STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 271215 St. Clair Circuit Court
JIMMIE KEITH SMITH, Defendant-Appellant.	LC No. 05-002742-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 16 to 60 months' imprisonment. He appeals as of right. We affirm defendant's conviction and sentence, but vacate the portion of the judgment of sentence requiring defendant to pay restitution and attorney fees and remand for reconsideration of those issues.

I

Defendant's conviction arises out of his possession in October 2005 of a 1988 Honda Accord owned by Charles Eveland. Charles left the vehicle with his estranged wife, Rosa Eveland, while he attended a drug rehabilitation program for 15 days. Rosa testified that defendant took the vehicle from outside her residence, using a spare set of keys in the vehicle, after she failed to comply with his demand for money owed to him for drugs. She later contacted defendant in an attempt to have the vehicle returned, but defendant told her he had sold it. Charles testified that Rosa told him different stories regarding why the vehicle was taken. After leaving the drug rehabilitation program, Charles contacted the police to report that the vehicle was stolen.

On November 1, 2005, Port Huron Police Officer James Gilbert conducted a traffic stop of the vehicle after confirming that it had been reported stolen. According to Officer Gilbert, defendant, the driver, claimed that he purchased the vehicle from Rosa for $300, but he did not have any proof of purchase. Officer Gilbert searched the vehicle for proof of ownership, but could not find anything. Other testimony indicated that the police returned the vehicle to Rosa, even though it was registered to Charles. Charles was in another rehabilitation program when he learned that the vehicle had been recovered. According to Rosa, the condition of the vehicle

deteriorated during the time that it was in defendant's possession. After the vehicle was returned to her, other people tried to steal it, and it was eventually "junked."

Defendant testified that he purchased the vehicle from Rosa for $300 and thereafter drove it, even though he did not have a valid driver's license. Defendant testified that Rosa gave him a written bill of sale. He stated that he placed it in the glove compartment along with the registration and proof of insurance that were already there, but he admitted that he did not have the title to the vehicle. He denied that either Rosa or Charles owed him any money for drugs.

II

On appeal, defendant claims that he was denied the effective assistance of counsel because defense counsel did not request or object to the lack of a specific intent instruction that would have required the prosecutor to prove that defendant intended to unlawfully take possession of the vehicle. Defendant also claims that defense counsel failed to properly present an apparent authority defense or request an instruction to explain the concept of apparent authority to the jury.

Because defendant failed to move for *Ginther*[1] hearing or new trial in the trial court, our review is limited to the mistakes apparent from the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). A defendant seeking a new trial based on ineffective assistance of counsel bears a heavy burden to overcome the presumption that counsel provided effective assistance. *Id*. at 714; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant "must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *Rodgers*, *supra* at 714. Defendant must also establish a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have different. *Id*. Defendant must also demonstrate that the result of the proceedings was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). "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." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

"A defendant is entitled to have counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. Further, if a defendant requests an instruction on a defense or theory supported by the evidence, the trial court must give the instruction. *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006). "Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Jury instructions are examined in their entirety to determine if an error requiring reversal occurred. *Id*.

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

MCL 750.413 provides that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ." UDAA constitutes a property offense aimed at the unauthorized use of a motor vehicle. *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994). The prosecutor need not prove any specific intent to permanently deprive the owner of possession of the motor vehicle. *Id*. However, for a conviction to be valid, it is necessary for the prosecutor to show that the defendant took possession unlawfully and that he acted "wilfully or wilfully and wantonly and without authority." See *Landon v Titan Ins Co*, 251 Mich App 633, 641-643; 651 NW2d 93 (2002) (internal citation and quotation marks omitted). A specific intent requirement arises from the statutory requirement of willful conduct.[2] *People v Lerma*, 66 Mich App 566, 568-571; 239 NW2d 424 (1976). The essential elements of UDAA are "(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) [that] the possession and driving away [were] done without authority or permission." *Landon*, *supra* at 639 (internal citation and quotation marks omitted).

In this case, it is apparent from the record that the defense presented at trial was focused on whether defendant had permission or authority to take the vehicle. It was not disputed that defendant intentionally took possession of the vehicle. In his closing argument, defense counsel challenged Rosa's credibility and attacked the police work as "sloppy." Defense counsel presented defendant's testimony to establish that defendant acquired possession of the vehicle by purchasing it from Rosa, and counsel suggested that she be treated as an "owner" by asserting in closing argument that "[t]he owners have told you they never gave permission for this car to be taken." Defense counsel expressly withdrew a request for a "claim of right" instruction in accordance with CJI2d 7.5[3] because he did not believe it would be applicable and, in any event, thought the instruction would be more detrimental than beneficial to the defense. Defense

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[2] A specific intent crime has been described as involving a particular criminal intent beyond the intent to do the physical act. *People v Nowack*, 462 Mich 392, 405; 614 NW2d 78 (2000). A general intent crime involves merely an intent to do the physical act. *Id*. "[T]he enactment of MCL 768.37, which abolished the defense of voluntary intoxication except in one narrow circumstance, has significantly diminished the need to categorize crimes as being either 'specific' or 'general' intent crimes." *People v Maynor*, 470 Mich 289, 296; 683 NW2d 565 (2004).

[3] CJI2d 7.5(1) provides, in pertinent part:

> (1) To be guilty of [larceny/robbery/(*state other crime*)], a person must intend to steal. In this case, there has been some evidence that the defendant took the property because [he/she] claimed the right to do so. If so, the defendant did not intend to steal.
>
> (2) When does such a claimed right exist? It exists if the defendant took the property honestly believing that it was legally [his/hers] or that [he/she] had a legal right to have it. Two things are important: the defendant's belief must be honest, and [he/she] must claim a legal right to the property. [Emphasis in original.]

counsel successfully requested an instruction to limit the use of evidence that defendant was involved with narcotics to the question of defendant's motive and whether he acted purposely. Counsel expressed satisfaction with the jury instructions given by the trial court.

Limiting our review to the record, we reject defendant's claim that counsel was ineffective by not requesting or objecting to the lack of a specific intent instruction explaining that the prosecutor was required to prove that defendant intended to unlawfully take possession of the vehicle. Examined as a whole, the instructions were adequate to present the statutory requirement of willful conduct by explaining that the prosecutor was required to prove that defendant acted intentionally and without the authority or permission of the owner, with respect to both the act of possession and the act of driving away. The court specifically stated that prosecutor had to prove that defendant "intended to take possession of this vehicle and take it away" and that "these acts were . . . both done without authority or permission of the owner." No error requiring reversal is apparent.

The concept of apparent authority on which defendant relies on appeal only has a bearing on whether Charles would be estopped from denying that Rosa acted on his behalf with respect to the vehicle. "In agency law, the principal and his agent share a legal identity; it is a fundamental rule that the principal is bound, and liable for, the acts of his agent done with the actual or apparent authority of the principal." *People v Konrad*, 449 Mich 263, 280-281; 536 NW2d 517 (1995) (Brickley, C.J., dissenting). Whether apparent authority exists depends on the circumstances of the particular case. In the business context, it is generally held that where a principal places a person "in such a situation that a person of ordinary prudence, conversant with business usages and the nature of a particular business," would be justified in assuming that the agent was authorized to perform a particular act, and the act was performed, "the principal is estopped from denying the agent's authority to perform it." *Lynch v R D Baker Constr Co*, 297 Mich 1, 7-8; 296 NW 858 (1941) (internal citations and quotation marks omitted). However, the mere fact that an owner of property entrusts custody to another does not provide apparent authority to sell that property to a third party and pass title. *Ball-Barnhart-Putman Co v Lane*, 135 Mich 275, 277; 97 NW 727 (1903). The rule is otherwise if the owner provided the other person with indicia of ownership. *Id*.

In the present case, there was no evidence that Charles provided Rosa with indicia of ownership to his vehicle. Further, defendant's own testimony indicates that he understood that the vehicle belonged to Charles. Defendant answered "[y]es" when asked, "Was it your understanding that the vehicle was titled to Rosa's husband?"

The record does not indicate that there was evidence to support an inference that Rosa had apparent authority to sell the vehicle for Charles, notwithstanding the evidence that Rosa and Charles were married at the time that defendant obtained possession of the vehicle. The mere existence of a marital relationship does not create an agency relationship. See, e.g., *Wentworth v Process Installations, Inc*, 122 Mich App 452, 462; 333 NW2d 78 (1983). A proper instruction on agency principles might have been detrimental to the defense by highlighting that an owner's mere entrustment of property to another does not provide apparent authority to sell the property. Limiting our review to the record, defendant has established neither deficient performance nor prejudice arising from defense counsel's failure to either present an "apparent authority" defense or request instructions regarding this concept.

III

Defendant next raises two issues concerning sentencing. First, defendant seeks a remand to the trial court for a proper evaluation of the amount, if any, of restitution that he should be ordered to pay to Charles, relying on the plain error doctrine in *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), for unpreserved issues or, alternatively, on the ground that defense counsel was ineffective by not challenging the restitution order.

Under the Crime Victim's Rights Act, MCL 780.751 *et seq.*, defendant must make full restitution, but the Legislature has left the task of how best to make victims whole to the determination of the trial court based on the evidence presented, subject to the prosecutor's burden to prove losses attributable to defendant's crime-related acts. *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006). The trial court must consider the amount of the loss sustained by the victim as a result of the offense in determining the amount of restitution. MCL 780.767(1). A "victim" is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). "Restitution awarded by a sentencing court is not a substitute for civil damages, but encompasses only those losses which are easily ascertained and measured and are a direct result of a defendant's criminal acts." *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991). Where property is involved, MCL 780.766(3) provides:

> If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:
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> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
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> (i) The value of the property on the date of the damage, loss, or destruction.
>
> (ii) The value of the property on the date of sentencing.
>
> (c) Pay the costs of the seizure or impoundment, or both.

The record indicates that the sentencing judge relied solely on the presentence report to determine the amount of restitution. The sentencing judge did not preside over defendant's trial and expressly stated that he was following sentencing recommendations in the presentence report. A sentencing judge may appropriately rely on information in the presentence report to determine restitution if a defendant does not challenge the type or amount of restitution. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). The recommended restitution amount is

presumed accurate unless the defendant effectively challenges the accuracy of the factual information in the presentence report. *Id*. at 276-277 n 17.

Nonetheless, the factual information in the presentence report does not support the recommended restitution amount of $500. The recommendation was based on Charles's request for the full value of the vehicle. Charles explained in the victim's impact statement contained in the presentence report that he claimed a total loss of the vehicle because it was destroyed *after* defendant's criminal conduct. Charles indicated that "there had been numerous attempts by unknown individuals to re-take the vehicle for payment of his ex-wife's drug debt" and that he tried to avoid having the vehicle taken by leaving it in the police impound lot, but the vehicle was taken to a salvage yard and crushed because of an error involving the paperwork.

Contrary to the prosecutor's argument on appeal, there was no evidence indicating that the total loss of the vehicle directly resulted from defendant's criminal conduct. Instead, the presentence report indicates that the total loss occurred because (1) "unknown individuals" had attempted to steal the vehicle, (2) Charles therefore "tried to avoid having the car taken by leaving it in the police compound," and (3) a paperwork error resulted in its being crushed.[4] It is apparent that the total loss claimed by Charles was not a direct result of defendant's criminal actions, and therefore the sentencing judge committed plain error in ordering restitution in the amount of $500 based on the factual information in the presentence report. Because defendant was ordered to pay restitution in an amount greater than that authorized by statute, we conclude that the plain error affected defendant's substantial rights and warrants a remand. *Carines, supra* at 763-764.

Both parties concede on appeal that there was evidence at trial that the vehicle sustained some damage while in defendant's care. The extent of the damage is unclear, however. Although Officer Gilbert's testimony indicated that the vehicle was operative when he stopped defendant on November 1, 2005, Rosa testified that she found a dent and problems with the transmission and headlights, and the vehicle was allegedly "smoking" when it was returned by the police. We conclude that the appropriate remedy is to vacate the restitution portion of the judgment of sentence and remand for reconsideration of this issue in accordance with the statutory standards. On remand, the prosecutor shall be afforded an opportunity to present evidence to establish the appropriate amount of restitution by a preponderance of the evidence, as provided by MCL 780.767(4). Because we are remanding for a reassessment of restitution, it is unnecessary for us to address defendant's claim that defense counsel was ineffective by not challenging the restitution award.

Next, relying on *Carines*, *supra*, defendant argues that the sentencing judge also plainly erred by assessing him $2,223.96 for attorney fees as part of the judgment of sentence and by failing to consider his ability to pay attorney fees. We agree. As with the restitution amount, the

[4] It is not clear how the vehicle ended up in the "police compound," because Rosa testified that the vehicle was returned to her and "stay[ed] at [her] residence for . . . a couple days." Rosa then testified that her father had the vehicle towed because people had been breaking into it and that "[t]hey" (presumably the individuals at the place to which it was towed) "junked it."

record indicates that the sentencing judge relied solely on the recommendation in the presentence report to assess attorney fees.

Before issuing an order requiring a defendant to pay attorney fees, the trial court must consider the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 253; 690 NW2d 476 (2004). This requirement includes both the ability to pay presently and in the future. *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007). The purpose of this requirement is to assure that repayment is not required while a defendant remains indigent. *Dunbar, supra* at 256. If a defendant does not specifically object to the reimbursement amount at the time it is ordered, a trial court is not required to make formal findings regarding a defendant's financial situation, but must at least provide some indication that it considered the defendant's ability to pay. *Id*. at 254-255. Additionally, any reimbursement order must be entered separately from the judgment of sentence. *Id*. at 256; *People v Nowicki*, 213 Mich App 383, 386-388; 539 NW2d 590 (1995).

Here, the sentencing judge's comments at sentencing are insufficient for us to conclude that he considered defendant's financial circumstances for the purpose of assessing attorney fees.[5] Moreover, the sentencing judge plainly erred by ordering defendant to pay attorney fees as part of the judgment of sentence. Therefore, consistent with *Dunbar, supra* at 256, we vacate the portion of the amended judgment requiring defendant to pay attorney fees and remand to the trial court for reconsideration of this issue.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth Gleicher

[5] Although the sentencing judge expressed a belief that defendant should be earning an honest living, these remarks were not related to the attorney fee issue but were made in response to defendant's claim, during allocution, that the system failed him because he was not guilty. The judge questioned why defendant, at the age of 25, could not be earning an honest living and then informed defendant that he was responsible for making "bad choices."