

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BRIAN BERRY,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 256446

Oakland Circuit Court

LC No. 2004-194320-FH

Before: Wilder, P.J. and Kelly and Borrello, JJ.

PER CURIAM.

Defendant was convicted of malicious destruction of property more than \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 15 years' imprisonment. Defendant appeals as of right his conviction and sentence. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to prepare the defense witness, investigate a potential witness, and object to prejudicial hearsay testimony and prosecutorial misconduct. We disagree.

Defendant moved for a new trial or an evidentiary hearing, which the trial court denied.¹ "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an

¹ Although the trial court deemed defendant's motion untimely, it considered it as a motion for relief from judgment and, reviewing defendant's claim of ineffective assistance of counsel, ruled that it was without merit.

objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).]

Defendant first maintains that defense counsel failed to properly prepare the sole defense witness Jodi Sobiecki, defendant's former wife. Sobiecki established an alibi for defendant for at least one of the vandalism incidents. She also testified that she did not believe defendant committed the charged crimes. Despite her additional testimony that defendant was arrested because he "drop kicked" their daughter, Sobiecki's testimony was the only evidence beneficial to the defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* Assuming that defense counsel knew that Sobiecki might testify in this regard (he did object before the testimony to this "line of questioning"), his decision to call her nonetheless is presumed to be a matter of trial strategy. If defense counsel did not know, it was incumbent on defendant, not Sobiecki to tell him. Defense counsel "cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). On this record, even considering the affidavit submitted by defendant, we cannot conclude that defense counsel's performance with respect to calling Sobiecki as a witness "was below an objective standard of reasonableness under prevailing norms."

Defendant also contends that defense counsel should have investigated and called as a witness a police officer identified only as "Officer Smith" who responded to and wrote a report on the complainant's last of multiple complaints of vandalism to his vehicle. Failure to call a witness may constitute ineffective assistance only if it deprives the defendant of a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant asserts that Officer Smith may have disputed the complainant's allegation that defendant caused the alleged windshield damage because Officer Smith did not mention it in his report. However, Officer Smith noted in his report that there was a prior related complaint and the window complaint was made a day earlier. Further, defendant offers nothing but speculation that Officer Smith would have assisted his defense. Therefore, we cannot conclude that defense counsel's decision not to call this witness denied defendant a substantial defense.

Defendant further argues that defense counsel was ineffective for failing to object to Sobiecki and the complainant's inadmissible testimony. With respect to Sobiecki's testimony, defendant contends that her testimony that defendant "drop kicked" his daughter denied him a fair trial. However, the record clearly reflects that defense counsel objected to this line of questioning, but the court admitted it is as going to credibility. Even if defense counsel had not objected, however, defendant has not identified any legal basis for defense counsel's objection. "Issues insufficiently briefed are deemed abandoned on appeal." *People v VanTubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

Defendant also asserts that defense counsel should have objected to the complainant's inadmissible hearsay concerning defendant's abusive relationship with Tamara Kornak. Again,

other than citing the testimony and asserting that it is hearsay, defendant has cited no supporting authority and provides no analysis as to why the statements are inadmissible hearsay. Therefore, this issue is also abandoned. *VanTubbergen, supra* at 365.

Defendant's claim of prosecutorial misconduct is also without merit. Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). The prosecutor's reference to defendant "living on the streets" was supported by Sobiecki's testimony that defendant needed a place to stay and the complainant's testimony that defendant made threatening phone calls from pay phones. Because it was supported by evidence, the prosecutor's statement was not improper. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant next argues that he is entitled to resentencing because the trial court incorrectly scored 25 points for offense variable (OV) 13. The prosecutor conceded in the trial court, and concedes on appeal, that OV 13 should have been scored zero points. A review of defendant's record indeed reveals that, although he has demonstrated a pattern of criminal activity, it was not a pattern of felonious criminal activity. MCL 777.43. Therefore, OV 13 should have been scored zero points. However, resentencing is "not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). After reducing defendant's OV 13 score to zero points, his OV total is reduced to 1 point, and his OV level changes to I. Accordingly, defendant's minimum sentence guidelines range is 9 to 46 months, taking into account his fourth habitual offender status. Defendant's minimum sentence of 36 months is within this range. Additionally, the trial court, after being made aware of this error, clearly indicated that it would not change defendant's sentence. Therefore, defendant is not entitled to resentencing.

Affirmed and remanded for a correction of defendant's sentencing information report. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello