STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 280457 Kent Circuit Court
MICHAEL ANTWONE JORDAN, Defendant-Appellant.	LC No. 07-001892-FH

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

PER CURIAM.

Defendant appeals by right a portion of his sentences for two convictions of uttering and publishing, MCL 750.249. For the reasons set forth in this opinion, we vacate that portion of the judgment of sentence ordering defendant to pay restitution, and remand to the trial court for recalculation of the amount of restitution owed. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant stole and deposited payroll checks issued to Matthew Loveless and Mitchell Swanson. Defendant forged endorsements and deposited the checks in a Chase Bank account. He deposited Loveless's check for $301.54 on January 19, 2007, made a number of withdrawals, and then deposited Swanson's check for $281.78 on January 26,2007. Defendant continued to withdraw money until February 1, 2007, when Swanson's check was returned to Chase Bank because a stop payment order was placed on it. On February 5, 2007, access to the account was restricted under federal regulations.

At sentencing, defendant was ordered to pay $301.54 in restitution to Mathew Loveless, and $281.78 to Chase Bank, for a total of $583.32. Defense counsel did not object to this restitution amount.

On appeal, defendant challenges the trial court's order that he pay $281.78 in restitution to Chase Bank. He claims that trial counsel's failure to challenge this portion of the restitution order constituted ineffective assistance of counsel.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the

record." *Id*. "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his claim is limited to mistakes apparent on the record. "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). We review questions of constitutional law de novo. *Id*.

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, 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." *Id*. "Second, 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." *Id*.

Defendant maintains that when the account was closed on February 5, 2007, it had a balance of $202.32. Therefore, the trial court should have found that defendant owed Chase Bank only $78.46, and ordered restitution in that amount. MCL 780.766.

Defendant is incorrect in his assertion that his bank account had a balance after it was closed. According to the testimony of Chase's assistant manager, a total of $480 was withdrawn from defendant's account over the life of the account. The only check that cleared was that for $301.54, because the other check defendant deposited was returned. Therefore, at the time defendant's account was frozen, it should have had a negative balance of $178.46.

This would appear to support defendant's challenge to the trial court's restitution order to some extent. From the evidence presented, the bank suffered a loss of only $178.46, exclusive of fees or other damages it incurred. The trial court's award of $281.78 to Chase, and its $583.32 total award, appears to be clearly erroneous. We therefore vacate that portion of the judgment of sentence ordering restitution, and remand this case to the trial court for recalculation of the correct amount of restitution. We do not preclude the addition of any other damages shown to have been suffered by any victim.

Vacated in part and remanded to the trial court for recalculation of the correct amount of restitution owed. We do not retain jurisdiction.

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