STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2008
v	No. 278269 Macomb Circuit Court
MARVIN LAMONT FRANKLIN, Defendant-Appellant.	LC No. 2006-005463-FH

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of breaking and entering a building with intent to commit larceny, MCL 750.110, and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 38 months to 10 years' imprisonment for the breaking and entering conviction and one to two years' imprisonment for the resisting or obstructing a police officer conviction. We affirm in part and vacate in part.

This case arises out of a breaking and entering incident during the early mornings hours of November 1, 2006, in Warren, Michigan. Police responded to the activation of an alarm and motion sensors in a gas station storage room. At the scene, the storage room door was ajar, its lock had been pried off, merchandise that was stacked against the door had been moved and strike marks were discovered on bulletproof glass leading to the cashier's office. Police arrived at the gas station within minutes after the alarm and observed defendant a few feet from the south side of the building. Police verbally asked defendant to "come here," but defendant fled the scene on foot. A police chase ensued, during which defendant disposed of a lug wrench. The shape of the pry marks on the storage room door and interior bulletproof glass was matched to the shape of the lug wrench and the color of paint transferred onto the lug wrench was similar to the paint color of the storage room door. When the police arrested defendant, they discovered a pair of latex gloves in his pocket.

Defendant's first argument on appeal is that the trial court improperly admitted hearsay evidence that violated his constitutional right of confrontation. We disagree. Defendant's unpreserved claim of constitutional error is preserved for review of plain error affecting his substantial rights. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

At trial, the owner of the gas station, Faisal Ibrahim, testified that his building has an alarm system through National Alarm. Although not objected to at trial, defendant now asserts

that Ibrahim's statement that the alarm company called and informed him, immediately after phoning police on the night of the breaking and entering, that the store alarm and interior motion detectors were activated constituted inadmissible hearsay. Defendant does not challenge corroborative testimony by a police officer that the police responded to the gas station alarm that indicated motion detectors inside the store had been activated.

A review of the lower court record reveals that defense counsel, on cross-examination, queried this witness regarding the presence of the sensors, their configuration/range and which sensors had been triggered on the night of the breaking and entering. Defendant may not assert error when he contributed to the alleged error by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). Further, defendant impliedly asserts that the prosecution relied on this testimony to prove the element of entry to establish a breaking and entering. However, testimony regarding the activation of the interior motion sensors was not the only evidence presented to demonstrate entry. Ibrahim and police also testified that merchandise within the interior of the gas station had been moved and disrupted, indicating the presence of an intruder inside the building. Even assuming Ibrahim's statement regarding information conveyed to him by phone from the alarm company constituted hearsay, any such error would not amount to plain error impacting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). Given the existence of evidence, aside from the motion sensor activation, that entry had been made into the gas station, defendant has failed to demonstrate that this cumulative evidence resulted in the conviction of an actually innocent person or served to undermine the integrity of the judicial system. *Id.* at 355-356. Consequently, reversal is not warranted.

Defendant's second argument on appeal is that defense counsel was ineffective for failing to object to Ibrahim's testimony. We disagree. This Court's review of defendant's unpreserved claims of ineffective assistance of counsel is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Michigan has adopted the ineffective assistance of counsel standard established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Grant, supra* at 485. Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

Defense counsel's performance did not fall below an objective standard of reasonableness. *Grant, supra* at 485-486. Counsel renders effective assistance even if counsel fails to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because we find that the Ibrahim's testimony did not constitute plain error affecting defendant's substantial rights, defense counsel's failure to object did not comprise ineffective assistance.

Defendant also argues that defense counsel was ineffective because he failed to use a police report to "impeach" Ibrahim. This Court may only consider the issue to the extent that the claimed mistakes are apparent on the record. *Rodriguez, supra* at 38. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this regard, defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id*. "This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy" and ineffective assistance of counsel will not be found "merely because a trial strategy backfires." *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

Defense counsel questioned the witness regarding statements made to police. When the witness could not recall the alleged statement, counsel did not proffer the police report to refresh the witness's memory. Notably, the witness did not present conflicting testimony. The witness indicated to police that some of the marks observed on the cashier's door had occurred during previous robberies. However, when questioned by counsel, defendant's attorney referenced marks evidencing damage to a different door, the storage room door, which the witness correctly could not recall indicating to police. Because the evidence and testimony were not contradictory, there existed no basis for impeachment. Further, defense counsel was able to elicit testimony regarding the report of previous break-ins and the marks on the cashier door through a police witness. Therefore, the failure to obtain cumulative testimony on this issue through the store's owner did not impact the outcome of the trial.

Defendant also contends that the cumulative effect of his ineffective assistance claims on appeal denied him a fair trial. "It is true that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (1992). Cumulative error actually refers to unfair prejudice. *Id.* at 592 n 12. Only the unfair prejudice of actual errors are aggregated to satisfy the standard set forth in *Carines*.[1] *Id.* at 592 n 12. We find that there are no trial errors to aggregate, which denied defendant a fair trial or caused unfair prejudice to defendant. *Ackerman, supra* at 454. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Defendant's third argument on appeal is that the trial court erred when it failed to assess defendant's ability to pay attorney fees. We agree. This Court reviews defendant's unpreserved claim for plain error affecting defendant's substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

A person who is afforded appointed counsel might be ordered to reimburse the costs of that representation, if such reimbursement can be made without substantial hardship. *Dunbar, supra* at 253. Before issuing an order requiring a defendant to pay attorney fees, the trial court must consider the defendant's ability to pay presently and in the future. *Id.* If a defendant does

[1] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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 a minimum, provide some indication that it considered defendant's ability to pay. *Id*. at 254-255.

The trial court's statements at sentencing are insufficient for this Court to conclude that the trial court considered defendant's financial ability to pay for the purpose of assessing attorney fees. The trial court merely stated, "The court-appointed attorney bill and fees are seventeen hundred dollars." The trial court did not indicate that it ascertained defendant's ability to pay from facts presented in the presentence investigation report ("PSIR"), such as defendant's education or current employment. Thus, we vacate that portion of the sentence that ordered defendant to pay attorney fees and remand to the trial court to address defendant's current and future financial circumstances and foreseeable ability to reimburse for attorney fees before determining whether he should pay those fees. At the trial court's discretion, the decision may be made based on the record without the need for a formal evidentiary hearing. *Dunbar*, *supra* at 252-256.

Defendant's final argument is that the length of his sentence for a previous conviction is incorrectly recorded in the PSIR. At sentencing, defense counsel affirmatively indicated that the PSIR was accurate. Moreover, defendant actively refused to communicate with defense counsel and the trial court regarding the contents of the PSIR. Defendant has, therefore, waived appellate review of this issue. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

We affirm defendant's convictions. We vacate that portion of the sentence that ordered defendant to pay attorney fees, and remand to the trial court solely to address defendant's ability to pay those fees. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot