STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 293283 Muskegon Circuit Court
MARTY LEE ST. AMOUR, a/k/a MARTY LEE STAMOUR, Defendant-Appellant.	LC No. 09-057604-FH

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of larceny in a building, MCL 750.360. Defendant was sentenced as a second habitual offender, MCL 769.10, to five months in jail, 15 months' probation, and costs. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

The prosecution's theory at trial was that defendant took Bruce Jenkins's wallet at a library with the intent to steal it. On appeal, defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to call Matthew Aliseo as a witness. Defendant filed a timely motion to remand in this Court for the purpose of establishing a record for his ineffective assistance claim. However, that motion was denied.

According to defendant, Aliseo would have testified that defendant had found and returned his wallet on two occasions. Indeed, Aliseo provided a written statement in conjunction with defendant's motion to remand indicating that defendant had twice found and returned his wallet. Aliseo averred that, on both occasions, his money, credit cards, and identification were in the wallet when it was returned. Defendant asserts that Aliseo's testimony would have established that he did not intend to steal Jenkins's wallet.

Because the circuit court did not hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel,[1] and because this Court denied defendant's motion to remand, "our review is limited to the facts apparent in the lower court record." *People v Fike*, 228 Mich

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

App 178, 181; 577 NW2d 903 (1998). However, Aliseo's statement is not contained in the lower court record, and we therefore cannot review it. See *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003); see also *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) (holding that a party may not expand the lower court record on appeal).

Even considering Aliseo's statement that was submitted to this Court, defendant's argument must still fail. Defendant argues that, had Aliseo testified consistently with his statement, his testimony would have proven that defendant had the intent to return Jenkins's wallet. According to defendant, the absence of this testimony deprived him of a substantial defense. Defendant argues that this testimony could have been offered to prove habit under MRE 406 or as other-acts evidence under MRE 404(b)(1).

The decision whether or not to call a witness is presumed to be a matter of trial strategy, and a defendant must "meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). An attorney's decision not to call a particular witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defendant bears the burden of proving that trial counsel's decisions prevented him from presenting a substantial defense. *People v Armstrong*, 124 Mich App 766, 772; 335 NW2d 687 (1983).

Although Aliseo's testimony may have minimally aided defendant in proving his theory that he intended to return Jenkins's wallet, the absence of this testimony did not deprive defendant of a substantial defense because defendant could have presented this same defense through his own testimony. See *People v Hoyt*, 185 Mich App 531, 538; 462 NW2d 793 (1990).

In reaching our conclusion, we note that Aliseo's testimony would not have been admissible under MRE 406. Evidence that a defendant has returned a lost wallet on two occasions is quite simply insufficient to support a finding that the defendant has a habit of returning lost wallets. See e.g. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 255-256; 318 NW2d 639 (1982). Moreover, although Aliseo's testimony might have been admissible to prove defendant's intent under MRE 404(b)(1), defendant cannot establish that the outcome of the trial would have been different with the testimony. The offense of "[l]arceny in a building is complete as soon as there is the slightest taking of property with the intent to steal it." *People v Mumford*, 171 Mich App 514, 518; 430 NW2d 770 (1988). Here, the record demonstrates that defendant made no attempt to return the wallet to the library or notify anyone that he had it. Even more importantly, Jenkins stated there was about $140 in his wallet when he left it at the library and the wallet was later found in the glove compartment of defendant's vehicle with no money inside. Cash in the amount of $134 was subsequently discovered in defendant's coat pocket after he was arrested. It is therefore reasonably likely that, even if Aliseo had testified, a reasonable jury would have found that defendant intended to steal the wallet and the money. Given the other evidence of defendant's guilt in this case, we cannot conclude that defense counsel was ineffective for failing to call Aliseo as a witness. *People v Daniel*, 207 Mich App 47, 58-59; 523 NW2d 830 (1994).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell