

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHEL M. MONTES,

Defendant-Appellant.

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UNPUBLISHED

July 15, 2008

No. 277211

Kent Circuit Court

LC No. 06-001166-FC

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced, as an habitual offender, fourth offense, MCL 769.12, to 10 to 20 years' imprisonment. Defendant will serve his prison sentence for the instant crime consecutive to any prison term imposed as a result of having violated his parole. We affirm.

On appeal, defendant first argues that trial counsel was ineffective for failing to object to improper impeachment evidence. Defendant preserved this claim of ineffective assistance by moving for a new trial on this ground. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews factual findings for clear error, but we review de novo questions of constitutional law. *Id.*

“To establish a claim of ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *Snider, supra* at 423-424; see also *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defense counsel is given wide discretion in matters of trial strategy. See *id.* at 325. Accordingly, there is a strong presumption of effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

It is undisputed that the prosecutor improperly impeached defendant by asking him about his two misdemeanor theft convictions. See MRE 609. The question is then whether trial counsel’s failure to object to the admission of this improper evidence constituted ineffective assistance of counsel. Defendant must show that, but for trial counsel’s failure to act, there is a reasonable probability that the jury would not have convicted him. *Snider, supra*. Defendant

cannot meet that burden on the record before this Court. The prosecutor presented overwhelming evidence that defendant participated in the crime: the victim identified defendant as acting as the lookout during the robbery, defendant's girlfriend reported overhearing defendant and codefendant planning the robbery, and codefendant incriminated defendant, by admitting that defendant acted as the lookout while he robbed the victim, when he pleaded guilty to armed robbery. Also, defendant's credibility was properly impeached when the prosecutor asked him about his conviction for uttering and publishing, a felony involving an element of dishonesty. See MRE 609. It is highly unlikely that, but for trial counsel's failure to object to the improper impeachment testimony, the jury would have acquitted defendant. Having failed to overcome his burden of proof, defendant is not entitled to relief based on his ineffective assistance claim.

Defendant also argues that trial counsel was ineffective for failing to request separate jury instructions on aiding and abetting for the armed and unarmed robbery charges. Defendant did not preserve this claim: this issue was not raised in defendant's motion for a new trial. *Snider, supra* at 423. For that reason, our review is for mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Jury instructions "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

In this case, the trial court gave the standard jury instruction for aiding and abetting, CJI2d 8.1, regarding intent. In *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), the Court acknowledged that, although the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, they can be useful in evaluating the propriety of the instructions given. And, the contents of this instruction have previously been determined to be a proper statement of the law. *People v Champion*, 97 Mich App 25, 32; 293 NW2d 715 (1980), rev'd on other grounds 411 Mich 468 (1981). The trial court clearly specified that the standard aiding and abetting instruction applied to both the armed and unarmed robbery charges, and that defendant was charged with either committing the crimes or "intentionally assisting someone else in committing either one of them." There is no indication that the jury was confused by the instructions, or did not understand that defendant had to have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance. Upon review, it is sufficiently clear that the jury was instructed to decide whether defendant aided and abetted with the intent to commit armed robbery or unarmed robbery, or knew that co-defendant intended to commit either armed robbery or unarmed robbery when he aided and abetted. Because the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights, the jury instructions were proper. *Gaydosh, supra* at 237. Accordingly, trial counsel was not ineffective for failing to object to the jury instructions as given. *Snider, supra* at 425 ("Trial counsel is not required to advocate a meritless position.").

Defendant next argues that he is entitled to credit for the 422 days he served in jail, pending trial and sentencing. Defendant waived this issue by acknowledging, at sentencing, that he was not entitled to jail credit against his new sentence. Waiver is "the 'intentional

relinquishment or abandonment of a known right.”” *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). A party who waives his rights may not thereafter seek appellate review regarding the deprivation of those rights because the waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). By specifically stating that he was not entitled to jail credit against his new sentence, defendant intentionally relinquished his right to argue otherwise on appeal. Nevertheless, we note that defendant was on parole when he committed the instant offense. Consequently, he was not entitled to jail credit against his new sentence; his time served in jail is credited to the sentence from which parole was granted. *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006).

We affirm.

/s/ William B. Murphy  
/s/ Richard A. Bandstra  
/s/ Jane M. Beckering