STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2016
v	No. 327023; 327024 Eaton Circuit Court
ANTROY DEON NATHAN, Defendant-Appellant.	LC No. 14-020159-FH; 14-020172-FH

Before: M. J. KELLY, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Antroy Deon Nathan, appeals by right his jury convictions of two counts of obtaining money by false pretenses, $1,000 or more but less than $20,000, MCL 750.218(4)(a); and two counts of performing an occupation without a license, MCL 339.601.[1] The trial court sentenced Nathan as a fourth habitual offender, MCL 769.12, to serve 3 to 20 years in prison for each conviction of false pretenses, and to serve 90 days in jail for each conviction of performing an occupation without a license with credit for 90 days served. The court also ordered him to pay a total of $16,975 in restitution for both cases. On appeal, Nathan argues that he is entitled to be resentenced or have a new trial because the prosecutor improperly allowed false testimony, his trial lawyer was ineffective, and the trial court improperly enhanced his sentence. We conclude that there were no errors warranting relief. Accordingly, we affirm.

I. BASIC FACTS

Testimony established that Nathan had a home-improvement business, which he called Best for Less, and that he met Norman and Ann Puma while soliciting business in their neighborhood. Nathan offered them a free estimate on a replacement roof for their house. While talking to him about the estimate, Ann Puma told Nathan that they also needed new flooring. He offered to install the flooring without charging the Pumas for labor if they hired him to install a new roof. The Pumas agreed, and paid Nathan a down payment of $6,450. The Pumas paid

[1] The charges stem from two separate cases that were tried together. This Court similarly consolidated his appeals. See *People v Antroy Deon Nathan*, unpublished order of the Court of Appeals, entered May 19, 2015 (Docket No. 327023).

Menards separately for the roofing materials, and Ann Puma wrote Nathan a second check for $3,225 before anyone commenced working on their house.

Nathan arranged for a crew to work on the Pumas' roof; however, the shingles were not the correct color. In addition, the crew tore off the old roof and did not take appropriate measures to protect the house from exposure. According to the Pumas, work stopped completely after the roofing crew's leader was arrested. The home suffered extensive water damage in a rainstorm, but Nathan promised to fix it and complete the roof. Although Nathan sent others to complete the installation, the Pumas insisted on proof of proper licensing and insurance, which the new crews could not provide. Nathan refused to refund the Pumas' money.

At one point, Nathan was a salesperson for a large home improvement company and, while working for that company, he met Timothy and Barbra Monroe. Nathan later contacted the Monroes and told them that he had started a new home improvement company, and asked whether they had any home projects he could complete for them. The Monroes contacted him about replacing their windows, and he offered to do the job through his company, Millenium Home Improvement.[2] Although he initially quoted them a much higher price, he eventually told them that he could do it for $9,800. The Monroes accepted the offer, and at Nathan's direction, wrote a check for $6,800 to a different company, Affordable Construction. Nathan promised to contact the Monroes about a week after they signed the contract to schedule their job, but never did. He also never installed the windows and refused to refund their money.

II. FALSE TESTIMONY

Otto Harrison testified for the prosecution. He had worked with Nathan at the large home improvement company and then for Best for Less before he became the sole owner of Millenium. Harrison testified that Nathan had his permission to use Millenium's paperwork, but only with Harrison's knowledge. Harrison stated that Nathan should not have "been going to the houses . . . and signing up any customers or any jobs" on behalf of Millenium without his knowledge. He claimed that he knew nothing about the Monroe job.

Nathan argues that Harrison falsely testified that he was not offered a plea agreement in exchange for his testimony and that the prosecutor improperly failed to correct the testimony. It appears that the Ingham County Prosecutor's Office had agreed to reduce separate charges filed against Nathan, and to not authorize other charges in Ingham County cases, in exchange for Harrison's agreement to testify against Nathan in pending cases in Ingham, Eaton, and Clinton Counties, and to plead guilty to various charges.

On cross-examination, Nathan's trial lawyer asked Harrison whether he had received an offer of "leniency" in exchange for his testimony. He responded that he was not offered leniency for his testimony: "I was . . . told that I wouldn't have any prosecution on any of these cases, which I have nothing to do with. I don't have any cases where they're giving me leniency on for testimony on this stuff, no. I'm here on drunk drivin'."

[2] This company is also referred to in the record as Millenium Construction.

Nathan's trial lawyer moved for a new trial or evidentiary hearing on the basis of Harrison's false testimony; in the motion, Nathan's lawyer characterized Harrison as a "major witness in this case." Relying on the decision in *Giglio v United States*, 405 US 150, 153-154; 92 S Ct 763; 31 L Ed 2d 104 (1972), the trial court concluded that Nathan was not entitled to a new trial because Harrison was not a material witness. In *Giglio*, the United States Supreme Court considered whether the prosecution's failure to disclose a promise of leniency made to a witness required a new trial. *Giglio*, 405 US at 150-151. The defendant's alleged coconspirator was the only person linking the defendant to the crime and testified against the defendant at trial, claiming that he had not been promised leniency by the prosecution in exchange for his testimony. *Id.* at 151-152. Following trial, however, newly discovered evidence revealed that the prosecution had promised the coconspirator he would not be prosecuted if he testified before the grand jury and at trial. *Id.* at 152. The Supreme Court reversed the defendant's conviction and concluded that due process required a new trial, observing that the prosecution's case depended almost entirely on the coconspirator's testimony:

> [W]ithout it there could have been no indictment and no evidence to carry the case to the jury. [The witness's credibility] was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it. [*Id.* at 154-155.]

Here, Harrison was not a key witness, nor was he an important link between Nathan and the offenses. Unlike the coconspirator in *Giglio*, Harrison did not offer testimony pertaining to Nathan's involvement in the offenses. Rather, Harrison testified that he and Nathan had worked together in the past, although he had not been involved in the jobs that Nathan contracted to perform for the Pumas or the Monroes. Harrison did testify, however, as to incidental contact he had with them, including a telephone conversation with Norman Puma during Nathan's initial visit to the Pumas' residence, and a telephone conversation with Barbra Monroe, who called him to ask whether he would honor their agreement with Nathan when it became clear that he would not perform. Following trial, the prosecutor asserted that the purpose of Harrison's testimony was to support Norman Puma and Barbra Monroe's testimony regarding the telephone conversations. The prosecutor noted that Harrison did not testify "that he had any personal knowledge of either one of these jobs." After reviewing the record, we agree that Harrison was not a material witness.

Nathan maintains that Harrison's testimony was significant because he was Nathan's "friend." However, Nathan alone asserted that they were friends—Harrison did not testify to that effect. Moreover, as noted, Harrison's testimony did not significantly address the issue of Nathan's culpability. Thus, he has not shown that he is entitled to a new trial under *Giglio*. Nevertheless, we agree that the prosecutor erred by failing to disclose Harrison's plea agreement. Although the record indicates that the error was inadvertent, in *Giglio*, the Court held that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 US at 154. Nevertheless, we conclude that, even if Harrison's plea agreement had been disclosed to the jury, there is no reasonable likelihood that it affected the outcome of the cases. Consequently, the error does not warrant relief. *Id.*

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Nathan argued before the trial court that his trial lawyer was not adequately prepared. His lawyer took over the case a few days before trial, and, according to Nathan, convinced him to reject a plea offer even though his lawyer did not have "all of the information about the case." The trial court rejected Nathan's post-trial motion for an evidentiary hearing, concluding that Nathan simply did not like the result of his trial and now wished that he had agreed to a reduced sentence as part of the plea offer, which was not "incompetence of counsel."

In order to prevail on this claim, Nathan must show that his trial lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. This Court reviews de novo whether the identified acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and prejudiced Nathan's trial. *Id.* at 19-20. Where, as here, the trial court did not hold an evidentiary hearing, there are no factual findings to which this Court must defer and our review is limited to mistakes that are apparent on the record alone. *Id.* at 20.

In order to establish ineffective assistance, Nathan must first identify the acts or omissions that he believes "were not the result of reasonable professional judgment." *Id.* at 22. Although Nathan argues that his trial lawyer was not properly prepared for trial, he has not identified any specific act or omission involving his lawyer's preparation for trial. He has not identified any act or omission that might amount to a breach of his lawyer's duty to prepare, investigate, and present all substantial defenses. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Consequently, he has not established an error on this ground.

Nathan has identified one act that he claims amounted to ineffective assistance: his lawyer's recommendation that he reject the plea deal and proceed to trial. Nathan's trial lawyer's strategy was to suggest that Nathan lacked the requisite intent to defraud the Pumas and the Monroes because his actions showed that he intended to perform both contracts. This was a valid and entirely plausible defense given the evidence. See *People v Peach*, 174 Mich App 419, 422; 437 NW2d 9 (1989). Nathan has not identified an alternate defense about which his trial lawyer knew or would have known with a reasonable investigation. Although Nathan now believes it was the wrong choice to proceed to trial, he has not identified any basis for concluding that his trial lawyer did not have a reasonable basis for advising him to proceed to trial or failed to properly advise him concerning his chances should he proceed to trial. Because there was evidence that Nathan tried to perform under the agreements, and the evidence that he intended to defraud was circumstantial in both cases, we cannot say that no reasonable lawyer in Nathan's lawyer's position would ever recommend proceeding to trial. See *Gioglio*, 296 Mich App at 22-23 (explaining that this Court must conclude that a trial lawyer's act or omission fell within the wide range of reasonable professional conduct if there might have been a legitimate strategic reason for proceeding as he or she did).

Nathan has not identified an act or omission by his trial lawyer that fell below an objective standard of reasonableness under prevailing professional norms. In addition, Nathan has not identified any potential factual dispute concerning his lawyer's acts or omissions that

would require a hearing to resolve; accordingly, he has not established the need for an evidentiary hearing on his trial lawyer's effectiveness. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

IV. HABITUAL OFFENDER ENHANCEMENT

Nathan next argues that the prosecutor improperly sought enhancement of his sentences under the rule stated in *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002). In *Hornsby*, the prosecution provided the defendant with a timely notice of intent to seek sentence enhancement. *Id.* at 469-470. One month after filing the initial notice of enhancement, the prosecution amended the notice to correct the underlying convictions it had relied upon in seeking the enhancement. *Id.* at 470. The trial court denied the defendant's motion challenging the enhancement because the "amendment did not alter the fact that defendant had been provided proper notice of the intent to seek sentence enhancement on the basis of his status as a third-offense habitual offender." *Id.* We held that "a recognized difference exists between an amendment of a notice to seek sentence enhancement that attempts to impose more severe adverse consequences to a defendant and one that does not," and held that the prosecution was not precluded from amending "a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *Id.* at 472.

Nathan argues that *Hornsby* is distinguishable because the information in that case was amended just one month after the initial notice and before sentencing. By contrast, the prosecutor in this case amended the information after sentencing. We do not agree that this difference is dispositive. In *Hornsby*, we emphasized that the original notice of intent to seek an enhanced sentence was timely filed under MCL 769.13, and recognized that " 'the supplemental information may be amended outside the statutory period only to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13 . . ., i.e., the amendment may not relate to additional prior convictions not included in the timely filed supplemental information.' " *Hornsby*, 251 Mich App at 471, quoting *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997). Nathan does not dispute that the original information provided notice of the prosecution's intent to seek an enhanced sentence on the basis of his status as a fourth habitual offender. The amended information did not add prior convictions that would have enhanced the severity of his sentence, and so did not violate the rules stated in *Hornsby* or *Ellis*. Alternatively, Nathan asserts that *Hornsby* was incorrectly decided "based upon statutory construction," but offers no further explanation or argument. We decline to address this issue because he has abandoned it on appeal. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). The trial court did not err when it determined that the notice was proper.

Finally, Nathan argues that the court improperly used his two convictions for attempted felonies, in addition to his single felony conviction, to enhance his sentence. More specifically, he claims that attempted resisting and obstructing and attempted fleeing and eluding, fourth degree, are misdemeanors and so should not have been used to increase the sentencing guideline range. Even if these offenses were misdemeanors under MCL 750.92, the trial court nevertheless could properly rely on these convictions to determine Nathan's status as a habitual offender. The sentencing enhancement statute specifically provides that the sentence enhancement is proper where "a person has been convicted of any combination of 3 or more

felonies or *attempts* to commit felonies . . . ." MCL 769.12(1) (emphasis added). The statute does not require that the attempt to commit the felonies itself be a felony. See *People v Davis*, 89 Mich App 588, 594; 280 NW2d 604 (1979).

The trial court did not err in applying the sentence enhancement for habitual offenders.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly