STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2008
v	No. 279337 St. Clair Circuit Court
JOHN HENRY SADOCHA, Defendant-Appellant.	LC No. 06-002523-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of making a false statement in the application for a certificate of title, MCL 257.254; and concealing or misrepresenting the identity of a motor vehicle, MCL 750.415(2). He was sentenced on both counts to three months in jail, which was to be suspended upon payment of monies owed to the court. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In September of 2001, Kevin Prodin purchased from defendant what he believed was a 1995 Dodge Neon. In late 2005, Prodin received letters from the Michigan Attorney General and Secretary of State informing him there was a problem with his vehicle's title and directed him to have the car inspected.

In March of 2006, the police inspected Prodin's vehicle and discovered that the hidden VINs did not match the public VIN and that the federal sticker that contains the VIN was missing. The hidden VINs revealed that Prodin's vehicle was a 1996 Neon and only had a scrap title.

Upon further investigation, it was revealed that defendant's business, Auto Farm, had acquired possession of a 1995 and 1996 red Neon through auction. The 1995 Neon had maintained interior burn damage and carried a resale title. The 1996 Neon had fire damage in the engine compartment and carried a scrap title.

Defendant gave both vehicles to Randy Findley, a mechanic, for their repair. Prodin first observed the vehicle at Findley's business. Findley arranged a test drive and gave Prodin defendant's phone number. At trial, it was unclear whether defendant or Findley handled the

negotiation of the purchase price. Upon selling the vehicle, defendant claimed that Findley provided defendant the necessary information for the application for title.

The application for Certificate of Title contained several discrepancies including the sale price of the vehicle, the mileage, and whether the vehicle was towed out.

To prove absence of mistake, plan, or knowledge, the prosecution introduced testimony regarding previous investigations of a similar nature involving defendant, including the investigation of Auto Farm for two separate incidences of switching VIN numbers on Neons. Defendant confirmed these investigations and testified that in 2004 he was criminally charged and placed on probation.

Defendant's appellate counsel interviewed Findley and took his statement in the form of an affidavit. In his affidavit, Findley denied ever being interviewed or speaking with an attorney representing defendant until present appellate counsel met with him.

Defendant first argues on appeal that he was denied the effective assistance of counsel because defense counsel failed to call Randy Findley as a witness.

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review its constitutional determination de novo. *Id*. A factual finding is clearly erroneous where, after reviewing the entire record, a definite and firm conviction is left that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, this Court gives no deference to the trial court. *People v Howard*, 223 Mich App 52, 54; 595 NW2d 497 (1998).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). To overcome this presumption, the defendant must meet a two-pronged test. The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 312-313. Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy in which this Court will not review without the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks might be necessary in order to win difficult cases. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). There is accordingly a strong presumption of effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Dixon*, *supra* at 398.

Defendant claims that Findley's testimony was crucial to his defense. Defendant's theory at trial was that he mistakenly wrote the incorrect VIN on the application for Certificate of Title because Findley inadvertently switched the vehicles' VINs without defendant's knowledge. Defendant alleged that Findley, after selling the car to Prodin, telephoned defendant and relayed the VIN for the vehicle to him over the phone. Thus, defendant asserts that he was denied the opportunity to present the defense of mistake. However, our review of the lower court record reveals that defense counsel offered the defense of mistake without calling Findley. Defense counsel raised the defense of mistake through his direct examination of defendant and bolstered that defense in his opening and closing arguments.

Further, it is likely that counsel did not call Findley as a witness as a matter of trial strategy. Findley's affidavit indicates that any testimony by Findley would only have bolstered the prosecution's case by verifying that defendant filed a false application for title. In addition, Findley's affidavit indicates that, if called to testify, he would have incriminated himself, and potentially defendant as well, in additional crimes. Therefore, it is likely that, when confronted with this proposed testimony, either the prosecutor or the trial court would have warned Findley of his Fifth Amendment right not to testify, thereby making himself unavailable as a witness. See MRE 804(b)(1). Trial counsel did not render ineffective assistance when he deemed it wiser to mention Findley's role in the instant case without calling him as a witness. Lastly, we note that the decision to call a witness is a matter of trial strategy that an appellate court will not second-guess on appeal. *Dixon*, *supra* at 398.

Defendant next argues on appeal that the trial court erroneously denied his request to instruct the jury on the defense of mistake in accordance with CJI2d 6.4 as to Count 1, Falsifying a Motor Vehicle Title. Defendant argues that even if the trial court's failure to instruct on the defense theory alone did not result in an unfair trial, when coupled with defense counsel's failure to call Findley, the verdict was inconsistent with substantial justice.

We generally review claims of instructional error de novo on appeal, but review the trial court's determination that a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007). We review jury instructions in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. *Id*.

Generally, a trial court is required to instruct the jury on the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). The trial court is required to give a defendant's requested instruction when the instruction concerns his theory and is supported by the evidence. *Id*. Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Where a requested instruction is not given, the defendant bears the burden of establishing that the trial court's failure to give the instruction constituted a miscarriage of justice. MCL 769.26; *Rodriguez*, *supra* at 473-474.

We have reviewed the instructions the trial court gave the jury and conclude that, taken as a whole, they accurately reflected the elements of the crime charged and otherwise sufficiently protected defendant's rights. The additional instructions that defendant requested were

cumulative to the instructions actually given and reiterated arguments defendant that was allowed to present about how the case should be resolved. Thus, we conclude that the trial court did not err by failing to give the jury the additional instruction.

Defendant claims the failure of the trial court to give CJI2d 6.4 combined with the failure of the jury hearing from Findley was not consistent with substantial justice. This is a cumulative error argument. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors would not merit reversal. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, in this case, no errors occurred and therefore no cumulative effect could warrant reversal.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis