

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMAR GREEN,

Defendant-Appellant.

UNPUBLISHED

January 15, 2008

No. 272546

Roscommon Circuit Court

LC No. 05-004996-FH

Before: Kelly, P.J., and Cavanagh and O’Connell, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as a second habitual offender, MCL 769.10, to 2 to 30 years in prison for the delivery conviction and 42 days in jail for the possession conviction. We affirm in part, vacate in part, and remand in part.

I. Basic Facts

Michael Hutt, a confidential police informant working with the Michigan State Police, arranged to purchase cocaine from defendant at Hutt’s apartment. Tracy Bingham went to Hutt’s apartment on defendant’s behalf and gave Hutt a package of crack cocaine in exchange for \$1,600, which consisted of bills that had been marked by the police. Hutt gave Bingham a small amount of cocaine from the package as a delivery fee. Bingham met up with defendant and defendant’s girlfriend, who were in a different vehicle, and the three were observed talking outside Bingham’s apartment or cabin. Defendant and his girlfriend left in their vehicle and were later stopped by police, who discovered in the vehicle a small bag of marijuana and \$1,600 comprised of bills matching the marked bills.

Defendant and his girlfriend claimed that he had been selling a boat to Bingham, and the \$1,600 represented a down payment, but they did not have the boat with them because the trailer did not have operational lights. Bingham, who was originally charged with delivery of cocaine with defendant, testified that he had been collecting money from Hutt on defendant’s behalf for the sale of a boat to Hutt. Bingham, who admitted to purchasing cocaine from Hutt in the past, asserted that he delivered the package of cocaine to Hutt but did not realize it was cocaine. Bingham acknowledged receiving some cocaine when he collected the \$1,600 for defendant, but

he claimed that he had purchased the cocaine from Hutt for his own use and did not know it came from the package he had given Hutt.

II. Jury Instructions

Defendant first argues that accomplice jury instructions should have been given regarding the testimony of Bingham and Hutt. However, defendant expressly waived review of these issues. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). After reading the jury instructions, the trial court asked defense counsel if there had been any mistakes or if counsel wanted to request any additions, corrections, or deletions. The trial court also specifically asked counsel if he wished to request any additional instructions. Defense counsel answered, “No, your Honor” to both questions, expressly waiving review of these issues. In any event, because these issues were not raised below, we may only review them for plain error affecting substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

A. Disputed Accomplice Witness Jury Instruction Regarding Bingham

Defendant asserts that the trial court erred in failing to sua sponte provide the jury with CJI2d 5.5, the instruction for a disputed accomplice witness, with respect to Bingham. We disagree.

Defendant maintains that, because Bingham was originally charged with delivering the same cocaine defendant was alleged to have delivered, and he pleaded to a lesser offense in exchange for testifying against defendant, he was an accomplice to the charged offense. Whether to give cautionary accomplice instructions is left to the discretion of the trial court, and to show plain error, defendant must show that the instruction was clearly or obviously required, i.e., that Bingham was an accomplice. *Young, supra* at 143-144. At trial, Bingham denied knowing that the package he delivered to Hutt contained cocaine. Moreover, defendant testified that his contact with Bingham was limited to the innocent purpose of selling a boat, and his denied that he gave Bingham a package or was otherwise involved in selling cocaine. Therefore, Bingham was not clearly or obviously an accomplice, and the trial court did not commit plain error in failing to sua sponte read this instruction to the jury.

B. Cautionary Accomplice Testimony Instruction Regarding Hutt

Defendant claims that the trial court erred in failing to sua sponte provide the jury with CJI2d 5.6, the cautionary accomplice testimony instruction, with respect to Hutt’s testimony because Hutt solicited drugs from defendant before involving the police, and had arranged for the transaction. We disagree.

A jury instruction is only required if supported by the evidence, see *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998), and defendant has failed to show that Hutt was clearly or obviously an accomplice, *Young, supra* at 143-144. A cautionary instruction would not have been appropriate with respect to Hutt’s testimony because there was no evidence that defendant and Hutt were acting in concert or that Hutt assisted defendant in the delivery of the cocaine. Hutt was acting as a confidential informant and working with the state police during the drug buy. Hutt admitted that he had sold drugs in the past and he was working with police

officers in an effort to reduce his own charges. Despite these admissions, however, Hutt's actions in the circumstances underlying the instant case do not fit the definition of an accomplice. Rather, Hutt was involved in the drug buy only in his capacity as an informant for the police.

Further, this Court has considered inconsistencies between the defendant's theory and a cautionary accomplice instruction in determining that a trial court did not err in failing to sua sponte provide the instruction. *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). In the instant case, the instruction would have been inconsistent with defendant's theory, as defendant testified and defense counsel argued, that defendant was selling a boat and was not involved in the drug transaction. Accordingly, the trial court did not err, let alone plainly err, in failing to sua sponte give a cautionary accomplice instruction regarding Hutt.

C. Ineffective Assistance of Counsel

Defendant claims that his trial counsel was ineffective for his failure to request the accomplice instructions. We disagree. Because defendant failed to file a motion for new trial on these grounds or request a *Ginther*¹ hearing, this Court's review of his ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In order "to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303, 309; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis omitted). Moreover, effective assistance of counsel is presumed, and defendant bears a "heavy burden" of proving otherwise. *Id.* Defendant has not shown that trial counsel's performance fell below an objective standard of reasonableness in failing to request the accomplice testimony instructions. Rather, it would have been reasonable for trial counsel to believe that the accomplice instructions would have undermined defendant's testimony that he was not involved in the drug transaction with Bingham and Hutt. Defendant has therefore failed to overcome the presumption that counsel's performance constituted sound trial strategy, *Riley, supra* at 140, or the presumption that trial counsel provided effective assistance, *Rodgers, supra* at 714.

III. Resentencing

Defendant next argues that the trial court's pronouncement of the sentence shows that "it appeared to have mistakenly believed the habitual offender statute required such a term" even

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

though the court “did not specifically state that it believed a 30 year maximum term was mandatory[.]” We disagree. Because defendant failed to object during sentencing, this issue has not been properly preserved and may only be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-765; 597 NW2d 130 (1999).

In *People v Knapp*, 244 Mich App 361, 388-389; 624 NW2d 227 (2001), the defendant challenged his sentence because the trial court had “failed to articulate on the record that it had discretion when imposing the maximum sentence.” *Id.* Rejecting this argument, the Court stated, “[c]ontrary to defendant’s assertion, there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion.” Unless there is “clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail.” *Id.* at 389 (citations omitted). In the instant case, there is no indication in the record that the trial court did not understand that it had the discretion to impose a sentence lesser than the statutory maximum. In fact, the trial court’s statement that it had “reviewed the matter” and that it was imposing a sentence it felt was “proportionate” and “appropriate” to the offense of which defendant was convicted suggests that the trial court knew it had discretion and believed its sentence to be an exercise of that discretion. Absent clear evidence showing that the trial court did not believe it had discretion, defendant’s argument fails.

IV. Attorney Fees

Finally, defendant argues, and the prosecution concedes, that the trial court erred by requiring him to reimburse the county for his attorney’s fees without first determining his financial ability to pay. We agree. Because this issue was not raised below, our review is for plain error affecting substantial rights. *Carines, supra* at 762-765.

Defendant challenges the trial court’s decision to order reimbursement of attorney’s fees because it did not make any findings about defendant’s present or future ability to pay the fees. In *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), this Court identified five features of a constitutionally acceptable attorney’s fees reimbursement program:

First, the program under all circumstances must guarantee the indigent defendant’s fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state’s decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual’s resources, the other demands on his own and family’s finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney’s fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy. [*Dunbar, supra* at 253-254, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984).]

Although a trial court is not required to make a specific finding on the record regarding a defendant's ability to pay unless the defendant contemporaneously and specifically objects, it must "provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. "The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's foreseeable ability to pay." *Id.* at 255 (emphasis omitted).

In the instant case, the trial court, like the trial court in *Dunbar*, did not provide any indication that it had considered defendant's ability to pay or the financial and employment sections of his presentence investigation report. *Dunbar, supra* at 255. Rather, the trial court here merely imposed the fees without any discussion. According to *Dunbar*, the proper remedy is to vacate the portion of the judgment of sentence requiring defendant to pay for his court-appointed attorney and remand the case to the trial court for reconsideration of defendant's current and future financial circumstances. *Id.* at 255-256. We therefore vacate that portion of the judgment of sentence (§ 9) ordering defendant to pay \$500 in attorney fees, and we remand this case to the trial court for reconsideration of defendant's present and future ability to reimburse the county for his trial attorney's fees.

Affirmed in part, vacated in part, and remanded for reconsideration of the issue of attorney's fees. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell