STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2009
v	No. 283457 Washtenaw Circuit Court
CARL RICHARD TINSLEY, JR., Defendant-Appellant.	LC No. 07-000573-FH

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions on three counts of illegal use of a financial transaction device, MCL 750.157q, related to his employment as a server in a restaurant. Defendant improperly overcharged the credit cards of three patrons on three separate dates, each time charging additional tips without the victims' consent. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel because his attorney failed to present certain witnesses and certain documentary evidence at trial. After review of this unpreserved claim for errors that are apparent on the record, we disagree. See *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000).

To succeed on an ineffective assistance of counsel claim, defendant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness according to prevailing professional norms, and that, absent trial counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which we will not second-guess with the benefit of hindsight and can constitute ineffective assistance only when defendant is deprived of a substantial defense. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*.

The witnesses defendant purportedly requested that his counsel present included: (1) his parole agent and the examiner at his parole violation hearing because they could allegedly testify as to what one of the victims stated at the parole violation hearing, (2) the owner of the restaurant

who allegedly terminated defendant for drinking on the job, not overcharging customers, and (3) a person who witnessed defendant drinking on the job and being fired. The documents defendant claims his attorney should have presented included: (1) documents showing that defendant was in New York when he was supposedly terminated for overcharging customers, and (2) "cash out reports" from the restaurant which would allegedly demonstrate that he did not actually receive the money in dispute.

However, in brief, whether the appearance and testimony of these witnesses would have been beneficial to defendant is purely speculative and, actually, appears unlikely. Referencing defendant's status as a parolee, as well as the fact that he was fired for drinking on the job, would likely have been more harmful to defendant's defense than the purported testimony would have been helpful. Further, presenting documents that prove that defendant went by bus to New York after he allegedly overcharged customers, as well as alleged "cash out reports," would not likely buttress defendant's defense. In summary, defendant's ineffective assistance of counsel claim premised on this ground lacks merit. He has neither demonstrated that his counsel's performance was deficient nor that any claimed deficient performance prejudiced his defense. See *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), quoting *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Next, defendant alleges that the evidence was insufficient to support his convictions. After a de novo review of the evidence, considered in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. See *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987), quoting *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.157q "proscribes and renders felonious the use of a credit card obtained or held under circumstances constituting an offense under" MCL 750.157n or MCL 750.157p. *People v Collins*, 158 Mich App 508, 511; 405 NW2d 182 (1987). "Sections 157n and 157p proscribe stealing, knowingly taking, retaining or secreting a credit card without the consent of the cardholder, and the possession, control or receipt of a credit card with the intent to circulate, sell, procure or permit the use, delivery, circulation or sale while knowing that the possession, control or receipt is without the consent of the cardholder." *Id*.

Here, defendant only alleges that the evidence did not establish his intent to defraud. We disagree. The record shows that defendant waited on all three victims at the restaurant where he worked, and all three testified that their credit cards were charged for excessive tips that they did not authorize. One victim testified that, after defendant refused his offer of a $3 tip, he did not leave defendant any tip at all; yet, he was charged for a $20 tip. A second victim testified that, although his receipt authorizing a $20 tip was signed, it was not his signature and he was never given the "customer copy" of that receipt. Defendant claimed that he reported the overcharges as mistakes. But the restaurant manager testified that defendant never informed him of any mistaken overcharges, even when he fired defendant as a result of the overcharges. Instead, defendant claimed he did not know what the manager was talking about.

Only minimal circumstantial evidence is necessary to establish the element of intent because of the difficulty in proving the defendant's state of mind. *People v McGhee*, 268 Mich

App 600, 623; 709 NW2d 595 (2005). Defendant's knowledge and intent may be inferred from the record evidence, including but not limited to the facts that he neither claimed that the overcharges were mistakes when he was confronted by the manager about the transactions, nor did he testify that he followed up with the restaurant owner concerning the transactions. See *People v Reigle*, 223 Mich App 34, 39; 566 NW2d 21 (1997). Thus, sufficient evidence supported all three of defendant's convictions. And to the extent defendant is claiming that his counsel was ineffective for failing to move for directed verdict in the trial court, that argument is without merit. Defense counsel is not required to make meritless motions. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Finally, defendant argues that the prosecutor engaged in misconduct during his questioning of defendant. After review of this unpreserved claim for plain error, we disagree. See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant claims that the prosecutor inappropriately assumed facts not in evidence and commented on the credibility of one of the victims during his questioning of defendant. In particular, defendant takes issue with the prosecutor's specific statement: "I'm insinuating that you filled this out and you wrote in his signature, that's what I am insinuating." But, defendant fails to set forth the context of this purported misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis, with the alleged misconduct considered in context to determine if defendant was denied a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

During cross-examination of defendant by the prosecution, defendant repeatedly responded with extensive narrative answers to questioning and interjected testimony, as well as questions, that were not solicited. The claimed error arises from one such exchange. In particular, defendant was asked if he remembered the victim's testimony that it was not his signature on one of his two receipts—the receipt authorizing a tip for $20. The prosecutor asked defendant to look at the two signatures that were supposedly from the same man, and tell the jury "if you think they are similar right now." Defendant responded, "So what are you insinuating?" The following exchange occurred between the prosecutor and defendant:

> *Q.* Oh, do you want to know what I am insinuating?
>
> *A.* Yes. What are you insinuating?
>
> *Q.* I'm insinuating that you filled this out and you wrote in his signature, that's what I am insinuating.

Thus, clearly, if error occurred by this colloquy, it was invited by defendant. See *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). A prosecutor is permitted to respond proportionately to a defendant's conduct that invited the challenged response. See *id*. Here, the prosecutor's response was proportionate in light of the invitation and did not affect the fairness of the trial. Further, the trial court instructed the jury that the lawyers' questions to the witnesses were not evidence, and the jury is presumed to follow its instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor improperly asked him to comment on that same victim's credibility, asking "Is it your belief that [the victim] was lying when he said that [he never gave defendant a $20 tip on a $17 bill]?" It is improper for the prosecutor "to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). However, the prosecutor's improper question was curable by an objection and a limiting instruction; thus, relief is not warranted. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly