STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 5, 2000
v	No. 212716 Kent Circuit Court
DONALD ALEXANDER SPICE, Defendant-Appellant.	LC No. 97-001366-FH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for possession of burglar's tools, MCL 750.116; MSA 28.311, and conspiracy to commit breaking and entering of a building, MCL 750.110; MSA 28.305, MCL 750.157a; MSA 28.354(1). Defendant was sentenced as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to five to ten years' imprisonment on each conviction to run concurrently. The trial court ordered that defendant's sentences on these convictions be served concurrently with defendant's sentence of fifteen to thirty years' imprisonment imposed in a separate Clinton County case and that the sentence be served consecutively to the remaining portion of the three- to ten-year sentence for which defendant was on parole in Kent County.[1] Although we affirm defendant's convictions, we remand this case for the sole purpose of ensuring that defendant's written statement is attached to his presentence report.

Defendant first argues that the trial court abused its discretion by denying defendant's motion for an adjournment so that defendant could obtain civilian clothes, thereby denying him due process and a fair trial because he had to wear jail clothing on the first day of his trial. We disagree. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified in part, remanded in part 457 Mich 885; 586 NW2d 925 (1998).

Trial judges are afforded broad discretion in ruling upon motions for continuances. *People v Martin*, 147 Mich App 297, 300; 382 NW2d 726 (1985). In the present case, we find that the trial court properly exercised its discretion when denying defendant's motion for adjournment. First, the record reveals that the trial had been adjourned multiple times before and the case was more than one

year old. The trial court balanced defendant's right to a speedy trial against the prejudice that may result by defendant appearing at trial in jail clothing. See *Martin*, *supra* at 300-302. The trial judge concluded that a cautionary instruction would cure any prejudice; thus, the trial court offered a rational basis for denying defendant's motion for adjournment. Second, defendant failed to demonstrate that prejudice resulted from the trial court's decision to deny his motion for adjournment. *Pena*, *supra* at 661. Immediately before jury selection, the trial court provided the prospective panel with a cautionary instruction concerning defendant's attire. Because jurors are presumed to follow their instructions, *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997), and because curative instructions can remedy potential prejudice, see *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), we are convinced that no prejudice resulted from the trial court's decision to deny defendant's motion. We find no abuse of discretion and conclude that the trial court's decision to deny defendant's motion for adjournment did not deprive defendant of due process or his right to a fair trial.

Defendant next argues that he was entrapped when the Kent County Sheriff's Department induced defendant to participate in the breaking and entering that gives rise to this appeal. Defendant claims that in exchange for his help, the police made several promises, such as placing an arrest warrant on hold, expunging defendant's past criminal record, and helping defendant with parole. Because defendant never raised the entrapment defense before the trial court, this issue is not preserved, and is for that reason waived. See *People v Crall*, 444 Mich 463, 464-465; 510 NW2d 182 (1993); see also *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Upon review of the record, we find that no manifest injustice will result from declining to address this issue. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

Next, defendant argues that the prosecutor violated his Fourteenth Amendment right to due process by failing to provide requested discovery. We disagree. We review a trial court's determination of evidentiary issues, including decisions on discovery requests, for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). Similarly, we review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Our Supreme Court has stated that "[u]nder due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment. Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *Fink*, *supra* at 454. In the present case, no facts within the lower court record support defendant's argument. The prosecutor responded to defense counsel's discovery request, and the lower court record is devoid of any indication that defense counsel was dissatisfied with the prosecutor's response. Essentially, defendant is claiming that the prosecutor failed to produce documentary evidence that he committed the breaking and entering as a police agent when the facts indicate that no such documentary evidence existed. At trial, the same police detective who defendant claimed authorized defendant to commit the breaking and entering testified that defendant had no such authority and was not serving as a confidential police agent when defendant committed the instant crimes. We find no abuse of discretion.

Defendant also argues that he was deprived of the right to effective assistance of counsel because his trial attorney failed to call various witnesses and failed to raise an entrapment defense. We disagree. Because defendant failed to request an evidentiary hearing or a new trial on this basis in the lower court, we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996); *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). To establish ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *In re Ayres*, 239 Mich App 8, 21; __ NW2d __ (1999), quoting *Pickens*, *supra* at 302-303. Moreover, "[t]he defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *Id.* "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In the present case, defendant has not overcome the presumption. Because we have held that a trial counsel's failure to call a particular witness is presumed to be trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), we will not substitute our judgment for that of trial counsel. *Id.* Further, "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; __ NW2d __ (2000); see *Maleski*, *supra* at 523-524. The record contains no facts to support an entrapment defense. Even assuming that defense counsel's failure to call various witnesses and failure to pursue an entrapment defense constitutes deficient performance, defendant cannot establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Next, defendant claims that because he was working as an agent for the Kent County Sheriff's Department when he committed the breaking and entering, he lacked the requisite intent to commit the breaking and entering. Therefore, defendant implicitly argues that there was insufficient evidence to support his convictions. We disagree.

When determining whether the prosecution has presented sufficient evidence to sustain a conviction, we "'must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Where the police detectives that defendant claims implied authority to participate in the offense testified that defendant had no such authority and was not working for the police at the time of the breaking and entering, and where testimony of a coconspirator suggested that defendant not only acted as the coordinator of the breaking and entering, but also that he performed the act of breaking and entering while the coconspirator served as the lookout, sufficient evidence exists from which a jury could find beyond a reasonable doubt that defendant possessed the requisite intent to commit the charged offense.

Defendant next contends that he was entitled to have his written statement attached to the presentence report. We agree. MCR 6.425(A) provides in relevant part that "[t]he [presentence]

report must be succinct and, depending on the circumstances, include … any statement the defendant wishes to make." MCR 6.425(A) and (A)(8).

Here, the presentence report includes a section entitled "Defendant's Version of the Offense," which provides that "[t]he defendant gave this investigator a written statement regarding the instant offense and it is attached for the court's perusal." To the contrary, defendant's written statement was never attached to the presentence report. Thus, pursuant to MCR 6.425(A)(8), we remand this case for the sole purpose of ensuring that defendant's written statement is attached to his presentence report.

Finally, defendant argues that he should have been sentenced as an habitual third offender rather than an habitual fourth offender. This issue is now moot. A previous panel of this Court remanded defendant's case to the trial court for the purpose of resentencing defendant to correct the sentences imposed at the initial sentencing proceedings. Thereafter, the trial court resentenced defendant as an habitual third offender on both convictions. As we have noted, "[w]here a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot." *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Because the trial court corrected defendant's initial sentence, this issue is now moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Although we affirm defendant's convictions, we remand this case for the sole purpose of ensuring that defendant's written statement is attached to his presentence report. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffery G. Collins

[1] Because defendant's June 11, 1998 sentence contained several errors, a previous panel of this Court remanded the case for resentencing. The trial court resentenced defendant on March 31, 1999, as a third-offense habitual offender.