STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2009
v	No. 278699 Genesee Circuit Court
IRA JAMES DORSEY, Defendant-Appellant.	LC No. 07-019801-FH

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of failure to pay child support, MCL 750.165, and sentenced to 60 months' probation with the first 180 days to be served in jail, $1,028 in restitution, and $1,120 in attorney fees and costs. (Judgment of Sentence, 4/24/07; ST, p 14.) He appeals as of right. We affirm.

I

Defendant was charged with failure to pay court-ordered child support in six separate files, which were consolidated for trial. Each case involved a different mother, some of whom were receiving state assistance for their children. The charging time period of the offenses was May 31, 2003 to June 1, 2004. Genesee Friend of the Court (FOC) casework supervisor Larry Leslie testified regarding defendant's arrearage; he gathered the information from the Michigan Child Support Enforcement System Court Order Information Report (MCSES). The cover of the MCSES report for each case showed a name, social security number, and birth date of the payor; Leslie used that information to identify defendant as the payor.

In LC No. 07-019802-FH, defendant was charged with failing to pay court-ordered support of $39 a week to Lucretia Woodward, beginning on June 25, 1997. A copy of an order of affiliation and a support order were admitted. Defendant made one payment of $148.12 during the charging period. In LC No. 07-019801-FH, defendant allegedly failed to pay support for a child he fathered with Laiondre Larry pursuant to a court order to pay $8 a week beginning in March 2001. An order of affiliation custody and support was admitted. Defendant made one payment of $59.25 during the relevant charging period. In LC No. 07-019800-FH, defendant allegedly failed to pay court-ordered support of $164 a week to Shekilia Weems, beginning in September 1993. The order of affiliation custody and support was admitted. Defendant made one payment of $1,333.06 in November 2003, as a result of a search and subsequent attachment

of his bank account. In LC No. 07-019804-FH, defendant failed to pay court-ordered support of $43 a week beginning in June 1996 to Janell Laquan Lewis. An order of affiliation custody and support was admitted. Defendant made one payment of $266.60 during the charging period. In LC No. 07-019803-FH, defendant failed to pay court-ordered support of $140 a week to Ericka Lynne Powell beginning in September 1993. The order of affiliation custody and support was admitted. Defendant made one payment of $1,066.45, as a result of an attachment of his bank account. In LC No. 07-019805-FH, defendant failed to pay court-ordered support of $165.30 a month to Ronshelia W. Grant beginning in February 2001. An order of affiliation custody and support was admitted. Defendant made one payment of $88.87 during the charging period, and a "purge payment" of $6,459, after he was arrested in order to settle a civil contempt lawsuit for not paying child support.

Only one of the six mothers appeared. Laiondre Larry testified that defendant currently resides with her in Ann Arbor and provides for all three of their children. She further testified that defendant gave her cash during the charging period for various needs, including clothing, and actually paid more than the ordered amount.

The trial court directed verdicts of acquittal in five of the six cases, concluding that the essential element of identity had not been established. The court noted that five of the mothers failed to appear, and there were no witnesses to identify defendant as the father or authenticate defendant's listed birth date and social security number.

The defense asserted that defendant was not in arrears, and claimed that payments had been made on defendant's behalf through Sony Records. The defense presented Gary Vincent-Casner, a former FOC child support enforcement officer, who testified that he was responsible for enforcing the child support order involving Larry. Vincent-Casner identified a letter, dated June 14, 2005, that the FOC received from Sony Records regarding an income withholding order that Sony had received concerning defendant. In the letter, the Sony representative proposed to make payments on defendant's behalf from defendant's royalties, which the FOC accepted. Defense counsel asked Vincent-Casner to read the following paragraph to which Casner signed his name on behalf of the FOC:

> I, the undersigned, on behalf of Genesee County, hereby instruct Sony Music to disperse 35 percent of [defendant's] royalties, royalty payments to MISDU, P.O. Box 30351, Lansing 48909. Which amount shall be applied toward [defendant's] child support obligations and to disburse the remaining 65 percent to [defendant] or his designees.

On cross-examination, Vincent-Casner testified that he was unaware of the amount of royalties received by the FOC. He testified, however, that the royalties were "much less than the total amount of the support Orders," that the money received was "just a partial payment and it was disbursed among the six cases." He further testified that "there was not much money that was applied to any single one of the cases."

II

Defendant argues that the trial court abused its discretion when it denied his request for an adjournment of trial after new counsel was appointed the day before trial. We disagree.

A

Defendant had retained counsel from the preliminary examination through arraignment. At the February 5, 2007, arraignment, defendant's retained counsel moved to withdraw because defendant had not paid his fees. The trial court questioned both defendant and retained counsel about the chances that retained counsel might continue to represent defendant:

> *The court*: Well, I'm not sure if he's gonna be qualified for a court appointed attorney. I'll first say that. I can't guarantee that. And you don't think there's any chance the two of you are gonna mend your fences?
>
> *Defendant*: I'm gonna try to. I'm gonna try, if I could.
>
> *The court*: As they say - - work this out. So, he can continue to represent you, since - -
>
> [*Defense counsel*]: No, he hasn't, Judge.
>
> *The court*: I'm sorry?
>
> [*Defense counsel*]: He has not.
>
> *The court*: No. We haven't yet.
>
> [*Defense counsel*]: Yeah.
>
> *The court*: He said there's some chance you might.
>
> [*Defense counsel*]: I don't - -
>
> *The court*: He's smiling and saying yes.
>
> [*Defense counsel*]: Judge, all I want is the Court to enter my order. If we work it out, then I'll do another substitution for the Court.

The trial court, concerned that defendant may not be able to qualify for a court-appointed attorney, ruled that it would reconsider the motion to withdraw after defendant met with the person in charge of court-appointed counsel.

By the March 9, 2007, pretrial hearing, the court noted that defendant still had not contacted the person in charge of court-appointed counsel, had not returned the person's phone calls, and had failed to cooperate with the person. The trial court emphasized to defendant that he must determine whether he could maintain his retained counsel or needed to apply for a court-appointed attorney, because the March 21, 2007, trial date was quickly approaching. The court noted that the trial date has been set for some time. The court offered to arrange for defendant to meet with the person in charge of court-appointed counsel "right away." Defendant agreed to meet with the person, but consistently indicated that he was attempting to procure funds to maintain his retained counsel and that he was "real close." The trial court repeatedly cautioned

defendant to either immediately pay his retained counsel or follow through with obtaining court-appointed counsel, because there was little time before the impending trial date.

By the March 19, 2007, pretrial hearing, defendant had completed the affidavit to request appointed counsel. The trial court identified an attorney for defendant, noting that he would likely need appointed counsel. Appointed counsel noted that he had received the prosecution's motion in limine from the court "last week." The trial court set the hearing for the prosecution's motion on the following afternoon to give appointed counsel an opportunity to review it.

On March 20, 2007, the trial court held a final pretrial hearing. It was noted that defendant completed the paperwork to receive a court-appointed attorney, but failed to meet the eligibility criteria. The trial court entered an order, allowing defendant to utilize court-appointed counsel and reimburse the county for the attorney fees. The court noted that it had arranged for the prosecution's FOC witness to be at the March 20, 2007, pretrial hearing, and allowed appointed counsel to review the entire file in preparation for trial. Subsequently, appointed counsel asked to adjourn the trial. The trial court asked counsel what issues he had and what he needed to prepare for, because it would ensure that he had all that he needed. Appointed counsel asked whether the cases would be consolidated. The court advised appointed counsel that it had already ordered consolidation. Appointed counsel raised no further issues and the court stated that there was "no reason to adjourn" and denied defendant's motion. Appointed counsel then requested that Vincent-Casner appear in court. During trial, defense counsel requested an adjournment during the FOC witness's testimony, indicating that he had not seen certain documentation concerning defendant's arrearages. After noting that the parties had gone over everything the day before, the court ordered a recess in order to obtain copies of what counsel needed. After a brief recess, trial continued.

B

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000). When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992), lv den 442 Mich 929 (1993). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, *supra*.

C

There was no abuse of discretion because defendant was negligent and did not establish good cause for an adjournment. Defendant claimed that the defense was not given ample opportunity to prepare for trial. However, defendant failed to pay his retained counsel and was negligent in timely taking the necessary steps to obtain new counsel, despite the court's repeated admonition to do so. It was unreasonable to expect that after waiting more than a month to resolve his representation with full knowledge of the impending trial date, defendant would then be allowed to delay trial.

Further, defendant argued that appointed counsel was not prepared to proceed because he was appointed the day before trial. Although counsel was not officially appointed until March 20, 2007, he was aware of his probable involvement earlier, as evidenced by his receipt of the prosecution's motion in limine from the court the week before March 19, 2007. Also, during trial, the court noted that appointed counsel "was on deck before" March 20, 2007. Moreover, at the court's direction, the prosecution's FOC witness was available at the March 20, 2007, final pretrial hearing for appointed counsel to ask questions. The court also arranged for the entire file to be available for appointed counsel's review, and agreed to give appointed counsel whatever he needed. The trial court adequately addressed appointed counsel's concerns. Also, during trial, when appointed counsel raised an issue about not having certain documentation, the court ordered a recess to allow counsel to obtain copies of what he needed. Further, the facts of the case were not overly complex. Under these circumstances, the trial court did not abuse its discretion by denying defendant's request for an adjournment.

III

Defendant next argues that the trial court erred when it consolidated the six child support cases. We disagree. The trial court's determination whether offenses are related and whether joinder of the offenses for trial is permissible under MCR 6.120(B) is reviewed de novo. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004). The trial court's ultimate decision to consolidate a case is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997), lv den 456 Mich 910 (1997).

MCR 6.120(B) provides:

> On its own initiative . . . the court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

At the arraignment, the trial court asked the parties if the cases could be consolidated. The prosecution had no objection. Retained counsel, who indicated that he planned to withdraw, requested that the court defer consolidation because "new counsel" may have an objection. On that basis, retained counsel objected for the record, but stated that if he "was going to continue to represent [defendant] - - [he] would agree with consolidation - - would be the best approach." The trial court ruled that "[c]onsolidation makes sense," given the facts and defendant's defense in each case.

Joinder of the offenses was permissible under MCR 6.120(B)(1)(c). The evidence indicates that the acts committed against the individual complainants constituted "part of a single scheme or plan" on defendant's part to father children with different mothers and fail to pay court-ordered child support from May 2003 until June 2004. In each case, the same witness, the FOC casework supervisor, testified regarding defendant's failure to pay. For each case, defendant's defense was that he paid child support through an income withholding agreement with Sony Records. Also, at the time consolidation was ordered, defendant had planned to argue in each case that a FOC worker had modified court orders without permission. While defendant contends that the time frames for the child support orders vary greatly, temporal proximity is not required to establish a single scheme or plan under MCR 6.120(B). *People v Tobey*, 401 Mich 141, 152 n 15; 257 NW2d 537 (1977) (Joinder is allowed for offenses that are part of a single scheme, even if considerable time passes between them). Finally, defendant has not established prejudice. Consequently, joinder of the offenses was permissible and the trial court did not abuse its discretion.

IV

Defendant further argues that he was denied the effective assistance of counsel at trial. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant contends that defense counsel was ineffective by admitting, through defense witness Vincent-Casner, the MCSES report because it showed defendant's nonpayment. Defendant argues that, although the FOC casework supervisor used the report to refresh his recollection, the prosecution never introduced it into evidence. Defendant has mischaracterized the record. While defense counsel marked the MCSES report as a defense exhibit, it was never admitted in evidence. Furthermore, although the FOC casework supervisor used the report to

"refresh his recollection," he testified in detail about defendant's child support payment history based on the report. Therefore, Vincent-Casner's testimony that defendant was ordered to pay Larry $8 a week in child support, based on the MCSES report and the relevant court order, was cumulative.

Moreover, it is apparent that defense counsel mentioned the report and the court order only to lay a foundation for the amount of child support owed to Larry before questioning Vincent-Casner about the fact that the FOC agreement with Sony Records covered the amount of defendant's child support obligation to Larry. To the extent that defendant relies on the fact that defense counsel's method was not successful, nothing in the record suggests that defense counsel's actions were unreasonable or prejudicial. Decisions about what questions to ask and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id*.

V

Defendant also argues that a new trial is required because the trial court failed to instruct the jury that a necessary element of the offense of failure to pay court-ordered child support is that the defendant appeared in or received notice by personal service of the action in which the order was issued, as required by MCL 750.165(2), and that no evidence of that necessary element was presented to the jury. Because defendant did not object to this alleged omission at trial, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

MCL 750.165 provides, in pertinent part:

> (1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.
>
> (2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued. [MCL 750.165.]

Plaintiff argues that the required elements of failure to pay child support are set forth solely in MCL 750.165(1). Plaintiff contends that the notice requirement set forth in MCL 750.165(2) is not an element of the offense, but rather a statutory exception that need not be proven because "it is a matter of defense, and must be shown by the defendant," and that, pursuant to MCL 767.48, "the prosecution is not required to either plead or prove the negative of an exemption."

In *People v Herrick*, 277 Mich App 255, 256; 744 NW2d 370 (2007), the defendant moved in the trial court to quash the information, arguing that there was insufficient evidence to

bind him over for trial because there was no evidence that he appeared at, or received notice by personal service of, the actions in which the support orders were entered, as required by MCL 750.165(2). In discussing the elements of the offense, the *Herrick* Court held:

> The elements of the crime of felony nonsupport are "(1) the defendant was required by a decree of separate maintenance or divorce order to support a child or current or former spouse, (2) *the defendant appeared in or received notice by personal service of the action in which the order was issued*, and (3) the defendant failed to pay the required support at the time ordered or in the amount ordered." *People v Monaco*, 262 Mich App 596, 606; 686 NW2d 790 (2004) *(Monaco I)*, aff'd in part and rev'd in part on other grounds 474 Mich 48 (2006) (emphasis added).
>
> We are bound by *Monaco I* to the extent that it is not inconsistent with our Supreme Court's decision in *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006) *(Monaco II)*. The statement of the elements of the offense of felony nonsupport in *Monaco I* has not been overruled or modified. Therefore, it was binding on the trial court and is binding on this Court. MCR 7.215(C)(2); MCR 7.215(J)(1). Moreover, even if the *Monaco I* statement of the elements of felony nonsupport were merely judicial dicta, the plain language of MCL 750.165 evinces the Legislature's intent to define the offense of felony nonsupport to include the notice requirement set forth in MCL 750.165(2) as an element of the offense. We must apply the plain and unambiguous language of the statute. [*Herrick*, *supra* at 257-258.]

Consequently, as defendant argues, evidence that he appeared in or received notice by personal service of the action in which the support order was issued is a necessary element of prosecution under MCL 750.165.

It is undisputed that the trial court did not instruct the jury on this element, and that no direct evidence of this element was presented to the jury. Thus, defendant has established a plain error. As previously indicated, however, defendant must also establish that his substantial rights were affected. *Carines*, *supra*. Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence, *Carines*, *supra*.

Defendant does not assert on appeal, nor did he ever argue below, that he did not appear in or was never personally served in the underlying support action. Indeed, defendant acknowledges that at the final pretrial hearing, the trial court reviewed evidence establishing that he was served in the support action.[1] There, the trial court noted that "everything's in order,"

[1] Plaintiff has submitted a proof of service from the underlying support action that shows that defendant was personally served in that action.

and that it had "looked through, there's orders in every case. He was served in all of them." Defendant never challenged this statement, but rather consistently argued at trial that he had complied with the court-ordered child support through an income withholding agreement and money paid directly to Larry. Further, in his opening statement, defense counsel asserted that defendant "did maintain his support obligation" "with the Order that is in effect." He further asserted that "what the prosecutor . . . must show is that there had been non-compliance" with the order. In closing argument, defense counsel argued that, through Vincent-Casner, he had "put before [the jury] what has been met and what had been done by [defendant] to fulfill obligations under this Court Order." In sum, although defendant now complains that the issue of his notice of the underlying support action was not presented to the jury, considering the posture of this case and the defense theory at trial, we conclude that this plain error did not affect defendant's substantial rights. Consequently, this unpreserved issue does not warrant appellate relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot