

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH LEE POET,

Defendant-Appellant.

UNPUBLISHED

November 25, 2008

No. 280418

Jackson Circuit Court

LC No. 06-004523-FH

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree home invasion, MCL 750.110a(3), larceny in a building, MCL 750.360, and receiving and concealing stolen property (\$200 or more but less than \$1,000), MCL 750.535(4)(a). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 60 to 180 months' imprisonment, with credit given for 129 days, for the home invasion and larceny convictions, and to 129 days in jail, for the receiving and concealing stolen property conviction. The court also ordered defendant to pay \$472 in attorney fees. We affirm defendant's convictions and sentences but remand for reconsideration of the order for attorney fees. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant disputed the testimony of prosecution witnesses that he admitted breaking into his neighbor's house and stealing property. He admitted having in his possession property later found to be stolen from his neighbor but claimed he had purchased it at a garage sale. During direct examination, defendant voluntarily offered the information that he had been previously imprisoned. When asked by defense counsel about his criminal record, defendant confirmed he had prior convictions for home invasion and breaking and entering. At a later point in his direct examination, defendant denied confessing the crime to a certain witness by stating: "No. Why would I tell her that? The record I got I'd be put away for life. I just now started a new life." During cross-examination, the prosecution asked defendant about his comments made in direct examination regarding his prior convictions and imprisonment. The prosecution also asked defendant whether he thought two prosecution witnesses were liars, to which defendant answered yes. In its closing argument, the prosecution made a single reference to defendant's criminal record when it said defendant's past caused him to initially disavow any knowledge about the stolen property. Meanwhile, defense counsel mentioned defendant's prior imprisonment several times in his closing when he argued that, as an experienced felon, defendant would have known better than to loan stolen property to his upstairs neighbors or

confess the crime to two other people. The trial court instructed the jury on the proper use of prior conviction evidence.

Defendant first argues that he was denied the effective assistance of counsel by his attorney's failure to take steps to prevent the prosecution's use of defendant's prior convictions as impeachment evidence. However, it was defendant who first introduced his prior imprisonment and convictions into evidence, and it was defense counsel's strategy to use this evidence to defendant's advantage. This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); see also *People v Rodgers*, 248 Mich App 702, 716-717; 645 NW2d 294 (2001) (where a prosecutor would have the option of impeaching the defendant with a prior conviction, the defendant may not mitigate the damage by fronting the conviction and then argue on appeal that admission of the testimony was error).

Next, defendant argues that it was prosecutorial misconduct for the prosecution to ask defendant whether the two prosecution witnesses were liars. We disagree. Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). In addition, appellate relief is not warranted if a curative instruction could have eliminated any possible prejudice. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). This case came down to whether the jury believed defendant's claims. In the challenged exchange, the prosecution was emphasizing the stark contrast of the claims made by defendant and the two prosecution witnesses and was not asking whether defendant possessed special knowledge regarding any witness's credibility. Therefore, the prosecution did not commit prosecutorial misconduct in that line of questioning. See *Knapp, supra* at 385 (in light of defendant's consistent allegations that certain witnesses were lying, defendant was not harmed by questioning the veracity of one other witness).

Finally, the sentencing court erred when it failed to articulate on the record that it had reviewed and considered the defendant's ability to pay before ordering defendant to pay \$472 in attorney fees. Before issuing an order requiring a defendant to pay attorney fees, the court must consider the defendant's ability to pay presently and in the future. *People v Dunbar*, 264 Mich App 240, 253-256; 690 NW2d 476 (2004). If a defendant does not specifically object to the reimbursement amount at the time it is ordered, a 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 253-256. Here, the sentencing court made no reference on the record to defendant's financial situation or his ability to pay attorney fees.

Defendant's convictions and sentences are affirmed, but the order of attorney fees is vacated and the issue is remanded for consideration of defendant's ability to pay. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski