STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2011
v	No. 294358 St. Clair Circuit Court
DAVID MICHAEL MCLEAN, Defendant-Appellant.	LC No. 07-001691-FH

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of larceny by false pretenses over $20,000, MCL 750.218(5)(a), two counts of larceny by conversion between $1,000 and $20,000, MCL 750.362; 750.356(3)(a), and two counts of check insufficiency over $500, MCL 750.131(3)(c). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 9 to 20 years for the larceny by false pretenses conviction, 4 to 20 years for the larceny by conversion convictions, and 2 to 15 years for the check insufficiency conviction. Defendant was also ordered to pay $52,600 in restitution. Defendant appeals as of right. We affirm in part, but vacate the trial court's order finding defendant in contempt.

I. BASIC FACTS

Defendant's convictions arise from his interactions with Frances Stocks, who he first met late in June 2006. Defendant and Stocks subsequently became romantically involved. Defendant told Stocks that he owned a business named "Tomcat," that he had been in business for over 15 years, that he had a plant in Indiana where he manufactured belt drive systems for custom motorcycles, and that he was thinking about starting to do business in Port Huron, where he had just moved to be with his children.

According to Stocks, defendant told her that he wanted to buy out his partner before he entered into a lucrative contract with Orange County Choppers. To relieve the financial strain of buying out his partner and because defendant said that he could turn the $15,000 into $20,000 by October 2006, when he expected to deliver an order for five motorcycles to Orange County Choppers, Stocks gave $15,000 to defendant. Around this same time, Stocks also charged approximately $7,000 to her credit card for car parts and raw materials that defendant told her he needed for vehicles that he wanted to sell to raise money for his business. In July 2006, defendant told Stocks that the Orange County Choppers contract was finalized, and that he was

talking to his attorney about making her a formal partner in the business. On July 14, 2006, Stocks bought a Chrysler 300, with upgraded wheels and tires, for defendant to use to entertain clients.

Stocks testified that defendant agreed to repay the money that she had already expended, for the checks, credit card purchases, and the car, through an installment loan agreement. However, when defendant later told Stocks that he would lose the Orange County Choppers contract if he did not get additional funding, Stocks applied for and received a personal bank loan for $25,000.

Stocks said that she got two more loans in early August 2006 at defendant's request. The first loan was for a $13,000 motorcycle defendant found on eBay. The second loan was for $35,000. Defendant said he had an Impala in storage in St. Clair County and Stocks believed that defendant signed the title over to her to use as collateral for the loan. Defendant said the Impala was worth $35,000. Stocks was later contacted by the bank that issued the loan and told that the title was never transferred to her and that the bank "could not locate that, that they had an actual lien on the actual title." During trial, the prosecution introduced a document from the LEIN system that indicated defendant still had title to the Impala. When Stocks thereafter questioned defendant about the title, he merely stated that he thought he had a buyer for the car.

In August and September 2006, defendant gave Stocks two checks that did not clear because of insufficient funds. Stocks regained possession of the Chrysler 300 in January 2007, but it no longer had the upgraded wheels and tires. Defendant told Stocks that all the wheels and tires were damaged. Furthermore, despite defendant's February 2007, promise to return the eBay motorcycle and the Impala, she never received either. Stocks estimated that she gave defendant a total of $124,371, and defendant had repaid approximately $18,000. Stocks opined at trial that she did not believe the Orange County Choppers contract existed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant's first argument on appeal is that there is insufficient evidence to support his convictions for larceny by false pretenses and larceny by conversion. We disagree. When reviewing a sufficiency challenge, "this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

> "The crime of larceny by false pretenses requires (1) a false representation as to an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the false representation with an intent to deceive, and (4) detrimental reliance by the victim on the false representation." [*People v Webbs*, 263 Mich App 531, 532 n 1; 689 NW2d 163 (2004), quoting *People v Flaherty*, 165 Mich App 113, 119; 418 NW2d 695 (1987), overruled in part on other grounds; see also MCL 750.218.]

Based on the evidence, a rational trier of fact could find: (1) that defendant falsely represented to Stocks that (a) he had a contract with Orange County Choppers and that the $35,000 loan would be paid off in full by October, (b) he had transferred title to the Impala, and (c) the Impala was in "mint" condition and was worth $35,000;[1] (2) that defendant knew that his representations regarding (a) the existence of the contract and his ability to pay off the loan, and (b) the transfer of title were false; (3) that defendant intended to deceive Stocks into believing that he (a) had a contract with Orange County Choppers and could pay the loan off in full by October, and (b) had transferred title so the $35,000 Impala would be collateral for the loan; and (4) that Stocks relied on defendant's false representation when she gave him the $35,000 loan proceeds. Accordingly, the prosecutor presented sufficient evidence that the essential elements of larceny by false pretenses were proved beyond a reasonable doubt.

Defendant argues that the evidence was insufficient to support his convictions of larceny by conversion because Stocks voluntarily transferred both possession and title of the upgraded wheels, tires, and eBay motorcycle to him. Defendant argues that he therefore committed larceny by false pretenses, if anything, not larceny by conversion. The elements of larceny by conversion are:

> (1) the property at issue must have "some value," (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property "with the intent to embezzle or fraudulently use" it, and (5) at the time the property was embezzled, converted, or hidden, the defendant "intended to defraud or cheat the owner permanently of that property." Stated more simply, larceny by conversion occurs "where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use." [*People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001), quoting *People v Scott*, 72 Mich App 16, 19; 248 NW2d 693 (1976).]

"[I]f the owner of the goods intends to keep title but part[s] with possession, the crime is larceny; if the owner intends to part with both title and possession, albeit for the wrong reasons, the crime is false pretenses." *People v Malach*, 202 Mich App 266, 271; 507 NW2d 834 (1993).

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[1] We reject defendant's argument that any statement he made, that the "mint" condition Impala had a value of $35,000, was a statement of opinion, not a misrepresentation of fact, and thus could not support a charge of larceny by false pretenses. This statement, along with the picture that defendant showed Stocks, served as the basis for the verification of value Stocks made before agreeing to the loan. Defendant's statement regarding the Impala does not constitute a mere "overcharge" as addressed by this Court in *People v Wilde*, 42 Mich App 514, 518; 202 NW2d 542 (1972) because "overcharges" involve "departures in a person's opinion of the value of his services from the established standard."

The prosecutor presented sufficient evidence that the essential elements of larceny by conversion of the eBay motorcycle were proved beyond a reasonable doubt. Stocks purchased the motorcycle with the proceeds of a Capital One internet loan for $12,000 and a $1,000 cash deposit. The motorcycle was delivered to defendant's home for modification and ultimately sale under the Orange County Choppers contract. The fact that Stocks retained title to the motorcycle is consistent with the conclusion that she only gave defendant possession of it for this limited purpose. In light of evidence that defendant later informed Stocks that the motorcycle's frame was cracked and could not be sold as part of the Orange County Choppers contract, and that the motorcycle was transported to Indiana and dismantled, we conclude that a reasonable trier of fact could find that defendant intended to permanently cheat Stocks of the motorcycle despite her transfer for the limited purpose of the Orange County Choppers contract.

Likewise, the prosecutor presented sufficient evidence that the essential elements of larceny by conversion of the upgraded wheels and tires were proved beyond a reasonable doubt. Stocks testified that defendant asked her to purchase a new, flashier vehicle, so that he could use it to entertain clients. Stocks purchased a Chrysler 300 with a roughly $37,000 loan, which included upgraded wheels and tires defendant wanted. She said the $2,400 cost of the four upgraded wheels and tires was included in her vehicle financing, and then the dealership wrote a $2,400 check directly to Discount Tire Company. Stocks said that defendant took the car to Discount Tire and had the upgraded wheels and tires installed. Some evidence, such as defendant's promise that the company would make the car payments, suggests that Stocks intended to transfer title and possession of the car, wheels, and tires to defendant. However, a reasonable trier of fact could otherwise find that Stocks gave possession of the car, wheels, and tires for the limited purpose of entertaining clients and, by subsequently returning the car without the upgraded wheels and tires, defendant intended to permanently cheat Stocks of those items. We will not second-guess the trier of fact's determinations concerning what inferences fairly arise from the evidence. *Hardiman*, 466 Mich at 428.

III. MCL 777.40(1)(b) – DOMESTIC RELATIONSHIP

Defendant argues that the trial court erred when it scored 10 points for offense variable (OV) 10. Under this Court's recent ruling in *People v Jamison*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297154, issued April 26, 2011), defendant is correct.

This Court reviews a trial court's findings on the existence of particular sentencing factors for clear error. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). There is no clear error if "there is *any* evidence in support" of trial court's finding. *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in quotation). The interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.40(1)(b) provides that a defendant should be scored 10 points for OV 10 if the "offender exploited . . . a domestic relationship." Although defendant does not dispute that he exploited his relationship with Stocks, he argues that their relationship did not constitute a "domestic relationship" under the statute. In *Jamison*, this Court ruled:

> We do not believe that simply *any* type of dating relationship, past or present, meets the requirements of OV 10. If this were the case, the Legislature would merely have said "relationship" or "dating relationship," rather than "domestic relationship." Thus, to qualify as a "domestic relationship," there must be a familial or cohabitating relationship. [*Jamison*, ___ Mich App at ___ (slip op at 5) (footnote omitted, emphasis in original).]

In *Jamison*, the defendant and the victim had been involved in a consensual, sexual relationship, however, "the two never shared a domicile, nor did they engage in a familial or cohabitating relationship." *Id*. at __ (slip op at 3). Thus, the *Jamison* Court concluded that the couple

> did not have the requisite "domestic relationship" to warrant scoring 10 points under OV 10. The pair did not share a domicile and they were not related. The prosecutor nevertheless argues that such a relationship did exist, pointing out that at some point in the past [the victim] was allowed to keep various articles of clothing at [the defendant's] house. However, merely being permitted to keep some of one's belongings at a person's home does not establish a cohabitating relationship. Therefore, [the couple's] relationship did not display the characteristics needed to elevate their ordinary relationship to "domestic relationship" status. Accordingly, the trial court erred in scoring 10 points for OV 10. [*Id*. at __ (slip op at 5-6).

In the case at bar, although Stocks and defendant became involved in a romantic, sexual relationship after their initial meeting, and further, defendant had discussions with Stocks about her moving to Tennessee with him, the fact remains that the two neither cohabitated nor married. Thus, pursuant to *Jamison*, defendant and Stocks were not in a domestic relationship and the trial court erred in scoring ten points for OV 10.

Defendant's total prior record variable score was 70 and his total OV score was 35, which placed him in the E-IV cell of the guideline grid for Class D offenses, MCL 777.65. The guidelines minimum sentence range for the E-IV cell was 29 to 114 months for a fourth offense habitual offender. MCL 777.65; MCL 777.21(3)(c). The trial court set defendant's minimum sentence at 108 months. Subtracting ten points for the improper OV 10 score shifts defendant's sentence range to the E-III cell, which has a lower minimum sentence range of 19 to 76 months for a fourth offense habitual offender. MCL 777.65, MCL 777.21(3)(c). Thus, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

IV. PROSECUTOR'S CONDUCT

A. DISCOVERY

Defendant next alleges several claims of prosecutorial misconduct with respect to discovery. Defendant's unpreserved assertions of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631.

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the

> plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

MCR 6.201(B) governs discovery in a criminal case and requires a prosecutor to provide a defendant the following, upon request:

> (1) any exculpatory information or evidence known to the prosecuting attorney;
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> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
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> (3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Moreover, a criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).]

1. BANK SEARCH WARRANT AFFIDAVITS

Defendant argues that he was denied a fair trial because the prosecutor "suppressed" two search warrant affidavits in violation of *Brady*. However, defendant fails to provide support for the contention that these two search warrant affidavits contained exculpatory information. He further provides no support for his alternative contention that the search warrants contained no affidavits. Therefore, defendant cannot demonstrate that, but for the alleged error with respect to

the search warrant affidavits, a reasonable probability exists that the outcome of the proceedings would have been different. *Thomas*, 260 Mich App at 453-454.

2. DISCOUNT TIRE COMPANY REPAIR INVOICES

Defendant also argues that he was denied a fair trial because the prosecutor "suppressed" a Discount Tire Company invoice in violation of *Brady* and made misleading statements to the jury. However, defendant provides no evidence that the prosecutor ever had the invoice in question. Further, given that the invoice is for a transaction involving the car Stocks provided to defendant, he could have obtained a copy of the invoice from Discount Tire Company with reasonable diligence.[2] In any event, the invoice provided on appeal indicates a total charge of $127.20 in October 2006, apparently for the replacement of upgraded tires and a wheel under warranty. Defendant fails to establish how this invoice makes the prosecutor's statements, questioning the subsequent return of the car without upgraded wheels and tires and defendant's defense that he repaid Stocks $3,500 for upgraded wheels and tires when Stocks testified that the upgrade only cost $2,400, false or misleading or affects his substantial rights. *Id.*

3. POLICE REPORTS

Next, defendant argues that he was denied a fair trial because the prosecutor "suppressed" a number of police reports in violation of *Brady*. However, defendant offers no evidence to show that the prosecutor possessed these police reports, that the prosecutor tried to conceal them, or that defendant could not have obtained copies of these public records with reasonable diligence. *Lester*, 232 Mich App at 281.

4. CHECKS

Defendant further asserts that Stocks suppressed two of his checks, for $1,000 and $850, respectively, which he had written for the purchase and delivery of the motorcycle purchased on eBay. However, defendant fails to establish any misconduct on the part of the prosecutor with respect to these checks because he admits in his Standard 4 brief that copies of bank records documenting these checks were provided by the prosecutor. *Thomas*, 260 Mich App at 453-454.

5. INSURANCE REIMBURSEMENT

Defendant argues that he was denied a fair trial because the prosecutor "suppressed" evidence that Stocks's insurance company reimbursed her for the wheels and tires in violation of *Brady* and made false statements to the jury. From the printout defendant attaches to his Standard 4 brief, which was not part of the lower court record, it is unclear whether the "SETTLEMENT FOR WHEELS AND TIRES" was paid to Stocks or involved the upgraded wheels and tires at issue in the larceny by conversion conviction. More importantly, defendant fails to establish that the prosecutor possessed or suppressed this printout, that defendant could

[2] Defendant attached a copy of this invoice to his Standard 4 brief.

not have obtained the printout with reasonable diligence, and that reimbursement, if it was made to Stocks, had any bearing on whether defendant committed larceny by conversion by failing to return the wheels and tires to Stocks. *Lester,* 232 Mich App at 281.

6. THIRTY PAGES OF BANK DOCUMENTS

Defendant argues that he was denied a fair trial because the prosecutor "suppressed" 30 pages of bank documents in violation of *Brady*. Given the fact that these bank documents concerned defendant's own account, he cannot demonstrate that the prosecution had evidence favorable to his defense, which he did not possess or could not have obtained through reasonable diligence. *Lester,* 232 Mich App at 281.

B. SELF-INCRIMINATION

Next, defendant argues that he was denied a fair trial when improper testimony from a police witness was elicited by the prosecutor concerning defendant's decision to assert his Fifth Amendment right to remain silent. As a preliminary matter, this issue does not appear in defendant's statement of questions presented and is therefore not properly before this Court for appellate review. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Moreover, the questioning cited by defendant was made by the prosecutor on redirect examination and was proper to rebut defense counsel's line of questioning during cross-examination that defendant was precluded from telling his side of the story before trial. *People v Allen*, 201 Mich App 98, 103-104; 505 NW2d 869 (1993).

V. INEFFECTIVE ASSISTANCE

Defendant argues that he was denied the effective assistance of counsel in several respects. We disagree. Review of defendant's unpreserved arguments is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We examine the trial court's factual findings for clear error and review de novo the matters of law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, defendant bears the burden of showing that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and defendant is required to overcome a strong presumption that sound trial strategy motivated defense counsel's conduct. *LeBlanc*, 465 Mich at 578.

Defendant first argues that he was denied the effective assistance of counsel when defense counsel failed to object to the prosecutor's alleged misconduct. Because we concluded earlier in this opinion that defendant failed to demonstrate any misconduct on the part of the prosecutor, defendant cannot show that counsel erred by failing to object to the alleged misconduct. "Counsel is not ineffective for failing to make a futile objection." *Thomas*, 260 Mich App at 457.

Defendant also argues that he was denied the effective assistance of counsel when defense counsel failed to object to the search warrant for his bank accounts, which defendant alleges was overly broad.

> Under both federal constitutional law and Michigan search and seizure law, the purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure. [*People v Zuccarini*, 172 Mich App 11, 15; 431 NW2d 446 (1988).]

"A general description . . . is not overly broad if probable cause exists to allow such breadth." *Id.* at 16. Here, the warrant to search and seize bank account records containing defendant's name or his business name, Tomcat Engineering, was not overly broad because specific facts were alleged indicating the transfer of funds between Stocks, defendant, and his business. Again, any objection would have been futile, so we conclude that defense counsel was not ineffective for failing to object on this ground. *Thomas*, 260 Mich App at 457.

Defendant next references documents, which he claims are exculpatory, and argues that, by failing to review and offer these documents at trial, defense counsel was ineffective. However, defendant cannot demonstrate that counsel was ineffective because there is no evidence in the record that the documents were ever presented to defense counsel or that counsel failed to review them if they were presented. *Rodriguez*, 251 Mich App at 38.

Defendant also argues that defense counsel did not adequately investigate and interview three potential witnesses and prepare for trial. Again, nothing in the record indicates that counsel failed to interview or investigate these witnesses. Furthermore, although defendant is entitled to have adequately prepared counsel for trial, *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990), when making a claim of ineffective assistance based on trial counsel's lack of preparation, defendant must show that the lack of preparation prejudiced him. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant argues that these witnesses were present during social gatherings between defendant and Stocks, but fails to identify what testimony these witnesses would have offered or explain how that testimony would have been relevant. In light of the sufficient evidence of guilt adduced at trial, defendant cannot show that but for counsel's alleged lack of preparation, the result of defendant's trial would have been different. *Mack*, 265 Mich App at 129.

Defendant last claims that defense counsel was ineffective by failing to object to a witness who was reading from notes. First, although the record indicates that the witness brought notes with her to the witness stand, it is unclear from the record whether the witness in fact read from her notes while testifying. In any event, defense counsel apparently brought the notes to the prosecutor's attention and the prosecutor advised the witness, "if you need to refer to something to refresh your recollection, we both ask that you let us know that and then if the Court grants that request, you can look at your notes." Defendant fails to explain how the results of his trial would have been different if counsel had raised a formal objection and thus fails to show that he was denied his right to the effective assistance of counsel. *Id.*

VI. CONTEMPT

Defendant argues that his due process rights were violated when the trial court found him in contempt, but failed to inform him of the nature of the charges against him and denied him adequate opportunity to prepare a defense or secure the assistance of counsel. We agree. We review defendant's unpreserved constitutional argument for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

Defendant failed to appear at his April 14, 2008, sentencing and was later arrested on a bench warrant. At his arraignment on the bench warrant, the trial court asked defendant if there was any justification for his failure to appear at sentencing. Defendant replied that he did not appear because he wanted to work and earn money for good appellate counsel. The trial court thereafter found defendant in criminal contempt and sentenced him to 90 days, with credit for 3 days served.

Although a defendant is entitled to be informed of "the nature of the charge against him or her" and "to be given time to prepare a defense, secure the assistance of counsel, and produce witnesses on his or her behalf," *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007), there is no indication in the record that defendant was aware that the trial court was going to conduct a contempt hearing during his arraignment, or even that defendant knew he had been charged with criminal contempt before the trial court began questioning him regarding his reasons for failing to attend his sentencing. As a result, defendant was unable to prepare a defense or secure the assistance of counsel. These errors were not harmless. Further, the complete denial of counsel is a structural defect that defies harmless error analysis. See *Neder v US*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). We therefore vacate the trial court's order finding defendant guilty of criminal contempt and his corresponding 90 day sentence.

VII. CONTINUANCE

Defendant argues that the trial court abused its discretion by denying his motion for a continuance to present the testimony of attorney Martin Brosnan.[3] We disagree.

A motion or stipulation for a continuance must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002), citing MCR 2.503(B)(1). As our Supreme Court noted in *Jackson*, MCR 2.503(C) governs adjournments on the basis of the unavailability of a witness:

> (C) Absence of Witness or Evidence.

[3] Defense counsel averred that Brosnan would testify that he sent the title for the 1961 Impala to Stocks.

> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence *must be made as soon as possible after ascertaining the facts.*
>
> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds *that the evidence is material and that diligent efforts have been made to produce the witness or evidence.*
>
> (3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary. [MCR 2.503 (emphasis added).]

In this case, defendant did not move to adjourn the proceedings as soon as possible, but instead he waited until approximately 3:00 p.m. on the third day of trial. There is also no indication that defendant exercised due diligence to secure Brosnan's presence. Brosnan was not included on defendant's amended witness list, and according to a facsimile from Brosnan in the lower court record, defendant did not subpoena Brosnan until 7:30 p.m., on the second day of trial—the day before he was ordered to appear. Finally, given Brosnan's response only that he could not attend the hearing and that the subpoena failed to comply with MCR 2.506(C)(1), the trial court had no assurances that Brosnan would testify if the case were continued. Thus, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a continuance.

VIII. PSIR

Defendant argues that the trial court's response to his challenges to the accuracy of the PSIR constituted an abuse of discretion. We disagree.

> We review a trial court's response to a claim of inaccuracy in the PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A "sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." *Id*. The trial court may determine that the challenged information is accurate, accept the defendant's version, or disregard the challenged information as irrelevant. *Id*. If the court chooses to disregard the challenged information, it must indicate that it did not consider the information when fashioning the sentence and it must strike the information from the PSIR. *Id*. at 649. [*People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010).]

Defendant disputed the author of the PSIR's characterization of him in the PSIR as uncooperative. Although defendant claimed that he and the author of the PSIR had a "personality conflict" and that she used profanity and was mean to him, the author of the PSIR testified that defendant said, "I don't have to speak to you," and stormed out of the interview after he had only partially filled out his packet. In light of this testimony, the trial court did not abuse its discretion by declining to change this portion of the PSIR.

Defendant disputed the finding of "non-verifiable employment or Social Security number," claiming that he had filed income tax returns in the last five years. Because the author of the PSIR testified that she could not verify whether she had defendant's genuine social security number as he had used several different social security numbers "given his lifestyle," and in light of defendant's refusal to participate further in the PSIR interview, the trial court did not abuse its discretion by declining to change this portion of the PSIR.

Defendant disputed the designation of "false" for high school education, claiming that he had a high school diploma from LaSalle High School in St. Ignace and graduated in 1987. However, in light of the author of the PSIR's testimony that she called LaSalle High School learned that defendant "did not graduate from that school," and she was unable to verify defendant's claim that he obtained a GED while in jail, the trial court did not abuse its discretion by declining to change this portion of the PSIR.

Defendant also claimed that he had served two prison commitments, not three as the PSIR indicated. Given the author of the PSIR's testimony that defendant "might have served two sentences but he was sentenced three different times" and "has served prison for three different convictions for three different courts," the trial court did not abuse its discretion by declining to change this portion of the PSIR.

Finally, defendant disputed the restitution of $52,600 and requested a hearing. Stocks estimated that she lost over $124,371, but the author of the PSIR indicated that restitution could not be ordered for various uncharged offenses defendant committed against Stocks. Without including interest accrued against Stocks, there was testimony that Stocks lost at least $35,000 for the personal loan and Impala transaction, at least $2,400 for the wheels and tires, at least $13,000 for the motorcycle, and approximately $2,200 on the bounced checks. Thus, the trial court did not abuse its discretion in setting the restitution at $52,600.

Defendant also argues that he was denied adequate time to review the PSIR. While at the relevant time MCR 6.425(B) required the trial court to permit "the defendant to review the PSIR at a reasonable time before the day of sentencing," defendant does not allege any inaccuracies in the PSIR beyond those that were presented to the trial court at sentencing. As the trial court addressed the claimed inaccuracies and did not abuse its discretion in doing so, defendant's argument is without merit.

In a related argument, defendant challenges the trial court's decision to deny his motion at the sentencing hearing for an adjournment to allow defense counsel to withdraw and for newly retained counsel to proceed with sentencing when available. Noting that the trial court had not had any communication with any counsel other than defense counsel and that it was reluctant to allow defendant to proceed without representation for a motion for a new trial scheduled to be heard on the same day as the sentencing hearing, the trial court denied defendant's motion. We review the trial court's ruling on defendant's request for an adjournment or a continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

> When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a

> constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

Although defendant asserted a constitutional right to counsel, and even if defendant's alleged lack of confidence in defense counsel or defendant's challenge to defense counsel's strategy with respect to the motion for a new trial could constitute a legitimate reason for asserting the right, defendant was negligent in failing to assert this right until the day of the sentencing hearing. Moreover, defendant has failed to demonstrate any prejudice resulting from the trial court's decision because, after the motion was denied, defense counsel argued for a new trial, challenged the accuracy of the PSIR, and requested leniency with respect to the sentencing guidelines range. The trial court did not abuse its discretion when it denied defendant's motion to adjourn and by refusing defense counsel's motion to withdraw. *Echavarria*, 233 Mich App at 369.

Defendant also claims that his defense counsel was ineffective, alleging that defense counsel failed to challenge the accuracy of the PSIR and failed to move for a restitution hearing. However, the premise of defendant's argument is incorrect because defense counsel in fact challenged the accuracy of the PSIR on multiple grounds and requested a restitution hearing on the record at the sentencing hearing. Therefore, defendant has not established that defense counsel's performance fell below an objective standard of reasonableness. *Mack*, 265 Mich App at 129.

We affirm in part, vacate the trial court's order finding defendant in contempt, and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Pat M. Donofrio