

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IZIAH JOHNSON,

Defendant-Appellant.

UNPUBLISHED

February 15, 2007

No. 266028

Wayne Circuit Court

LC No. 05-001208-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for breaking and entering, MCL 750.110, larceny in a building, MCL 750.360, and receiving or concealing stolen property valued at less than \$1,000, MCL 750.535(4)(a). We affirm, but remand for the limited purpose of correcting the judgment of sentence and presentence investigation report (PSIR).

Defendant first argues that the trial court improperly shifted the burden of proof when it commented on his failure to produce evidence in support of his theory of the case. We disagree. A trial court's factual findings are reviewed for clear error. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005). Questions of law are reviewed de novo. *Id.*

The trial court indicated that its guilty verdict was based on all of the testimony presented, including testimony that showed that defendant fled when Officer Snyder noticed him pulling an air compressor near Jermanuel Buckley's home. The court explained that the evidence sufficiently showed that Buckley's items were removed from his home, despite being locked away by Buckley the previous night. The court further explained that, based on the testimony presented, defendant was the only person with "access."

Defendant claimed that he was in Buckley's neighborhood to shovel snow for area residents. However, the prosecution asked defendant if he could provide names and addresses for his customers and defendant replied that he could not. Although the court noted that it was "significant that [defendant] wasn't able to name customers," the court did not improperly shift the burden of proof to him when it made this comment. The court permissibly commented on defendant's theory of the case and did not require defendant to disprove any elements of the charged offenses. In any event, because this was a bench trial "any error could be found harmless since the trial judge is presumed not to be prejudiced and to follow the law." *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), modified by 433 Mich 862 (1989).

Defendant next argues that his judgment of sentence and PSIR are inaccurate and should be amended to reflect his proper conviction. The prosecutor concedes this issue and we agree. Defendant was charged with receiving or concealing stolen property more than \$1,000 but less than \$20,000. During trial, it was determined that \$970 in tools were removed from Buckley's home. As a result, the prosecution moved to amend the charge to the lesser offense of receiving or concealing stolen property under \$1,000. And, defendant was convicted of this lesser offense, consistent with the evidence. Accordingly, the judgment of sentence and PSIR—which indicate that defendant was convicted as originally charged—are clearly incorrect and must be corrected. We remand this case for the limited purpose of correcting the judgment of sentence and PSIR.

Lastly, defendant argues that the trial court's order requiring that he reimburse the county for \$400 in attorney fees should be vacated. We disagree. Because this issue is unpreserved, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“The ability of courts to require defendants to repay expenses of court-appointed counsel has been recognized by the Michigan Supreme Court.” *People v Nowicki*, 213 Mich App 383, 387; 539 NW2d 590 (1995). Unless a defendant specifically objects to the reimbursement amount at the time it is ordered, a court is not required to make specific findings on the record regarding a defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004). However, “the court does need to 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.*

Before sentencing, the court asked defendant if he wanted to add anything, and defendant noted that his “educational level is much higher than what's on [the] paper.” Defendant then informed the court that he finished high school and “some other things too.” Based on defendant's response, the court asked defendant if he would have any problems gaining employment and defendant replied, “no.” At that point, the court ordered that defendant maintain full-time employment as a condition of his probation and that he, among other things, pay \$400 in attorney fees.

The court's inquiry into defendant's ability to gain full-time employment sufficiently showed that the court considered defendant's financial circumstances. “A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered.” *Id.* Although the court made a general statement, it considered defendant's ability to pay. See *id.* The court was not required to do anymore, and therefore, defendant's claim is meritless.

Affirmed, but remanded for the limited purpose of correcting the judgment of sentence and PSIR. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter