

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY CHARLES FREDERICK,

Defendant-Appellant.

UNPUBLISHED

December 12, 1997

No. 188699

Calhoun Circuit Court

LC No. 95-000149-FH

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of uttering and publishing, MCL 750.249; MSA 28.446, as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm.

Defendant and Harry Gibson both worked at Goodwill Industries on November 18, 1994. Defendant was found guilty of forging Gibson's signature on the back of Gibson's paycheck and then attempting to cash Gibson's paycheck at an Old Kent Bank in Battle Creek. Defendant testified at trial and denied that he had either forged Gibson's signature or attempted to cash Gibson's check.

I.

Defendant contends that insufficient evidence was presented at trial to establish that defendant stole Gibson's check or represented himself as the payee on the check. "The elements of uttering and publishing require that the defendant knew the instrument was false, that he had an intent to defraud, and that he presented the forged instrument for payment." *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991).

Defendant admitted finding Gibson's check. An expert in handwriting analysis testified that defendant endorsed the check by signing Gibson's name, and the bank teller testified that defendant presented the check to her with Gibson's signature on the back. Circumstantial evidence and the reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Intent may be inferred from all the facts and circumstances. See *People v Safiedine*, 163 Mich App 25, 29-30; 414

NW2d 143 (1987). In this case, based on the above evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant knew he possessed Gibson's missing paycheck, knowingly endorsed the check in an attempt to cash it by forging Gibson's signature, and presented the endorsed check to the teller for payment. Further, we will not interfere with the jury's role of determining the credibility of witnesses. *People v McFall*, 224 Mich App 403, 412; ___ NW2d ___ (1997). Therefore, the jury was free to reject defendant's testimony that he did not endorse or attempt to cash Gibson's check. Sufficient evidence was presented at trial to support defendant's conviction of uttering and publishing.

II.

Next, defendant contends that he was denied effective assistance of counsel. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Further, ineffective assistance of counsel can take the form of failing to call witnesses only if the failure deprives the defendant of a substantial defense. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *Kelly, supra*.

Defendant claims that his trial counsel, Richard Stevens, was ineffective for failing to secure transcripts that would have informed Stevens of defendant's request for certain witnesses. Defendant admits that he spoke with Stevens on several occasions before his trial, however. Therefore, as noted by the trial court in its opinion denying defendant's motion for new trial, "by his own admission, the defendant had ample opportunity to advise Mr. Stevens of who the defendant wanted to have called for trial." The failure to interview witnesses does not alone establish inadequate preparation. *Caballero, supra* at 642. Defendant must show that the failure resulted in counsel's ignorance of valuable evidence that would have substantially benefited the accused. *Id.*

Here, defendant apparently failed to inform Stevens of the witnesses he desired to call. Further, there is no evidence that testimony by the witnesses defendant requested would have benefited his defense. The record provides no reason to believe that the absence of these witnesses prejudiced defendant or that Stevens was ineffective for failing to secure their testimony. Therefore, defendant has not shown that he was denied a substantial defense. *Hoyt, supra*.

Regarding defendant's claim that Stevens was unaware that the prosecutor had retained a handwriting expert to testify at trial, we find no evidence supporting defendant's allegations. Again defendant had several opportunities to inform Stevens of the expert's potential testimony. Further, it was in response to defendant's motion to have a handwriting analysis performed that the court secured an expert witness on the topic. Defendant asserts that Stevens should have requested a written report from the expert, and if the report provided evidence contrary to defendant's defense, Stevens should have sought the expertise of his own handwriting expert. However, defendant was not denied a substantial defense because of Stevens' failure to call his own handwriting expert. Defendant testified that he had not signed the back of Gibson's check. Further, Stevens cross-examined the expert

regarding the analysis performed. Defendant has failed to show that the testimony of another handwriting expert would have made a difference in the outcome of the case and has therefore failed to show that he was denied effective assistance of counsel. *Id.*

Next, defendant asserts that he was denied effective assistance of counsel because Stevens failed to adequately challenge inaccuracies in the presentence report. Defendant claims that because he, rather than Stevens, objected to information contained in the report, he was denied effective assistance. We disagree. The record reveals that Stevens did object to the criminal history section of the presentence report indicating that defendant had been incarcerated four times, he also objected to the investigator's version of the offense. Defendant responded to the court's questions regarding Stevens' objections and defendant responded at length when given the opportunity to speak before he was sentenced.

Because Stevens did object to alleged inaccuracies in the presentence report, Stevens' counsel was effective. See MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647-648; 554 NW2d 391 (1996). Further, defendant does not claim that any alleged inaccuracies went unaddressed and does not claim that he was prejudiced in any way due to Stevens' actions at sentencing. Therefore, defendant was not denied effective assistance of counsel.

III.

Defendant also argues that he is entitled to resentencing because the trial court abused its discretion in failing to resolve defendant's challenge to alleged inaccuracies in the presentence report. We disagree.

At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. *Hoyt, supra* at 533-534; MCL 771.14(5); MSA 28.1144(5); MCR 6.425(D)(2)(b). The court has a duty to resolve any challenge to the information. *People v Barnett*, 165 Mich App 311, 319; 418 NW2d 445 (1987). When a defendant claims that a presentence report contains an error, the court may hold an evidentiary hearing to determine the report's accuracy, may accept the defendant's unsworn statement, or may ignore the alleged misinformation when sentencing. MCR 6.425(D)(3); *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988). If the court finds that challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. *Hoyt, supra*, citing MCL 771.14(5); MSA 28.1144(5), as amended; MCR 6.425(D)(3)(a).

Although defendant argues that "the trial court was sentencing defendant based on inaccurate information which was contained in the presentence report, which was not resolved at sentencing," defendant does not specifically identify which information he alleges to be inaccurate. At sentencing, defendant challenged information in the presentence report stating that defendant had been in prison four times. The trial court questioned defendant and defendant acknowledged receiving the four prison sentences reflected in the report. Although defendant argued that his "prison number," which began with the letter B, is not the appropriate number for a fourth offender, defendant did not deny that the

presentence report correctly identified four prison sentences. The trial court found that the report was accurate as to defendant's criminal history, and defendant did not object.

Defendant did object to the investigator's version of the offense, which defendant claimed varied from the evidence presented at trial. The investigator's version of the offense states that, according to the police report, defendant told the bank teller, "I gave you the wrong check." Defendant argued at sentencing that he never made that statement to the teller and that the statement was never presented to the jury. Although defendant is entitled to the use of accurate information at sentencing and a court must respond to allegations of inaccuracies, where the asserted inaccuracies would have no determinative effect upon the sentence, failure of a court to respond may be considered harmless error. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991), amended 440 Mich 882; 487 NW2d 464 (1992). The trial court addressed defendant's allegation that the investigator's description of the offense was inaccurate; however, the court did not hold a hearing to determine the accuracy of the statement, it did not strike the statement, and it did not accept defendant's unsworn statement at sentencing that defendant never made the statement in question. Whether defendant stated to the teller that he "gave [her] the wrong check" when he handed her Gibson's check is of no consequence to defendant's sentence, however. Defendant acknowledged at trial that he was in possession of Gibson's check but denied attempting to cash the check. Therefore, whether the contested statement in the presentence report was inaccurate would have no determinative effect upon the sentence. Defendant is not entitled to resentencing.

Finally, defendant complained at sentencing that he had no opportunity to discuss his version of the offense with the presentence investigator. The presentence report reveals that the investigator conducted a telephone interview with defendant on July 27, 1995 from the Western Wayne Correctional Facility. Even if the investigator had not conducted an interview with defendant, it is not necessary to resentence defendant on the that basis. *People v Young*, 183 Mich App 146, 147-148; 454 NW2d 182 (1990). Defendant's presentence report complied with statutory requirements and there is no indication that defendant's sentence was based on anything but accurate information. *Id.* Therefore, defendant is not entitled to resentencing.

IV.

Finally, defendant contends that the trial court abused its discretion in denying defendant's request for an evidentiary, or *Ginther*,¹ hearing regarding his claim of ineffective assistance of counsel. On October 15, 1996, defendant filed in pro per motions for judgment notwithstanding the verdict, or alternatively a new trial, and for resentencing. In his motion for new trial, defendant requested a *Ginther* hearing to further develop the record.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). "To the extent [defendant's] claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim . . ." *Id.* at 443, quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When a defendant asserts that his trial counsel is inadequate or

lacks diligence, "the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *Id.* at 442. The effectiveness of Stevens' counsel was addressed in Issue II, and was not dependent on facts not of record. Therefore, the trial court properly denied defendant's request for a *Ginther* hearing.

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey

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