

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICARDO STILLE,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2009

No. 282223

Oakland Circuit Court

LC No. 2007-216096-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

After a jury trial, defendant Ricardo Stille was convicted of one count of first-degree retail fraud, MCL 750.356c, one count of resisting and obstructing a police officer, MCL 750.81d(1), and one count of receiving or concealing stolen property, MCL 750.535(4)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to consecutive sentences of three-and-a-half to twenty years' imprisonment for the retail fraud conviction and three-and-a-half to fifteen years' imprisonment for the resisting and obstructing conviction, and he received time served for the receiving or concealing stolen property conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On August 4, 2007, defendant entered an ABC Warehouse store in Novi with a Bose SA3 amplifier box sealed with clear packing tape. Instead of a Bose amplifier and its Styrofoam packaging, the box contained scrap metal. Defendant asked Chad Morrow, the store manager, for speakers to use with a Bose amplifier. Morrow went to get the speakers, which were located in a locked area of the store, and defendant was left alone in the audio department. When Morrow was gone, defendant switched the Bose amplifier box that he was carrying with a Bose amplifier box located on a store shelf. When Morrow returned, defendant stated that he needed to go to his car to get his girlfriend and his credit card. Defendant then left the store carrying the box containing a Bose amplifier, leaving the box filled with scrap metal that he had brought into the store on the shelf.

Joseph Kassis, an employee stationed near the front door, had not seen defendant enter the store and became suspicious when he saw defendant leave the store with the Bose amplifier box and without a visible receipt. Kassis stopped defendant and asked to see his receipt. Defendant replied that he had purchased the amplifier, but the receipt was in the car. Kassis followed defendant to his car, where defendant produced a valid receipt for the amplifier from

ABC Warehouse's store in Farmington Hills.<sup>1</sup> Defendant drove off in his silver Cadillac, and Kassis reported the situation to Morrow.

As Kassis was interacting with defendant in the parking lot, Morrow recalled a corporate email issued a week earlier warning employees that a black male driving a silver Cadillac had been spotted taking pieces of Bose equipment from various ABC Warehouse stores. The email warned that this individual often left the store after telling employees that he had to get his girlfriend and credit card from the car. After Kassis returned to the store, Morrow spoke with him regarding defendant. Morrow then decided to check the Bose amplifier box located on the store shelf in the audio department. He opened the box and discovered that it only contained scrap metal. Morrow immediately issued an email alert to the other stores warning them of the unlawful taking.

Bruce Gorman, the assistant manager of the Farmington Hills store, received the email. Soon thereafter, defendant entered the store and asked to return the Bose amplifier in his possession. Defendant provided a receipt from the Farmington Hills store when Gorman requested one. Gorman also opened the box and noticed that it contained an amplifier. However, Gorman was still suspicious of defendant and called the police.

Eric Buckberry, an officer with the Farmington Hills police, talked with defendant soon after he arrived at the store. After Buckberry and another officer placed defendant in the backseat of a police cruiser, Buckberry looked through the window of defendant's Cadillac. He saw what appeared to be an amplifier and Styrofoam packaging lying on the floor.<sup>2</sup> Defendant resisted the officers' attempts to open his car and to arrest him; he only cooperated after he was informed that he would be tasered if he continued to resist.

On appeal, defendant claims that his trial counsel was ineffective for failing to obtain the ABC Warehouse receipt that defendant had in his possession at the time of his arrest and offer it into evidence. We disagree. Because defendant did not move for a new trial or a *Ginther*<sup>3</sup> hearing on this ground before the trial court, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of fact for clear error and questions of constitutional law de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an

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<sup>1</sup> Nobody was in defendant's car.

<sup>2</sup> Packing tape was later discovered in the car as well.

<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004) (internal citations omitted).]

Defendant fails to overcome the presumption that his counsel's decision not to enter the receipt into evidence was a matter of trial strategy and that, as a result, his actions did not constitute ineffective assistance of counsel. See *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) ("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.") The record indicates that numerous witnesses testified that the receipt in question was valid. Assuming that the receipt is, in fact, valid, it would merely confirm the underlying assumption regarding the receipt's validity presented by witnesses.<sup>4</sup> In addition, the receipt indicated that another individual besides defendant purchased the amplifier and paid for it with cash. Thus, the receipt does not support a claim that defendant purchased a Bose amplifier.

In addition, defendant fails to establish that the outcome would have been different if the jury had been permitted to see the receipt. Defendant would still be faced with the fact that he was apprehended with two SA3 amplifiers, one box, and one receipt. Considering that the evidence presented at trial indicates that defendant switched a box containing a Bose amplifier with a similar box containing scrap metal, and that a Bose amplifier and packing material, but no corresponding box, were found in defendant's car, admission of a receipt indicating that an individual besides defendant purchased one Bose amplifier is superfluous and probably would not affect a jury's determination regarding the resisting and obstructing charge.

Defendant also appears to argue that his counsel should have challenged the prosecutor for impermissibly shifting the burden of proof by telling the jury during closing arguments that defendant never provided a second receipt. However, defendant cannot show that any error was outcome-determinative where defense counsel and the trial court both properly instructed the jury that defendant did not have to prove anything. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (noting that jurors are presumed to follow their instructions, and that such instructions are presumed to cure most errors).

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<sup>4</sup> Of course, if any unusual markings or information on the receipt might lead jurors to believe that the receipt was not authentic, this evidence could support the jurors' conclusion that defendant engaged in fraudulent behavior.

Affirmed.

/s/ Brian K. Zahra

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood