his counsel's failure to advance a claim of right defense was unreasonable and constituted deficient performance because the claim of right defense was a viable defense in this case where defendant thought Murray's phone was his own. Further, defendant asserts, there was a reasonable possibility that inclusion of that defense would have "favorably determined the outcome of this case."

"A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Isrow*, 339 Mich App 522, 531; 984 NW2d 528 (2021) (quotation marks and citation omitted). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id.* Clear error exists where the reviewing court is left with a "definite and firm conviction" that the lower court made a mistake. *Id.* Unpreserved claims of ineffective assistance of counsel are reviewable for errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

A criminal defendant has the right to a fair trial which includes the right to effective assistance of counsel. *Isrow*, 339 Mich App at 531. "Trial counsel is ineffective when counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* (quotation marks and citation omitted). "Trial counsel's performance is presumed to be effective, and defendant has the heavy burden of proving otherwise." *Id.* "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). When evaluating an ineffective assistance of counsel claim, there is a "strong presumption that trial counsel's decision-making is the result of sound trial strategy." *Id.* at 532. "A deficiency prejudices a defendant when there is a reasonable probability that but for trial counsel's errors, the verdict would have been different." *Id.*

According to the claim of right defense, "if a defendant had a good-faith belief that the defendant had a legal right to take the property at issue, then the defendant cannot be convicted because the defendant did not intend to deprive another person of property." *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). Defendant's arguments regarding his claim of right defense rests on a limited reading of the trial record, namely, ignoring Cassandra's testimony that Murray yelled that the phone was his when defendant took it, and Murray's testimony that, after taking Murray's phone, defendant stated, "it's my phone now." Though defendant claimed that he never said, "this is my phone now," the jury obviously believed the testimony given by Murray and Cassandra in finding defendant guilty of unarmed robbery because that crime requires that the offender have the intent to rob. *People v Williams*, 288 Mich App 67, 82; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012) (explaining that the crime of unarmed robbery requires the intent to

rob). Therefore, even if we presume that defense counsel's failure to raise the claim of right defense constituted ineffective assistance of counsel, contrary to his assertions on appeal, the jury believed the testimony offered by Cassandra and Murray, and did not believe the testimony of defendant. In order to prevail on his claim of ineffective assistance of counsel, defendant must demonstrate not only that his counsel was ineffective but also that but for counsel's deficient performance, "there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 5. Because the record is clear that the jury did not believe defendant's testimony that he mistakenly believed the phone was his, he cannot demonstrate a reasonable probability that the outcome would have been different. Accordingly, defendant has failed to demonstrate the requisite prejudice for relief.

In his Standard 4 brief, defendant argues that the trial court abused its discretion by denying defendant's motion for a directed verdict of acquittal because there was insufficient evidence that defendant committed armed robbery, MCL 750.529.

"We review de novo a trial court's decision whether to deny a motion for a directed verdict." *People v Chelmicki*, 305 Mich App 58, 64; 850 NW2d 612 (2014) (citation omitted). "In doing so, we review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt." *Id.* (quotation marks and citation omitted).

The elements necessary to prove armed robbery are set forth in MCL 750.529:

> (1) [T]he defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Muhammad*, 326 Mich App 40, 61; 931 NW2d 20 (2018) (citation omitted).]

"The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Henry*, 305 Mich App at 143 (citation omitted). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (citations and quotation marks omitted).

A rational trier of fact could have found defendant committed an assault when he engaged in any one of these acts: (1)when he threatened to shoot Murray and Cassandra, or (2)when he came running at Murray before tackling him or (3)by striking Murray on the head with the gun before taking Murray's phone. A rational trier of fact could have also found defendant committed a felonious taking when he picked up defendant's phone and left with it because Murray testified that he informed defendant that the phone belonged to Murray before defendant left with it, and Cassandra testified that defendant acknowledged that the phone belonged to Murray. Finally, a rational trier of fact could have found defendant was armed with a weapon described in the statute when he took Murray's phone because Murray and Cassandra, with some discrepancies, testified

that defendant had a gun, and used it to hit Murray on the head just before defendant walked away with Murray's phone. See MCL 750.529 (explaining that possession of a dangerous weapon during a robbery converts the robbery to an armed robbery). Therefore, because a rational trier of fact could have found all of the essential elements of the crime were proven beyond a reasonable doubt, the trial court did not err by denying defendant's motion for a directed verdict.

Defendant additionally argues he was denied his right to a speedy trial because his trial occurred over two years after he was arrested. We conclude that defendant was not denied his right to a speedy trial.

"Whether defendant was denied his right to a speedy trial is an issue of constitutional law, which we . . . review de novo." *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006); see also *People v Stovall*, 510 Mich 301, 312; 987 NW2d 85 (2022) (explaining that questions of constitutional law are reviewed de novo).

The federal constitution "guarantee[s] criminal defendants a speedy trial without reference to a fixed number of days." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013) (citation omitted). "Claims of violation of the right to a speedy trial are evaluated on the basis of four factors (the "*Barker*[3] factors"): (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Maples v State*, 342 Mich App 370, 382; 994 NW2d 834 (2022) (citation omitted). "None of these factors is either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Instead, these are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 382-383 (quotation marks and citation omitted).

The first *Barker* factor is the length of the delay. *Id.* "When the delay is more than 18 months, prejudice is presumed, and the prosecution must show that no injury occurred." *Rivera*, 301 Mich App at 193 (citation omitted). "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Id.* (citation omitted). Defendant was arrested on May 31, 2020, but did not have his trial until July 25, 2022. Since this delay exceeded 18 months, it was presumptively prejudicial. *Id.* "Under the *Barker* test, a presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Williams*, 475 Mich at 262 (quotation marks and citation omitted).

Under the second *Barker* factor, the prosecution has offered no reasons for the delay. While we note that the speedy trial issue was raised on appeal in defendant's Standard 4 brief, after the prosecution had already filed its appellate brief, the prosecution failed to file a supplemental brief addressing the issues raised in defendant's Standard 4 brief.

Defendant asserts that his preliminary examination was delayed six times because the prosecution could not produce its witnesses. However, defendant provided no evidentiary support for this assertion. See *People v Smart*, 304 Mich App 244, 251; 850 NW2d 579 (2014) (holding a defendant-appellant may not "merely announce a position and leave it to this Court to rationalize

[3] *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

the basis for the claim, or elaborate the argument."). Defendant also argued that the prosecution delayed in an attempt to gain a tactical advantage, but, again, defendant failed to provide evidence to support that assertion. See *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009) (rejecting the defendant's speedy-trial argument in part because the defendant presented no evidence that the prosecution delayed in an attempt to gain a tactical advantage).

It is not apparent from the register of actions why it took over two years to commence defendant's trial. There was a three-week period from the time defendant filed a motion to quash until the trial court denied that motion, and then there was a three-month gap from the time defendant retained a private attorney until the pretrial conferences began. Further, one pretrial conference was adjourned for a few weeks at the request of the defendant. Each of these delays, amounting to roughly five months, are attributable to defendant.

Further, defendant requested an in-person jury trial, which was subject to delays resulting from the Michigan Supreme Court's decision to suspend jury trials in response to the COVID-19 pandemic. *People v Witkoski*, 341 Mich App 54, 63; 988 NW2d 790 (2022) (explaining that, on March 18, 2020, the Michigan Supreme Court instructed all trial courts to adjourn all criminal matters, including jury trials, for a period of a few months). This Court has recently held that any "delays caused by the COVID-19 pandemic are not attributable to the prosecution when evaluating a speedy-trial claim." *People v Smith*, ___Mich App ___ slip op at 1; ___NW2d ___(2024) (Docket No.362114).

In sum, roughly five months of delay are attributable to defendant, an unspecified amount of the delay is not attributable to the prosecution because of the COVID-19 pandemic, *Id.* and if there is another portion of the delay not attributable to defendant or the pandemic, because the prosecution failed to file a responsive brief arguing otherwise, that delay is attributable to the prosecution as an "unexplained" delay. See *People v Lown*, 488 Mich 242, 262; 794 NW2d 9 (2011) (holding that unexplained delays in holding a criminal trial may be attributed to the prosecution). However, since it is unclear whether there was an unexplained delay attributable to the prosecution that was longer than the delay attributable to defendant, we will not weigh this factor for or against either party. Similar to the facts presented in *Smith*, "[w]hile the length of the delay in this case creates a presumption of prejudice to [defendant], nearly all the delay stemmed from emergency public-health measures taken to limit the spread of COVID-19, and the delay did not prejudice [defendant's] ability to defend against the charges." *Smith*, slip op at 1-2.

Further, we note that defendant first asserted his right to a speedy trial on July 21, 2021, nearly 14 months after he was arrested, and one year before his trial. Defendant's decision to wait nearly 14 months after his arrest to assert his right to a speedy trial does not weigh in his favor. See *Cain*, 238 Mich App at 113-114 ("[W]e cannot ignore the fact that Cain waited eighteen months to assert her right to a speedy trial and that her trial commenced within nine months of when she asserted that right."). Though defendant's trial did not commence as quickly as the trial in *Cain*, the delay from defendant's assertion of his speedy-trial right to his trial was caused in part by his decision to hire a new attorney during that timeframe, along with the three-week adjournment he requested. Since defendant waited for more than half of his pretrial incarceration to assert his right to a speedy trial, this factor weighs mildly against defendant.

Turning to the question of prejudice, we must determine whether the delay prejudiced defendant. With respect to a delay of trial, "[t]here are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense." *Williams*, 475 Mich at 264 (citation omitted). Defendant argues that he was personally prejudiced because his movement in society was limited for the 11 months he was on bond, and because, when he was incarcerated, he had to physically defend himself from inmates, was housed in segregation, and endured mistreatment from the jail staff. Defendant asserted that he experienced anxiety and concern because of his incarceration during COVID-19. Finally, defendant asserted that his defense was impaired as a result of his incarceration because he could not contact favorable res gestae witnesses.

Even if we were to conclude that defendant suffered personal deprivation and anxiety during his incarceration, it is important to note that defendant experienced these feelings because he committed other criminal acts while he was on bond. Consequently, defendant's personal prejudice from being incarcerated weighs very mildly in his favor. Furthermore, this Court has held that "anxiety, alone, is insufficient to establish a violation of defendant's right to a speedy trial." *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997) (citation omitted).

Though defendant claimed that he was unable to contact favorable res gestae witnesses as a result of his incarceration, he did not describe the testimony those witnesses would have given, explain why he did not contact them during his 11-month period while out on bond, or explain why his attorney could not contact those witnesses for him. As such, defendant's assertions of prejudice are best described as general allegations. "General allegations of prejudice are insufficient to establish that [a defendant] was denied his right to a speedy trial." *Gilmore*, 222 Mich App at 462.

In sum, we conclude that a significant portion of the delay complained of in this matter is attributable either to defendant or to the COVID 19 pandemic. Since neither form of delay is attributable to the prosecution, we therefore conclude that defendant's right to a speedy trial was not violated. *Smith*, slip op at 1-2.

Affirmed.

/s/ Stephen L. Borrello
/s/ Brock A. Swartzle
/s/ Adrienne N. Young

Appendix C.

4-13 22

Dear Mr. Brusstar,

I talked to my dad he Said you Said "you were going to file 5 "motions" on my behalf June 8 '22. Looking forward to Seeing the motions. Please include an "Evidentiary hearing motion"; Also a motion for "Bond", Also "invalid Accusatory instrument". The police never read me my Constitutional rights & failed to inform me of my Charges.

Also I need Some or (2) defenses argued. I need "M. Crim. J.I. 7.5 Claim of right", & "M. Crim. J.I. 7.6 Duress. I recently was Stabbed in the Wayne County & needed you to take pics of my wounds. I don't feel here. Thanks in advance See you June 8th 2022

Sincerely,

Byron Jones

4-13-2022