STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2012
v	No. 304376 Tuscola Circuit Court
NICOLE LEE LICAVOLI, Defendant-Appellant.	LC No. 10-011507-FH

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of 21 counts of embezzlement by a public officer, MCL 750.175. The trial court sentenced defendant to concurrent terms of 2-½ to 10 years' imprisonment for each count. Because defendant waived her right to testify, she was not denied the effective assistance of counsel, the trial court properly denied her motion for a mistrial, and Offense Variables 9 and 12 were properly scored, we affirm.

Defendant worked for the city of Vassar from September 2007 to January 2010. She worked as a general office clerk until she assumed the role of deputy clerk in March 2008. Her primary duty was to oversee utility billing. In October 2009, the city manager discovered that all billing account histories before July 2009 had been purged. After the software company was able to recover the histories, it was discovered that 383 billing adjustments had been made between July 2008 and October 2009. Only two employees were trained to make adjustments during that time period, defendant and another employee who was not located in the clerk's office and did not have access to the software programs. Further, defendant's time cards indicated that she was working when all of the adjustments were made. Defendant was charged with respect to 21 of the adjustments, and the jury convicted her as charged.

I. RIGHT TO TESTIFY

Defendant first argues that she was denied her right to testify at trial. A criminal defendant has a constitutional right to testify in her own defense. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id*. If counsel states on the record that the defendant chooses to waive her right to testify, the defendant's assent to counsel's assertion is presumed. *United States v Webber*, 208 F3d 545, 551 (CA 6, 2000). If the defendant wishes to testify against counsel's advice, she must alert the trial court of

her desire to testify or, at a minimum, indicate that there is a disagreement regarding whether she should testify. *Id.* "When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so." *Id.*; see also *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985) (if the defendant "decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." (Quotation marks and citation omitted.) "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Here, the record shows that defendant waived her right to testify. Defense counsel stated on the record that she discussed with defendant the pros and cons of testifying and recommended that defendant not testify. Counsel further stated that defendant agreed with this recommendation, and defendant did not object or give any indication to the contrary. Defendant's silence indicates her assent to her attorney's assertion, and waiver of her right to testify may be inferred from her silence. *Webber*, 208 F3d at 551.

Defendant urges this Court to adopt a rule requiring that a waiver of the right to testify be placed on the record. This Court, however, has previously considered and rejected such a rule. See *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995) (trial courts are not required to ascertain on the record whether a defendant intelligently and knowingly waived her right to testify); *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991) ("there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify."). Pursuant to MCR 7.215(J)(1), we are bound to follow the rule of law set forth in these decisions and decline to revisit the issue. Accordingly, because defendant was not required to personally waive her right to testify on the record, and the record evidences her waiver through her attorney's assertion that she did not wish to testify, appellate review is precluded.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that her attorney rendered ineffective assistance of counsel by advising her not to testify. Generally, whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo and review a trial court's findings of fact, if any, for clear error. *Id.* Defendant preserved her claim of error for our review by moving to remand this case to the trial court for a *Ginther*[1] hearing, but because this Court denied her motion and no *Ginther* hearing was conducted, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish ineffective assistance of counsel, a defendant must show "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance,

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

the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667. Effective assistance of counsel is presumed, and the burden is on the defendant to prove otherwise. *LeBlanc*, 465 Mich at 578. "[T]he defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy[,]" *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), and counsel is given broad discretion regarding matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). An appellate court should neither "substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant is unable to establish a reasonable probability of a different result absent counsel's advice not to testify. Much of the testimony that defendant claims she would have provided was included in her statement to Detective Krebs, which the jury was able to review. Defendant's statement provided her side of the story and offered alternative explanations for why the money was missing. In addition to the statement, defendant's husband testified that he shared a bank account with defendant and that she could not have taken the money without his knowledge. Therefore, defendant was not deprived of a substantial defense, as she contends. Further, if defendant had testified, she would have been subject to extensive cross-examination regarding the numerous adjustments. Accordingly, defendant has failed to overcome the presumption that counsel's advice constituted sound trial strategy, and she has failed to demonstrate a reasonable probability that, but for counsel's advice, the result of the proceeding would have been different.

Defendant also argues that counsel rendered ineffective assistance by failing to call Ashley Clinesmith, her child's babysitter, who could have testified that defendant often came home for lunch. Defendant asserts that Clinesmith's testimony would have rebutted the prosecution's claim that defendant was possessive of her workstation and the utility billing software program, which could only be accessed by one person at a time. Decisions regarding which witnesses to call are presumed to be matters of trial strategy, and the failure to call a particular witness will constitute 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). Here, counsel's failure to call Clinesmith did not deprive defendant of a substantial defense. Regardless whether defendant went home for lunch a few days each week, as she claims, her time cards show that she was at work when all of the adjustments were made, and she was the only employee in the clerk's office who knew how to make adjustments to residents' accounts. Thus, defendant was not deprived of a substantial defense, and a different outcome was not reasonably likely if counsel had called Clinesmith to testify.

III. MOTION FOR MISTRIAL

Defendant next argues that the trial court erred by denying her motion for a mistrial after the prosecution improperly elicited testimony from Detective Krebs that defendant was guilty. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the principled range of outcomes. *Id.* A claim of prosecutorial misconduct presents a constitutional issue that we review de novo to

determine whether the defendant was denied a fair and impartial trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

It is improper for a witness to express an opinion regarding a defendant's guilt or innocence because that question must be determined by the trier of fact. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). An unresponsive, volunteered answer to a proper question, however, is not a valid basis for granting a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). A trial court's curative instruction to the jury is presumed to cure most errors. *Id*.

Defendant argues that the trial court should have granted her motion for a mistrial after Detective Krebs testified that she was guilty. When the prosecution asked Detective Krebs at what stage of his investigation he submitted the case to the prosecutor's office, he replied, "[a]fter I was confident that she was guilty." The trial court immediately struck the statement from the record and gave a curative instruction advising the jury that the detective's opinion was irrelevant and that defendant's guilt or innocence was for the jury to determine. Immediately before the jury began its deliberations, the court again instructed the jury not to consider stricken testimony.

The trial court did not abuse its discretion by denying defendant's motion for a mistrial. Detective Krebs's answer to the prosecutor's question was an unresponsive and volunteered answer to an otherwise proper question. The prosecutor did not ask about defendant's guilt or innocence and merely inquired regarding the stage of the investigation that the detective submitted the case for prosecution. There is no indication in the record that the prosecutor sought to elicit Detective Krebs's improper response, and an unresponsive answer to a proper question is not grounds for granting a mistrial. *Haywood*, 209 Mich App at 228. Further, the trial court's curative instructions were sufficient to remove the prejudicial effect of the unsolicited testimony. *Horn*, 279 Mich App at 36. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. OFFENSE VARIABLE SCORING

Finally, defendant argues that she is entitled to resentencing because the trial court erroneously scored Offense Variables (OVs) 9 and 12. A trial court has discretion in determining the number of points to score each variable, provided that record evidence supports a given score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). We review a scoring issue "to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *Id.* "Scoring decisions for which there is *any* evidence in support will be upheld." *People v Endres* (*On Remand*), 269 Mich App 414, 417; 711 NW2d 398 (2006) (emphasis added). A defendant "is entitled to resentencing on the basis of a scoring error only if the error alters the recommended minimum sentence range under the legislative sentencing guidelines." *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010).

Pursuant to MCL 777.39(1)(b), a trial court may score 25 points under OV 9 if "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." A "victim" is a "person who was *placed in danger* of physical injury or loss of life or property[.]" MCL 777.39(2)(a) (emphasis added). The statutory language does not require that a person actually suffer property loss in order to constitute a victim.

The record supports the trial court's scoring of OV 9. As the trial court noted, defendant's embezzlement cost the city over $20,000 and numerous persons, including taxpayers, municipal employees, and citizens who were or could have been double-billed, were placed in danger of property loss. Defendant relies on *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009), and argues that OV 9 is offense-specific, rather than transactional. Defendant's reliance on *McGraw* is misplaced, however, because each charge of embezzlement involved "20 or more victims who were placed in danger of property loss." See MCL 777.39(1)(b). Thus, even viewing defendant's offenses individually, rather than in the aggregate, record evidence supported scoring 25 points under OV 9. Contrary to defendant's argument, the city of Vassar was not the only victim of defendant's conduct. Accordingly, OV 9 was properly scored.

With respect to OV 12, MCL 777.42(1)(c) directs a trial court to score ten points if "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed[.]" MCL 777.42(2)(a) provides,

> A felonious criminal act is contemporaneous if both of the following circumstances exist:
>
> (*i*) The act occurred within 24 hours of the sentencing offense.
>
> (*ii*) The act has not and will not result in a separate conviction.

"Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010).

The record shows that defendant made 383 adjustments over a 129-day period. The trial court concluded that, based on the evidence presented, at least four adjustments had to have been made within a 24-hour period. Mathematically, 383 adjustments over 129 days is roughly three a day, and defendant did not work every day of the 129-day period. Accordingly, three adjustments, in addition to the sentencing offense, must necessarily have been. This notion is supported by the prosecution's exhibit showing that defendant made four adjustments to certain

residents' utility billing accounts on March 13, 2009. Therefore, the evidence supported the trial court's decision to score OV 12 at ten points.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro