STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
V	No. 292660 Kent Circuit Court
MAURICE COLEMAN PERTILLER, Defendant-Appellant.	LC No. 08-007751-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to consecutive prison terms of two years for the felony-firearm conviction and 42 months to 20 years for the armed robbery conviction. Defendant appeals as of right. Because we conclude that the trial court did not plainly err in failing to give a cautionary instruction and that defense counsel was not ineffective for failing to request a cautionary instruction, and because defendant's claim that he will be prejudiced by counsel's failure to request a correction or modification to the presentence investigation report is nothing but speculation and conjecture, we affirm.

I. BASIC FACTS

On May 17, 2008, three men, wearing bandanas as masks over their noses and mouths, entered and robbed the Fulton Street Outlet, a pawnshop in Grand Rapids. One of the men, identified at trial as codefendant Devin Armour by Ruben Jenkins Traviaso, a customer of the pawnshop, brandished a gun. Armour instructed one of the other robbers, identified at trial as defendant by Traviaso, to empty the store's showcase. The third robber remained by the door.[1]

After leaving the pawnshop, the three men escaped to a parked car driven by Shana Martinez-Galvan (Martinez). According to Martinez, she received a telephone call from codefendant Jerry Watkins earlier that morning, in which he asked her to pick him up at a

[1] Traviaso was not able to identify the third robber as codefendant Jerry Watkins. None of the others in the pawnshop at the time of the robbery were able to identify any of the robbers.

residence. She did so, and then parked the car approximately a block from the pawnshop when Watkins asked her to pick up two of his friends. Watkins left the car. Fifteen minutes later, Watkins and two men, all wearing bandanas over their faces, came running down the street. Watkins was carrying a gun. Under a threat from Watkins, Martinez drove the three men to the Black Hills neighborhood.

Police officers were at Martinez's house when she returned.[2] She identified the three robbers as "A," "John," and "Jacquil Jones." According to Martinez, on the day of the robbery, she only knew the street names of the three men. She subsequently learned their real names, "A" was defendant, "John" was Watkins, and "Jacquil Jones" was Armour, and gave those names to the police.

The police obtained a search warrant for defendant's residence at 925 Dayton Street. Several cellular telephones and watches were found in the apartment. Scott Hosteter, an owner of the pawnshop, identified one of the cellular telephones and two of the watches as items taken from the pawnshop during the robbery.

II. LIMITING INSTRUCTION

Defendant argues that the trial court erred when it failed to instruct the jury to disregard evidence of his poor financial status when his timely objection to the testimony of Maria Erazo, his landlord, was not overruled and the prosecutor abandoned the line of questioning. We disagree. Because defendant never requested a limiting instruction, this claim of error is unpreserved. We review an unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Erazo testified that she owned the duplex at 925 Dayton Street and that, at the time of the armed robbery, defendant and his girlfriend were renting one of the two apartments. The following exchange then occurred:

> *Q.* Ms. Erazo, did you -- did you try to contact Mr. Pertiller back near the [sic] May 17th --
>
> *A.* Yes. We did. Since the rent was due every first of the month, we were in contact with him a couple times after the first of May to try to collect the rent from him.

Before the prosecutor could ask his next question, counsel for codefendant Armour requested a sidebar. After a brief sidebar, the trial court excused the jury so that it could discuss cocounsel's objection that evidence of defendant's financial status was irrelevant. During the discussion, there was further questioning of Erazo, who stated that she received some rent money from defendant in May, but she could not remember if she received the money before or after the robbery. The trial court suggested, and the parties agreed, that Erazo be removed from the

[2] Ralph Hamblin, a customer of the pawnshop, chased after the three men. He was able to get the license plate number of the car driven by Martinez, which he gave to the police.

witness stand and come back the next day, allowing her time to review her records to determine when she received rent money from defendant. In addition, the trial court wanted time to review case law regarding evidence of a defendant's financial status. While it generally agreed that a defendant's overall financial status could not be used as evidence of motive, it was unsure whether a specific demand for a rent payment could be introduced as evidence.

The prosecutor never recalled Erazo to the witness stand, but there is no explanation in the record for why Erazo was not recalled. In addition, neither defense counsel nor his cocounsels asked the trial court for a ruling on the objection to Erazo's testimony or that the jury be instructed to ignore Erazo's testimony.

A defendant's poverty is not relevant to his guilt or innocence. *People v Johnson*, 393 Mich 488, 496; 227 NW2d 523 (1975); *People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979). Even if Erazo's testimony concerning defendant's failure to pay the May rent was improper,[3] the trial court did not plainly err in failing to give a limiting instruction. In the absence of a request or an objection to the final instructions, a trial court is under no obligation to give, sua sponte, a limiting instruction, even if such an instruction should have been given. *People v Chism*, 390 Mich 104, 120-121; 211 NW2d 193 (1973); *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Defense counsel may have refused to request a limiting instruction to avoid highlighting Erazo's testimony to the jury. See *People v Allen*, 429 Mich 558, 645; 420 NW2d 499 (1988) (RILEY, C.J., dissenting)[4]; *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973); *Rice (On Remand)*, 235 Mich App at 444-445.

In the alternative, defendant claims that defense counsel was ineffective for failing to request a limiting instruction. Again, we disagree. Because defendant did not move for a new trial or for a *Ginther*[5] hearing, our review is limited to mistakes apparent on the record. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Payne*, 285 Mich App 181, 188-189; 774 NW2d 714 (2009). A defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Here, defendant fails to overcome the presumption that counsel's failure to request a limiting instruction regarding Erazo's testimony was not sound trial strategy. As already stated, counsel may have refused to request a limiting instruction to avoid highlighting Erazo's

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[3] We note that on appeal defendant does not address the trial court's concern that where there is a specific demand for payment, that demand may be used as evidence of motive.

[4] In *Allen*, 429 Mich at 612, the majority agreed with Chief Justice RILEY that the trial court did not err in refusing to give, sua sponte, a limiting instruction.

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

testimony to the jury. See *Rice (On Remand)*, 235 Mich App at 444-445. We will not second-guess defense counsel on matters of trial strategy, nor will we assess his competence with the benefit of hindsight. *Id.* at 445. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Matuszak*, 263 Mich App at 61. Defendant was not denied the effective assistance of counsel.

III. PRESENTENCE INVESTIGATION REPORT

Defendant claims that he is entitled to correction and supplementation of the presentence investigation report (PSIR), where the PSIR indicates that he was the gunman in the robbery and fails to mention his post conviction cooperation with authorities in a separate criminal matter. We disagree.

At the sentencing hearing, pursuant to MCR 6.425(E)(1)(a) and (b), the trial court asked defendant and defense counsel if they had had the opportunity to review the PSIR and whether they had any requests for corrections or modifications. Defense counsel stated that he and defendant had reviewed the PSIR and that it "[was] accurate." This express approval of the information in the PSIR waived any claim of error. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Because a waiver extinguishes any error, *id.* at 215, defendant is precluded from arguing on appeal that the trial court erred in failing to correct or amend the PSIR.

We note that any alleged shortcoming of the PSIR did not prejudice defendant as to the sentence imposed by the trial court for his conviction for armed robbery. See *Morales v Parole Bd*, 260 Mich App 29, 45; 676 NW2d 221 (2003) ("The presentence investigation report is an information-gathering tool for use by the sentencing court."); MCR 6.425(A)(12) ("The report must . . . include[] . . . any other information that may aid the court in sentencing."). The trial court sentenced defendant to a minimum of 42 months' imprisonment. It explained that it imposed this sentence, which was "at the bottom end of the guidelines," because defendant's "involvement [in the armed robbery] was probably the least of the three [robbers]" and because of defendant's post conviction cooperation with the authorities in a separate criminal matter.[6]

Nonetheless, defendant argues that defense counsel was ineffective for failing to request a correction or modification of the PSIR, because an inaccurate PSIR will negatively affect his chances for obtaining parole. For example, he claims that if he "continues to deny being the gunman, the parole board likely will view him as failing to take full responsibility for his actions." To succeed on a claim for ineffective assistance of counsel, a defendant must show that counsel's performance prejudiced him, such that there is a reasonable probability that the result of the proceedings would have been different. *Payne*, 285 Mich App at 188-189. Defendant's claim of prejudice is nothing but speculation and conjecture. In addition, defendant fails to cite any authority for the proposition that the prejudice prong of an ineffective assistance claim can

[6] The trial court specifically stated that its initial inclination, in order to give defendant a sentence proportionate to his co-defendants, was to sentence defendant to a minimum of 54 months' imprisonment. It explained that because of defendant's cooperation with the authorities, it would reduce defendant's minimum sentence to one at the bottom of the guidelines range.

be satisfied by a possible decision in a future parole proceeding. Under the circumstances, we conclude that defendant has failed to establish that he is entitled to any relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens