

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO R. COOK,

Defendant-Appellant.

UNPUBLISHED

June 9, 1998

No. 201170

Oakland Circuit Court

LC No. 96-146964-FH

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted of false pretenses over \$100, MCL 750.218; MSA 28.415, following a jury trial. He subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to four to twenty years' imprisonment for the false pretenses conviction. That sentence was thereafter vacated, and defendant was then sentenced to four to twenty years' imprisonment for the habitual offender, fourth offense conviction. Defendant was also ordered to pay restitution in the amount of \$9,428.09. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred by failing to sua sponte instruct the jury on the lesser included offenses of attempt, larceny by conversion, larceny by trick, and larceny in a building, all of which carry a maximum penalty of less imprisonment than false pretenses. However, because defendant did not object to the instructions that were provided to the jury and because he did not request any instructions for these lesser offenses at trial, he has failed to preserve this issue for appeal. Therefore, any alleged error is waived unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

We find no manifest injustice resulting from the trial court's failure to instruct the jury on the aforementioned lesser included offenses. Larceny offenses are separate and distinct from the crime of false pretenses. The crime of false pretenses requires that the victim voluntarily surrender both title and possession of the property to a defendant who made a false representation, with the intent to deceive, which induced the victim to detrimentally rely on that

misrepresentation. *People v Jory*, 443 Mich 403, 412; 505 NW2d 228 (1993); *People v Malach*, 202 Mich App 266, 270-271; 507 NW2d 834 (1993); *People v Wilson*, 122 Mich App 270, 273; 332 NW2d 465 (1982). On the other hand, larceny offenses require either that the owner of the property stolen has no intention to part with the property or intends to relinquish possession of the property while maintaining ownership or title to it. *Id.*; *Malach, supra* at 270-271. In this case, the evidence demonstrated that the victim, Ameritech Corporation, intended to surrender both title and possession of the checks to defendant because of its reliance on defendant's misrepresentations concerning employment. The facts of this case do not support a charge of larceny, and thus, no instruction for any larceny offenses would have been appropriate.

We also reject defendant's contention that an attempt instruction should have been given. There was no evidence to support such an instruction. See *People v Baker*, 127 Mich App 297, 299; 338 NW2d 391 (1983). Accordingly, defendant's claim is without merit.

Defendant also argues that the introduction at trial of a State Identification Record (SID) bearing defendant's fingerprints was irrelevant, prejudicial, and not offered for a proper purpose under MRE 404(b)¹. At trial, the prosecutor questioned a fingerprint expert about the identity of the fingerprints found on the back of the checks that defendant cashed. He was questioned as to whether those fingerprints matched fingerprints from a SID that contained defendant's fingerprints. In order to facilitate the testimony, the prosecutor introduced the SID, which revealed that defendant had been fingerprinted in the past. Defendant failed to preserve his challenge to the use of this evidence because he did not object to this evidence below. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Moreover, we find that defendant has failed to establish the necessary prejudice to avoid forfeiture of this unpreserved, nonconstitutional issue. *People v Grant*, 445 Mich 535, 551, 553; 520 NW2d 123 (1994).

The SID was relevant to matching prints from the checks that were cashed to fingerprints that were undoubtedly defendant's own. It was properly used for a limited purpose, and the details of defendant's prior criminal record were never disclosed to the jury. In fact, the jury was not informed that the information contained in the SID described the details of defendant's prior criminal record or that defendant even had a prior record². The document introduced and discussed simply revealed that defendant had been fingerprinted on a prior occasion, and that those prints matched the ones found on the back of the checks. Furthermore, even if we were to assume that the jury became aware that defendant had a prior record, defendant offers no evidence or argument that he was prejudiced by this evidence in light of the overwhelming evidence of his guilt. We are not persuaded that the introduction of the evidence, for its limited purpose, was improper or that defendant suffered prejudice as a result. In so ruling, we note that other than citing to general evidentiary principles regarding the relevancy of evidence and MRE 404(b), defendant fails to cite to any authority to support his position that the introduction of the SID was improper and prejudicial.

Defendant next maintains that he was denied his Fifth Amendment due process right when the court ordered him to pay restitution as part of his sentence. Defendant particularly challenges the trial court's order on the basis that it did not conduct an evidentiary hearing to examine defendant's ability to

pay, or his financial situation, prior to issuing its ruling. We disagree that the trial court was required to hold an evidentiary hearing prior to ordering restitution.

Our Supreme Court recently addressed the issue presented in this case. *People v Grant*, 455 Mich 221; 565 NW2d 389 (1997). In *Grant*, the court addressed whether a trial court's failure to make express findings with respect to the statutory factors enumerated in the restitution statute, MCL 780.767(1); MSA 28.1287(767)(1), invalidated a restitution order³. In *Grant*, the Court indicated that, in enacting the Crime Victim's Rights Act, the Legislature intended to provide a means for a trial court to determine if a defendant had the resources or ability to pay the amount of the victim's loss and what the victim might actually expect to recover. *Id.* at 241. It thus requires a court, when determining whether to order restitution, to consider: 1) the financial resources and earning capacity of the defendant, 2) the financial needs of the defendant and his dependents, and 3) such other factors as the court considers appropriate. MCL 780.767(1); MSA 28.1287(767)(1).

Where a defendant, like defendant in this case, fails to assert that he is unable to pay restitution, no evidentiary hearing is required. *Id.* at 228-229, 234-235. The trial court must, nevertheless, consider the factors in reaching its decision as to whether restitution should be ordered, and if so, in what amount. *Id.* at 243.

We hold that the language of the statute does not require the trial judge to make a separate factual inquiry and individual findings on the record. When determining restitution, whether it is included in the plea agreement or is statutorily imposed at the discretion of the trial court, the statute requires the court "to consider" the enumerated factors in light of all the information available at the time of the sentencing hearing and then impose the sentence. Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence. [*Id.*]

In *Grant*, even though the trial court did not make express findings on the record with respect to the defendant's ability to pay restitution, the Court found that it had properly considered the enumerated factors. It emphasized that the judge had indicated, at the sentencing hearing, that he had read the presentence report and the recommendation, as well as the defendant's statement and various letters written on the defendant's behalf. *Id.* at 227-228. The presentence report contained information regarding defendant's ability to pay restitution, including his age, education, disabilities, previous employment history, and defendant support obligations.

Here, the trial court had the presentence investigation report before it and had ample information from which it could determine defendant's ability to pay. The report included information about his abilities, education, employment and support obligations. Under the circumstances we see no reason or purpose for a remand on this issue.

Finally, defendant argues that he was denied the effective assistance of counsel because of numerous alleged deficiencies in his trial counsel's representation. Absent an evidentiary hearing⁴, this Court may review an ineffective assistance of counsel claim only if the alleged deficiencies in defense

counsel's performance are apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Our review of the record does not disclose any deficiencies in counsel's representation that prejudiced the defense or defendant's due process rights.

Defendant first argues that his trial counsel was ineffective for failing to request instructions on the lesser offenses, which were previously discussed. Because we find that instructions on the lesser included offenses were not appropriate and that there was no factual or evidentiary support for instructions on those offenses, we hold that it was not ineffective assistance of counsel to fail to request them.

Defendant next argues that his trial counsel was ineffective for failing to object to the introduction of the SID. Because we find that the SID was relevant and that its introduction, for the limited purpose of matching defendant's fingerprints, was proper, we hold that trial counsel was not ineffective for failing to object to the use of the SID. Moreover, we note that there were only two references to the fact that defendant had a fingerprint record. Had defendant's counsel objected to the references, he would have emphasized the fact that defendant had a prior fingerprint record.

Defendant also argues that his counsel was ineffective for pursuing an allegedly inappropriate line of questioning. We disagree. Defendant claims that it was improper and prejudicial for his counsel to ask prosecution witnesses whether they were aware of defendant's efforts to pay restitution to Ameritech Corporation. The cross-examination of witnesses is generally considered to be trial strategy, which this Court will not question on review. *People v Moreno*, 112 Mich App 631, 638; 317 NW2d 201 (1981). We do not substitute our judgment for that of trial counsel in matters of trial strategy. *People v Burns*, 118 Mich App 242, 247; 324 NW2d 589 (1982). Moreover, we note that defendant does not explain why the line of questioning at issue was improper. Our review of the record reveals that the questions may have been asked in an attempt to persuade the jury that defendant did not have the requisite intent to commit a crime, but instead had made a mistake and was offering to make amends by attempting to pay the money back to Ameritech.

Affirmed.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ Martin M. Doctoroff

¹ Defendant attempts to phrase his challenge to the admission of the SID as a constitutional challenge by claiming, in his statement of the question presented, that his Fifth and Sixth Amendment rights were violated by the admission of this evidence. He fails to discuss or explain why the admission of the SID rises to the level of a constitutional error or how he was denied due process or a fair trial by the admission of the evidence. We find that his alleged error does not involve constitutional issues. It

merely involves whether the admission of the SID was irrelevant and prejudicial, and whether it should not have been admitted into evidence.

² The use of the SID did not reveal any prior bad acts, crimes or wrongs committed by defendant. Thus, defendant's claim that the introduction of the SID violated MRE 404(b) has no merit.

³ Although *Grant* is a case where the defendant had voluntarily entered into a plea bargain, which required the payment of restitution, the general principles announced in that case do not appear to be limited to cases where there was a plea bargain. Thus, we apply those principles to the case at hand.

⁴ Defendant did not request an evidentiary hearing pursuant to MCR 7.211(C)(1)(a) or *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); however, he filed a motion for new trial which effectively preserved this issue for appeal.