STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2010
v	No. 286772 Isabella Circuit Court
RONALD ARTHUR POLK, Defendant-Appellant.	LC No. 07-001358-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of conducting a criminal enterprise (racketeering), MCL 750.159i(1), and larceny by false pretenses of property valued between $1000 and $20,000, MCL 750.218(4)(a). The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to concurrent prison terms of 51 months to 20 years for the criminal enterprise conviction and two to five years for the false pretenses conviction, and also ordered that defendant pay restitution. We affirm, and have decided this appeal without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from purchases he made at auctions held on March 24, 2007, March 30, 2007, and March 31, 2007.[1] At each of the auctions, defendant bid on various items of personal property. After winning multiple items at each auction, defendant paid for them with checks and transported the property home. Within a few days of each auction, he went to different branches of the Lake Osceola State Bank and stopped payment on the checks he had used to pay for the auction items. Defendant maintained possession of his auction purchases until auction representatives, assisted by police officers, seized the items from his residence.

Defendant unsuccessfully moved at trial for a directed verdict, then presented testimony by his girlfriend, Jo Young, the only defense witness. Young recalled that when defendant arrived home with his auction purchases, she became upset with him because he had "a history

[1] The March 24, 2007 auction took place in Montcalm County, the March 30, 2007 auction occurred in Isabella County, and the March 31, 2007 auction was held in Osceola County. The prosecutor also introduced at trial evidence concerning similar acts at auctions in Sanilac and Midland Counties.

of spending" beyond the couples' means. Young characterized defendant as incompetent at managing his finances, and she noted that defendant could not even remember how much he had spent at the auctions. Young felt angry about defendant's purchases because they did not have the money for them and some of the items were in disrepair. Young averred that she advised defendant that he could not pay for the items with money set aside for the house payment or other family essentials, and that she instructed him to stop payment on the checks. According to Young, she and defendant tried to reach an agreement with the auction companies, and she told defendant to take back his purchases, which defendant was in the process of doing when the police arrived at the farm to seize the items.

After the jury returned its guilty verdicts, defendant filed a motion seeking judgment notwithstanding the verdict (JNOV), which the trial court denied before imposing sentence. Defendant then filed a claim of appeal in this Court. Subsequently, defendant moved for postjudgment relief in the trial court pursuant to MCR 7.208(B), claiming that his trial counsel had rendered ineffective assistance and that he was entitled to resentencing because the trial court erroneously had deemed him ineligible for the Special Alternative Incarceration (SAI) program. After a *Ginther*[2] hearing, the trial court rejected defendant's claims that his counsel was ineffective, and determined that defendant was ineligible for the SAI program because his minimum sentence exceeded 36 months and he had disqualifying physical ailments.

I. Ineffective Assistance of Counsel

Defendant first contends on appeal that his trial counsel was ineffective in several respects both at trial and the sentencing hearing. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first 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). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id*.

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

Defendant initially submits that his counsel was ineffective because he neglected to offer an opening statement, either before the prosecutor's proofs or before presenting the defense.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

This Court has held that a defense counsel's decision to waive an opening statement "can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). The decision whether to forego an opening statement involves trial strategy. *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989).

Defendant's trial counsel testified at the evidentiary hearing that he could not recall if he had discussed with defendant waiving the opening statement. On cross-examination, counsel expressed that it was not unusual for him to waive opening statement "and preserve it for a later time." Counsel additionally explained that he viewed an opening statement as unnecessary in this case in light of the facts that opening statements are intended to describe what the defense witnesses will say, he had only one defense witness in this case, and he felt he could discuss the sole defense witness's testimony during his closing argument. Where defense counsel delivers an extensive closing argument that fully comments on the defense and the evidence presented, the defendant generally does not endure prejudice arising from counsel's failure to give an opening statement. *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds in *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). In this case, defense counsel in his closing argument commented on the evidence presented by the prosecutor, Young's testimony concerning defendant's lack of criminal intent, and the evidence of defendant's efforts to return the property or otherwise resolve his dilemma. The record reflects that defense counsel's closing argument supported the defense theory that defendant's actions were inconsistent with those of someone who deliberately intended to defraud or engage in a criminal enterprise, a theory defense counsel promulgated in an attempt to win an acquittal of the more serious criminal enterprise charge. We conclude that defendant has not demonstrated that his counsel's waiver of an opening statement either qualified as objectively unreasonable or prejudicial to his defense. *Pickens*, 446 Mich at 302-303; *Rodgers*, 248 Mich App at 714-715.

Defendant next characterizes his counsel as ineffective for "relying on legal arguments which had no merit" instead of raising a "simple 'no intent' defense." Defendant also suggests that counsel improperly conceded his guilt of the lesser charged offense. The record reveals that during defense counsel's closing argument, he maintained that defendant did not possess the criminal intent to cheat or defraud anyone and that defendant certainly lacked the intent necessary to engage in an elaborate racketeering scheme. Defense counsel acknowledged that the jury could reasonably find defendant guilty of the lesser false pretenses charge, but he did not explicitly concede defendant's guilt of this charge. However, even had counsel urged the jury to convict on the lesser offense only, such an admission would not support a finding that he provided ineffective assistance. This Court has recognized that admitting guilt of lesser offenses while contesting guilt of more serious offenses can constitute sound trial strategy. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004); *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). In light of the strong evidence against defendant, his counsel's attempt to contest only the more serious criminal enterprise charge amounts to an objectively reasonable trial strategy.

Regarding defendant's complaints that his counsel should not have pursued an unsuccessful diminished capacity defense, raised the issue of defendant's bi-polar condition at trial, or attempted to have the criminal enterprise charge dismissed by analogizing it to federal law, defendant has not demonstrated what, if any, prejudice he suffered from counsel's

performance in these respects. Defendant appears to recognize that his counsel's efforts involved matters of strategy, albeit ultimately unsuccessful ones. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak*, 263 Mich App at 58. Defense counsel's strategic arguments do not qualify as ineffective assistance of counsel simply because they did not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

II. Sentence Guideline Departure

Defendant further alleges that the trial court abused its discretion by refusing to depart from the guidelines sentencing range applicable to his conviction. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Defendant has not shown that any error occurred in the scoring of the sentencing guidelines, nor does he explicitly argue that the trial court relied on inaccurate information in fashioning his sentences. Although defendant mentions defense counsel's unawareness that he might have been eligible for the SAI program despite his prior conviction, defendant does not specifically state that the trial court lacked awareness of his potential SAI eligibility notwithstanding his prior conviction. Furthermore, the presentence investigation report (PSIR) documents that defendant "is not SAI eligible due to his physical ailments." And as noted by the trial court in its order denying defendant's motions for postjudgment relief, including resentencing, the parties addressed at the sentencing hearing defendant's physical ailments and his receipt of social security disability payments.

In summary, defendant cannot show that the trial court relied on any inaccurate information when formulating his sentences. Because the trial court did not err in scoring defendant's guidelines, as we will discuss further *infra* at 10-11, and because the court sentenced defendant within the guidelines range, we must affirm his sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

III. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. Insufficient Evidence

Defendant insists that the prosecutor failed to present sufficient evidence of a criminal enterprise to support his racketeering conviction. He urges that the elements of the federal racketeering statute apply to Michigan's analogous statute, and that the prosecutor did not show the existence of an enterprise "separate and distinct from the pattern of racketeering activity in which it was engaged." Defendant additionally asserts that trial court erred in finding that he could engage in such an enterprise alone, and that the record contained no evidence that defendant used his farm business to conduct the allegedly illegal activities. We review de novo a defendant's allegations regarding insufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

In *People v Martin*, 271 Mich App 280, 289-290; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008), this Court discussed as follows the elements of Michigan's criminal enterprise offense:

> In order to prove a racketeering violation, the prosecution must prove beyond a reasonable doubt that the defendant was employed by, or associated with, an enterprise and knowingly conducted or participated in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity. MCL 750.159i(1). Pursuant to MCL 750.159f(c), a pattern of racketeering activity means the commission of not less than two incidents of racketeering, to which all of the following characteristics apply:
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> "(i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.
>
> "(ii) The incidents amount to or pose a threat of continued criminal activity.
>
> "(iii) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity."
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> "Racketeering" is further defined as "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit" certain enumerated offenses for financial gain. MCL 750.159g. Hence, the prosecution must normally prove the commission of each element of the predicate acts of racketeering, in addition to the other elements of racketeering, in order to prove a racketeering violation.

In addition, "'Enterprise' includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity." MCL 750.159f(a).

Contrary to defendant's assertion, the plain language of MCL 750.159f(a) contemplates that he could face liability for conducting a criminal enterprise alone. Moreover, our Supreme Court has explicitly disapproved of using federal authorities that construe provisions of the federal RICO statute, 18 USC 1961, *et seq.*, to construe Michigan's "unambiguous" racketeering statute. *People v Guerra*, 469 Mich 966; 671 NW2d 535 (2003); *People v Gonzalez*, 469 Mich 967; 671 NW2d 536 (2003). Defendant has pointed to no controlling Michigan case law to support his claim that the prosecutor had to show the existence of an enterprise "separate and distinct from the pattern of racketeering activity in which it was engaged" for the jury to find defendant guilty. Nor has he cited case law supporting his contention that an individual cannot constitute an enterprise, especially where, as here, the Legislature has expressly included "individual[s]" within the plain language of the definition of an "enterprise." Defendant thus has presented this Court with no legal basis for concluding that the evidence presented, when viewed

in the light most favorable to the prosecutor, failed to establish that he engaged in a pattern of racketeering, and we will not search for authority to sustain defendant's position. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Consequently, we reject defendant's unsupported contention that the prosecutor produced insufficient evidence supporting his racketeering conviction.

B. Plea Bargain

Defendant next avers that the prosecutor's failure to adhere to a plea agreement deprived him of his constitutional rights to due process and equal protection. Defendant maintains that the prosecutor agreed to drop the charges if he passed a polygraph examination administered by the Michigan State Police and paid restitution, but that when defendant arrived at the Grayling laboratory to take the examination someone advised him that the appointment had been cancelled. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

When questioned at the *Ginther* hearing, defense counsel testified that the prosecutor had offered defendant the opportunity to plead guilty of the false pretenses count in exchange for dismissal of the racketeering charge, but that counsel did not recall any agreement by the prosecutor to dismiss all charges in lieu of restitution if defendant passed a polygraph examination. Although defendant testified at the *Ginther* hearing that the prosecutor had made the polygraph-related plea offer, he has not presented or even suggested the existence of any other testimony or documentation tending to support his plea bargain deprivation claim. On the basis of the existing record, we conclude that defendant has not demonstrated any plain error entitling him to relief.

C. Sentence Variable Scoring Errors

Defendant lastly challenges the trial court's scoring of offense variable (OV) 9 (number of victims) and OV 16 (degree of property damage). Generally, we review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (internal quotation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id*.

Here, when the trial court discussed the guidelines scoring and asked whether counsel had any objections, defense counsel replied, "I do not, Your Honor." Defense counsel's affirmative statement that he had no objection to the scoring of the sentencing guidelines amounted to a waiver of this issue by defendant, which extinguished any claim of error with regard to the scoring of OV 9 or OV 16. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). "Because defendant waived . . . his rights . . . there is no 'error' to review." *Carter*, 462 Mich at 219.

Even were we to consider defendant's scoring objections as merely forfeited and unpreserved claims of error, defendant has failed to demonstrate any plain error affecting his substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Pursuant to

MCL 777.39(1)(c), a court may score 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." Under MCL 777.39(2)(a), a court should "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." To prove that defendant engaged in a criminal enterprise, the crime scored here, the prosecutor had to show a "pattern of racketeering activity" involving at least two crimes. *Martin*, 271 Mich App at 289-290. The prosecutor predicated the criminal enterprise offense on defendant's actions at the three auctions in Montcalm County, Isabella County, and Osceola County. The scored offense thus is a continuing one, encompassing what would otherwise be distinct acts, and the victims for each underlying offense were properly aggregated. Cf. *People v McGraw*, 484 Mich 120, 122, 135; 771 NW2d 655 (2009). Even taking into account only two of the auctions for scoring purposes, the trial court could properly have found that the criminal enterprise involved more than four victims, the auctioneers and the owners of the numerous items defendant tried to steal. We find no plain error in the trial court's assignment of 10 points under OV 9.

With respect to defendant's complaint that trial court misscored OV 16 at five points, MCL 777.46(1)(c) authorizes the scoring of five points when "[t]he property had a value of $1000.00 or more, but not more than $20,000.00." MCL 777.46(1)(c). In MCL 777.46(2)(a), the Legislature instructed that, "[i]n multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." This language permitted the trial court to take into account all of the items that defendant fraudulently purchased at the several auctions that comprised his criminal enterprise, the value of which items easily exceeded $1000.[3]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

[3] Defendant's related claim of ineffective assistance at sentencing likewise lacks merit because no scoring error occurred and counsel was not ineffective for failing to raise meritless objections. *Matuszak*, 263 Mich App at 58.