

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANCE MARTENS,

Defendant-Appellant.

UNPUBLISHED

June 12, 2014

No. 314296

St. Clair Circuit Court

LC No. 12-000894-FC

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant pleaded guilty to felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, second-degree home invasion, MCL 750.110a(3), and four counts of unarmed robbery, MCL 750.530. He was sentenced, as a third habitual offender, MCL 769.11, to 2 to 10 years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the felony-firearm conviction, 12 to 30 years' imprisonment for the second-degree home invasion conviction, and 12 to 30 years' imprisonment for each of the unarmed robbery convictions. He appeals the imposition of court costs and attorney fees by leave granted.¹ We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from defendant's sentencing for several felony offenses committed in Port Huron, Michigan. Defendant was represented by court-appointed counsel throughout proceedings that included an initial plea that was vacated in response to the prosecution's motion, and the ultimate entry of a second plea in accordance with a negotiated plea agreement. At sentencing, defendant filed an affidavit of indigency, in which he stated that he had no income, assets, or obligations. In addition to imprisonment, defendant was sentenced to pay state minimum costs amounting to \$476 and a crime victim rights fund fee of \$130. Additionally, on December 10, 2012, defendant was ordered to pay \$1,999.84 in attorney fees. On April 5, 2013, the trial court ordered that the Department of Corrections should "collect 50% of all funds received by the defendant over \$50.00 each month," until his balance was paid in full. The order stated that defendant's total balance owed was \$2,605.84.

¹ *People v Martens*, unpublished order of the Court of Appeals, entered February 19, 2013 (Docket No. 314296).

II. STANDARD OF REVIEW

“As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.” *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant has not raised any issue regarding the assessment of court costs or attorney fees before the lower court. Accordingly, this issue is unpreserved.

This Court reviews unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). “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.” *Id.* at 763. Whether a plain error affected substantial rights requires a showing of prejudice, i.e., that the error affected the outcome of the proceedings. *Id.*

III. ABILITY TO PAY

Defendant first argues that he should have been advised of the trial court’s actions to enforce the fee award, and afforded an opportunity to contest the enforcement on the basis of his indigency. Defendant further contends that he has no ability to pay the attorney fees. This claim is not ripe for review.

Pursuant to MCL 769.1k, a court may impose “the expenses of providing legal assistance to the defendant” in cases where the defendant enters a plea of guilty. Further, under MCL 769.1l, a court may order that 50% of the funds received by a prisoner in a month over \$50 be collected and remitted to the court towards satisfaction of the amount owed. In *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), the Michigan Supreme Court analyzed the procedures that must be followed regarding recoupment of fees for court-appointed attorneys. Specifically, courts are not required to conduct an “ability-to-pay assessment” before imposing a fee for a court-appointed attorney. *Id.* at 298. Rather, an ability-to-pay assessment is only required when the imposition of a fee is enforced and the defendant challenges his ability to pay. *Id.*

Where a court orders that funds over \$50 be garnished from a prisoner’s account, MCL 769.1l creates a statutory presumption of non-indigency. *Id.* at 295. In *Jackson*, the Court stated that a determination of indigency for a prisoner is different than one for a non-prisoner, because \$50 per month is “more than adequate to cover the prisoner’s other minimal expenses and obligations without causing manifest hardship.” *Id.* However, the statutory presumption of non-indigency may be overcome. If a prisoner believes that unique, individualized circumstances exist to rebut the statutory presumption of non-indigency, he or she may petition the trial court to reduce or eliminate the amount owed. *Id.* at 296. Although the prisoner bears a heavy burden of establishing extraordinary financial circumstances in such a challenge, the trial court may reduce or eliminate the amount owed if it determines “that enforcement would impose a manifest hardship on the prisoner or his immediate family.” *Id.* at 296-297.

In accordance with *Jackson*, if defendant wishes to challenge the imposition of fees on the grounds of his indigency, he must first do so before the trial court. *Id.* at 296. In that setting, defendant may attempt to overcome the statutory presumption of non-indigency described in MCL 769.1l and *Jackson*. Because defendant has not yet challenged the enforcement of the

imposed fees at the trial court level, review of his challenge by this Court is inappropriate and premature.

III. AMOUNT OF FEES

Defendant next argues that the trial court erred when it ordered him to pay \$2,605.84 in court costs and attorney fees. Specifically, defendant argues that the trial court failed to articulate on the record why it imposed such a substantial amount in fees. Further, defendant contends that due process requirements entitle him to an opportunity to be heard regarding the amount of costs and fees imposed and the factors or method involved in calculating them. We disagree.

The costs and fees assessed against defendant were of three types: \$476 in minimum state costs, \$130 for the crime victim rights fund, and \$1,999.84 for reimbursement of attorney fees. Because defendant was convicted of seven felony offenses, the imposition of \$476, at \$68 for each felony, was mandated by statute. MCL 769.1j. Further, because defendant was convicted of a felony, the imposition of \$130 for the crime victim rights fund was also mandated by statute. MCL 780.905. Neither the minimum state costs nor the crime victim rights fund fee were subject to discretion by the court. A court is not required to consider a defendant's ability to pay before imposing such costs. *People v Wallace*, 284 Mich App 467, 470; 772 NW2d 820 (2009).

Additionally, pursuant to MCL 769.1k, a court may impose "the expenses of providing legal assistance to the defendant" in cases where the defendant enters a plea of guilty. See MCL 769.1k(b)(iii). Although defendant refers this Court to our decision in *People v Sanders*, 296 Mich App 710, 714; 825 NW2d 87 (2012), in support of his argument that the trial court was required to articulate a factual basis for the imposition of the amount of attorney fees, *Sanders* involved the imposition of a flat fee under a different subsection of MCL 769.1k. The requirement of a factual basis for the fee imposed in *Sanders* was based upon this Court's interpretation of MCL 769.1k(b)(ii) as reflecting the Legislature's endorsement of the imposition of a "reasonable flat fee" for costs of prosecution under that subsection, as explicitly contrasted with the "more specific" imposition of the expenses of court-appointed attorney assistance under MCL 769.1k(b)(iii). *Sanders*, 296 Mich App at 714-715.

MCL 769.1k(b)(iii) merely allows the imposition of the expense of defendant's court-appointed attorney. Defendant makes no claim that the amount imposed does not accurately reflect that expense. Further, the record indicates that defense counsel expended significant effort, time, and resources in this case. Defense counsel filed a motion to quash the information, negotiated a plea agreement for defendant, and then had to renegotiate the plea agreement after defendant refused to comply with the first plea agreement. We thus conclude that defendant has not demonstrated that the imposition of any of the costs or fees is plainly erroneous. As noted above, defendant may challenge his fees in the trial court on the grounds of indigency at the time of enforcement. *Jackson*, 483 Mich at 292.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Mark T. Boonstra