STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2008
v	No. 275102 Wayne Circuit Court
KASSEM MOHAMAD SALAMEY, Defendant-Appellant.	LC No. 06-004275-01

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 12 to 20 years' imprisonment. We affirm.

Defendant's convictions arise from a conspiracy to rob Tyson Janisch, a representative of Atlas Oil Company, on Monday, March 21, 2005, outside of a Fast Track Gas Station owned by defendant's family. Defendant first contends that he was denied his right to due process and to present a defense because the police failed to preserve (or purposely destroyed) potentially exculpatory evidence. Detroit Police Investigator Maurice McClure seized the computer hard drive from the gas station's video surveillance system during the investigation. Investigator McClure downloaded one minute of footage from the hard drive, depicting the actual commission of the robbery. Investigator McClure then stored the hard drive, unplugged, in the police station's evidence room for two-and-a-half months. Defendant alleges that the remaining surveillance footage was erased from the hard drive while in police custody. Defendant contends that this footage was necessary to rebut the testimony of his codefendants, Michael Boyd, Cortez Chenault, and Ronald Scott.

We review de novo constitutional issues, such as those related to the right to present a defense and due process violations. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). Defendant raised this issue in a motion for new trial, which the trial court denied. We review a trial court's determination regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court acts within its discretion when it selects from among "reasonable and principled" outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Under principles of due process, "[a] criminal defendant has a right to present a defense." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). As part of that right, the prosecution is required to automatically disclose material, exculpatory evidence in its possession. *Schumacher*, *supra* at 176, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998) (footnote omitted). The prosecution and police are also required to preserve "potentially exculpatory evidence" in its possession; however, the failure to do so only violates the defendant's right to due process when the prosecution or police act in bad faith. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *Anstey*, *supra* at 460-461; *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

We hold that the trial court properly determined that defendant failed to establish that Investigator McClure acted in bad faith. Comparing the trial and *Ginther*[1] hearing testimony, it appears that Investigator McClure spoke to defendant and/or his father, Mohamad Salamey, the night of the robbery and found out that they did not know how to download the surveillance footage. Accordingly, Investigator McClure secured a search warrant and seized the hard drive on the day following the robbery. Such swift action was reasonable given that defendant informed Investigator McClure that the hard drive would rewrite itself and the footage would be lost forever. Investigator McClure would have no reason to believe that the slight variations in the testimony of the witnesses regarding events on the day of the robbery would require extensive examination of the lengthy surveillance footage. Further, there is absolutely no evidence that Investigator McClure purposely erased the footage from the hard drive or knowingly allowed the hard drive to rewrite.

Further, there is no reasonable probability that preservation of the remainder of the surveillance footage would have changed the outcome of defendant's trial. The jury heard the inconsistencies among the codefendants' testimony. Defense counsel's strategy was to highlight those inconsistencies. Surveillance footage, which may have disproved small points in the codefendants' testimony, would not likely have affected the jury's determination.

Defendant also contends that he received ineffective assistance of counsel. Defendant preserved this issue for appellate review by raising it in a motion for new trial, *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), and the trial court conducted a *Ginther* hearing to consider defendant's claim.

> Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. [*People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).]

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

We review a trial court's findings of fact for clear error, MCR 2.613(C), and conclusions of constitutional law de novo. *LeBlanc, supra* at 579. Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, there is a "reasonable probability" that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that defense counsel should have pursued the theory that defendant had no motive or opportunity to rob Janisch on Monday, March 21, 2005, because Janisch collected the cash proceeds from the station's gasoline sales during that weekend. Therefore, defendant would have no reason to know that Janisch would be carrying over $19,000 that day. However, we should not presume with the benefit of hindsight that defense counsel was ineffective just because the defense theory employed was unsuccessful. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Defense counsel, Jeffrey Edison, testified at the *Ginther* hearing that the prosecutor's theory was that defendant orchestrated an "inside job" with an employee (Chenault) and some of the employee's friends (Scott, Boyd, and Shawn Fegan) to rob Janisch while he was carrying a large sum of money. The prosecution theorized that the robbery occurred on Monday, March 21, 2005, because Janisch had not collected the proceeds that weekend. Accordingly, Janisch would be collecting over $19,000 in cash – the amount actually recovered when the police apprehended Scott and Fegan. Edison testified that there was no individual receipt documenting that Janisch collected $19,000 on March 21, 2005. Rather, that amount was reached by totaling the receipts dated March 19, 20, and 21, 2005.

During the trial, the prosecutor indicated that the attorneys stipulated to waive the testimony of cashier, Senela Gant, who was an eyewitness to the robbery. Edison testified that he did not learn that Gant had worked on Saturday, March 19, 2005, until after he had waived her testimony at trial. At that time, the Salamey family informed Edison that Gant had initialed a receipt acknowledging that Janisch came to the gas station and collected $8,763 in cash proceeds on Saturday, March 19, 2005. However, defendant's father never indicated when he told Edison about this information. Edison admitted that he did not speak to Gant in preparing for trial and, therefore, did not learn from Gant that she had worked that weekend. Edison indicated that the prosecution received its copies of the collection receipts from Janisch. Edison received those receipts as part of the discovery packet but the receipt initialed by Gant was not included. The prosecution presented into evidence receipts dated on each day that weekend at trial. *Defendant* initialed the receipt dated March 19, 2005, as provided by the prosecution.

Edison testified that the receipt dated March 19, 2005, and initialed by Gant, would have prompted him to question Janisch's credibility on the stand since Janisch testified that he did not go to the gas station on the weekend preceding March 21, 2005. However, Edison did not question Janisch about the collections allegedly made on Saturday and Sunday. He also never questioned Janisch about the fact that he should not have $19,000 on his person on Monday, March 21, 2005, when he was only collecting the proceeds for Sunday, March 20, 2005. Accordingly, Edison admittedly failed to highlight that defendant would have no reason to know

that Janisch would be carrying over $19,000 that day and, therefore, the alleged motive for the robbery would be negated.

Edison claimed that he did not pursue the inconsistencies of the collection receipts or attack Janisch's credibility because "the heart of the case" was to expose the codefendants' interest in lying to implicate defendant in order to minimize their roles in the robbery. Furthermore, the police actually recovered the coat and money that was stolen from Janisch and the gun used in the robbery when they arrested Scott and Fegan. Edison chose to steer the defense to establish that Chenault was privy to the same information as defendant and coordinated the robbery on his own.

Defendant failed to establish that defense counsel was ineffective for choosing one theory of defense over another. Investigator McClure learned of defendant's involvement in the conspiracy from the codefendants upon their arrests. Members of the codefendants' families also implicated defendant in the offense. Accordingly, it was reasonable to attack the credibility of those individuals who implicated defendant. Furthermore, the codefendants testified that defendant told them that Janisch would be carrying approximately $20,000 and the police actually recovered over $19,000 when Fegan and Scott were arrested. Even if Janisch had collected the proceeds during the weekend before the robbery and should have only been carrying approximately $8,600, this coincidence is striking. Clearly someone (most likely defendant) knew that Janisch would be carrying the entire weekend's proceeds. Accordingly, Edison's choice of defense theories was not outcome determinative.

We further find that defense counsel was not ineffective for waiving Gant's testimony at trial. The failure to call or question witnesses is a matter of trial strategy that only amounts to ineffective assistance if it deprives defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, defendant failed to rebut Edison's testimony that neither defendant nor his family members informed him of this defense until after he had waived Gant's testimony at trial. Absent information from his client, Edison would have no reason to know that Gant could provide information other than cumulative evidence regarding her view of the robbery.

Defendant contends that Edison was ineffective for failing to present evidence that defendant had recently upgraded the gas station's surveillance system. Defendant asserts that this information would have shown that he knew it would be "unwise" to rob the gas station on the day in question. Defendant's father testified regarding the upgrades to the system but did not indicate whether he had shared this information with Edison. Accordingly, defendant failed to establish that Edison even knew about this information.

Defendant contends that defense counsel should have taken some action in relation to the missing surveillance footage. Edison testified that defendant's father asked him to retrieve the surveillance system hard drive from the police when they retained him as defense counsel. Defendant's father informed Edison that a review of the full footage would show the gas station's entire perimeter on the day of the robbery. Edison did, in fact, secure a copy of the downloaded surveillance footage from the prosecution. The prosecutor informed Edison that he had only received from the police the one-minute section depicting the commission of the robbery. Defendant's father testified that he did not know that the police and the prosecutor only

had one-minute of footage until after trial. However, Edison claimed that he knew that the footage provided by the prosecution was incomplete because defendant's father told him that he had viewed the footage from the entire day before Investigator McClure seized the hard drive.

We find that defense counsel's failure to secure the full surveillance footage or challenge the failure of the police to preserve the footage did not affect the outcome of defendant's trial. First, there is no record indication that the footage would have been saved had Edison secured the hard drive sooner. Second, as noted *supra*, Investigator McClure did not act in bad faith by failing to preserve this evidence. Accordingly, any objection on that ground would have been meritless and defense counsel was not ineffective for failing to raise it. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Third, Edison elicited testimony highlighting many of the alleged inconsistencies between the codefendants' testimony and the surveillance footage. Edison elicited testimony that there was a six to eight-foot tall wall behind the gas station to rebut Chenault's testimony that he could see some of the robbery activity from where he allegedly sat in defendant's parked car on Alter Road. Defendant's father testified that the surveillance footage showed two men sitting on the picnic table outside of the gas station but never showed one of the men entering the station to buy sodas. However, Edison elicited testimony to highlight the inconsistent stories regarding whether Scott entered the gas station before the robbery. Defendant's father also testified that the surveillance footage did not show any one "suspicious looking" standing across the street in front of the Family Dollar Store where Chenault and Boyd allegedly acted as lookouts. However, defendant's father did not testify that no one was standing across the street. Accordingly, it is uncertain whether the surveillance footage would have contradicted the codefendants' testimony on this point.

Defendant contends that Edison should have called Sharod Scott, Ronald Scott's sister, as a witness to rebut Chenault's testimony that defendant was involved in planning the robbery. Sharod provided a statement to the police in which she stated that Chenault admitted to her that he planned the robbery before he quit working at the gas station. Chenault allegedly told Sharod that he provided all the details about the robbery, including how much money to expect and who to rob. Edison testified that he used this information in formulating the defense. As a result, he questioned Chenault about his role in planning the robbery in an attempt to show that Chenault took advantage of defendant. As noted, *supra*, the decision not to call or question a witness only amounts to ineffective assistance if the defendant is deprived of a substantial defense. *Hoyt*, *supra* at 537-538. However, defendant was not denied the use of a substantial defense by the omission of this witness. Edison did argue that Chenault knew about Janisch's financial activities at the gas station and planned the robbery without defendant's involvement.

Defendant further contends that his convictions were against the great weight of the evidence. Defendant raised this issue in his motion for new trial, but the trial court did not decide the issue when it denied the motion on other grounds. Accordingly, the issue is not properly preserved for appellate review. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In any event, in support of his claim, defendant merely reiterates his previous arguments in support of this issue. As we find that defendant failed to establish error requiring reversal in relation to those previous arguments, we reject the current challenge to his convictions.

Finally, defendant asserts that the trial court relied on inaccurate information in formulating his sentence and denied him the right to allocution at the sentencing hearing.

Defendant preserved this issue for appellate review by raising it "in a proper motion for resentencing." MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Pursuant to MCL 769.34(10), this Court must affirm a sentence that falls within the appropriate guidelines sentence range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant's sentence falls within the minimum statutory guidelines range for a second habitual offender, MCL 769.10. The minimum sentencing guidelines range for a second habitual offender is 81 to 168 months. Accordingly, defendant's minimum sentence of 12 years (144 months) is within the appropriate range and we must affirm unless we determine that the trial court relied on inaccurate information. MCL 769.34(10).

Defendant asserts that the trial court inaccurately determined that defendant "led the perpetrators of the robbery astray" given that the codefendants all had prior criminal histories and/or less than stellar personal backgrounds. Defendant also challenges the trial court for treating him differently than the other parties involved based on his perceived stable and privileged background. Defendant challenges the trial court for not allowing defendant's family to speak on his behalf before the imposition of his sentence and the author of his presentence investigation report (PSIR) for failing to contact his family. We disagree.

First, regardless of the codefendants' criminal histories, there is no reason to assume that they would have committed this particular crime without the information provided by an "inside man" such as defendant. Defendant correctly asserted that the codefendants had prior criminal histories and, therefore, were not necessarily innocents being led astray. However, the trial court did not make that assumption. Second, although defendant challenges the trial court's bias against him because he comes from a "stable and more privileged background," defendant does not contest the accuracy of that statement. It is indisputable that defendant's parents own a business that kept defendant employed.

Defendant challenges the trial court's failure to consider the statements of his family and friends in imposing the sentence. Pursuant to MCR 6.425(E)(1)(c), the trial court is required to allow only "the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity" to speak at the sentencing hearing. The court may, in its discretion, allow other parties to speak. *People v Lawson*, 172 Mich App 498, 500-501; 432 NW2d 354 (1988). There is no indication that the trial court abused its discretion in denying defendant's family members the opportunity to speak at the sentencing hearing. Further, defendant has not provided testimony or affidavits outlining his family members' potential statements. Accordingly, it is uncertain whether these statements would have affected the sentence imposed.

Defendant similarly contends that the author of the PSIR failed to contact his family members and include their statements in the report. The author of the report indicated that she attempted to contact defendant's family once by telephone but "no contact was made." A defendant's family members' statements might be relevant to certain required considerations in a PSIR, such as the defendant's social history, MCR 6.425(A)(4), or the "evaluation of and prognosis for the defendant's adjustment in the community," MCR 6.425(A)(10). However, the court rule does not mandate that the author of the report include such statements when compiling the PSIR. See generally MCR 6.425(A).

Defendant also asserted that he was denied his right to allocution when the trial court interrupted him at the sentencing hearing. As noted, *supra*, MCR 6.425(E)(1)(c) mandates the court to allow a defendant and his counsel the opportunity to "advise the court of any circumstances they believe the court should consider in imposing sentence." The purpose of the right to allocution is to allow a defendant "to speak in mitigation of the sentence," to equalize the sentencing process, and to allow the defendant to begin an atonement or healing process. *People v Petty*, 469 Mich 108, 119, 121; 665 NW2d 443 (2003). However, we find that defendant was not denied the right to allocution before his sentence was imposed. It is true that the court interrupted defendant. However, there is no indication in the transcript that defendant was denied the right to continue. Accordingly, we also affirm defendant's sentences.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot