STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 9, 2010
v	No. 289128 Muskegon Circuit Court
ANTHONY NEUMAN, Defendant-Appellant.	LC No. 08-056273-FH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions for two counts of resisting and obstructing, MCL 750.81(D)(1), and assault of a prison employee, MCL 750.197c. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose from a physical confrontation between defendant and Muskegon County Sheriff Deputies that occurred at the Muskegon County Jail while defendant was being booked for an unrelated offense. The prosecution alleged that defendant became violent during a confrontation concerning defendant's refusal to remove his boots during the booking process. In addition to officer testimony, the prosecution presented a videotape of the incident, narrated by one of the officers. Defendant denied being the aggressor, and maintained that the video had been altered. Taneka Sharp, a defense witness, maintained that she was in a holding cell when defendant was brought in. She did not see the beginning of the incident, but stated that she saw a deputy push defendant into a holding cell. Defendant threw his hands up "like he didn't want any trouble" before the officers sprayed defendant with pepper spray during the incident. Sharp stated that defendant fell on the guards because he could not see.

After trial, but prior to sentencing, defendant moved to re-open the proofs in order to take the testimony of Daren Major, who also had allegedly witnessed the incident. Defendant maintains that the trial court abused its discretion when it denied the motion to reopen the proofs. We review a motion to reopen the proofs for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Relevant in ruling on a motion to reopen proofs is whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party." *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988) (internal citation omitted). Other relevant factors include "whether conditions have changed . . . , whether newly discovered and material evidence is sought to be admitted, . . ., and the timing of the motion during the trial." *People v Moore*, 164 Mich App 378, 383-384; 417 NW2d 508 (1987); mod on other grounds 433 Mich 851 (1989).

The trial court did not abuse its discretion in refusing to reopen the proofs after the verdict. Defendant has presented no support for a finding that the trial court may, much less should, be required to, reopen the proofs after a verdict in a criminal trial.[1] Defendant does not claim that the evidence was newly discovered, so as to support a motion for a new trial. Defendant does not claim that counsel rendered ineffective assistance in deciding to forego Major's testimony, and defendant admits, as did defense counsel during the motion below, that the initial decision was deliberately strategic. In addition, defense counsel admitted below that the defense believed Sharp was "right across from [the incident]" and was in a good position to see what had occurred, and that Major's testimony was at least partly cumulative to the testimony of Sharp. Moreover, to the extent that Major had anything new to add, defendant did not present the trial court with an offer of proof as to Major's testimony, nor has he done so now. Any claim of prejudice to defendant is therefore speculative. Under these circumstances, the trial court's decision fell within the range of reasonable and principled outcomes and was not an abuse of discretion.

Defendant next appears to argue that the trial court erred when it ordered defendant to reimburse $750 in attorney fees without determining defendant's ability to pay. Defendant also appears to raise a related argument that the trial court should have suspended payment of the fees while he is in prison because he needs the money in his prisoner account to allow him to obtain various items of clothing and other living supplies. We review defendant's unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant bases his assertion of error as to the imposition of attorney fees on this Court's decision in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), which held that, before imposing a fee for a court-appointed attorney, a trial court must state on the record its presentence determination that the defendant has a foreseeable ability to pay the fee. However, our Supreme Court overruled *Dunbar* in *People v Jackson*, 483 Mich 271, 769 NW2d 630 (2009). The *Jackson* Court held that such an ability-to-pay assessment is only constitutionally necessary when that imposition is actually enforced and a defendant contests his ability to pay. *Id*. at 275, 290-292. Then, when a trial court attempts to enforce its earlier imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his then existing indigency. The trial court must then evaluate "whether a defendant is indigent and

[1] *Collier*, cited by defendant, involved a motion that occurred after the close of proofs but prior to closing arguments. *Collier*, 168 Mich App at 694.

unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id*. at 293 (emphasis in original).

As to defendant's argument that the trial court should have ordered suspension of its reimbursement order during defendant's incarceration, we note that *Jackson* also held that, "remittance orders of prisoner funds, under MCL 769.1l, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent." *Id*. at 275.

> MCL 769.1l inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency. The provision only allows the garnishment of a prisoner's account if the balance exceeds $50. Although this amount would be insufficient to sustain a defendant living among the general populace, it is uncontested that a prisoner's "living expenses" are nil, as the prisoner is clothed, sheltered, fed, and has all his medical needs provided by the state. The funds left to the prisoner on a monthly basis are more than adequate to cover the prisoner's other minimal expenses and obligations without causing manifest hardship. Thus, we conclude that § 1l 's application makes a legitimate presumption that the prisoner is not indigent. [*Jackson*, 483 Mich at 295].

Defendant has not shown plain error in the trial court's decision to order reimbursement of defendant's attorney fees. To the extent defendant's claim of error rests on a general claim of indigency at the time of sentencing, the trial court did not err. Defendant may object to the enforcement of any post-trial order to enforce the attorney fee recoupment order.

Defendant has also not shown that the trial court's sentencing decision not to suspend payment, if any, from defendant's prisoner fund was clearly erroneous. Defendant has not provided any support for his assertion that his living expenses are not being provided for by the state during his incarceration. Moreover, as discussed in *Jackson*, a prisoner who believes that he suffers "unique and extraordinary financial circumstances" and does not have the ability to pay fees while incarcerated may petition the trial court for separate relief, pursuant to the procedure contained in MCL 771.3(6)(b). See *Jackson*, 483 Mich at 296-297. Defendant may choose to avail himself of this procedure.

To the extent that defendant's argument could be read as a challenge to the imposition of the other costs, defendant provides nothing to support his claim of error concerning the imposition of costs and fees other than attorney fees. A trial court may require a convicted defendant to pay costs where such a requirement is expressly authorized by statute. *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995). The plain language of MCL 769.1k both authorizes the imposition of these costs and does not require the trial court to consider a defendant's ability to pay them. In addition, the imposition of costs and fees other than attorney fees does not raise the same Sixth Amendment implications as the imposition of attorney fees. See *Jackson*, 483 Mich at 277, 285. Defendant has not shown that the trial court erred in ordering defendant to pay the additional costs here.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood