

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL BENNETT,

Defendant-Appellant.

UNPUBLISHED

February 23, 2001

No. 219579

Oakland Circuit Court

LC No. 98-160435-FH

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny by conversion over \$100, MCL 750.362; MSA 28.594, after failing to deliver a painting to the complainant for which the complainant had paid defendant \$5,000 in late 1997. Defendant was sentenced within the guidelines range to a prison term of two to five years and was ordered to pay \$5,000 as a condition of parole. Defendant appeals as of right. We affirm.

Defendant raises two issues concerning sentencing. First, defendant argues that his sentencing was improper. There is no merit to defendant's claim. Contrary to defendant's contention, it is clear from the record that defendant, counsel, and the trial court were all familiar with the sentencing information report (SIR). It was not improper for the trial court to consider evidence of a prior charge against defendant that was dismissed. *People v Ewing (After Remand)*, 435 Mich 443, 446 (opinion by Brickley, J.), 462, 473 (opinion by Boyle, J.); 458 NW2d 880 (1990). Nor was it improper for the SIR to include hearsay. *People v Books*, 95 Mich App 500, 503; 291 NW2d 94 (1980). Although the procedure in this case may have been imperfect and the trial court did not affirmatively resolve defendant's challenge to some of the information on the record, any error was harmless. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v McAllister*, 241 Mich App 466, 473-474; 616 NW2d 203 (2000); *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991). Remand to allow the trial court to resolve defendant's challenges would be futile because, in light of defendant's criminal record and the circumstances of this case, it would not affect the sentence imposed. *McAllister, supra*.

Second, defendant's sentence is not disproportionate. A sentence must be proportionate to the seriousness of the matter before the trial court, taking into account the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1

(1990). A sentence within the guidelines' range is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Taking into account the circumstances surrounding the offense and the offender, defendant's sentence within the guidelines range is not disproportionately severe. *Milbourn, supra*.

Finally, there is no merit to defendant's claim that his trial counsel was ineffective. Because defendant did not request a *Ginther*¹ hearing, this Court's review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). The burden is on defendant to show that counsel made serious errors that prejudiced the defense and deprived defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* The decision whether to call witnesses is a matter of trial strategy that this court will not second-guess. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

The record does not support defendant's claim that counsel was ineffective for failing to call certain witnesses. Defendant has not demonstrated why the witnesses were necessary or how the outcome would have been different if they had testified. The decision which witnesses to call is a matter of trial strategy. *Mitchell, supra* at 163; *Daniel, supra* at 58. Nor does the record support defendant's contention that counsel was ineffective for failing to inform the trial court that defendant did not want to be represented by counsel. Indeed, defendant himself criticized the trial court for preventing him access to his money so he could hire his own lawyer. Defendant argues on appeal that counsel was ineffective in failing to call defendant as a witness, yet he told the trial court on the record that he did not testify because he was "seriously ill." Finally, contrary to defendant's allegations, trial counsel argued a number of challenges to information in the SIR. Defendant has not shown any serious error or demonstrated any prejudice in this case. *Mitchell, supra* at 156.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald

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