

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOUSTON ROBERTS, III,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 258439

Macomb Circuit Court

LC No. 2004-001305-FC

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of kidnapping, MCL 750.349, extortion, MCL 750.213, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant first asserts ineffective assistance of trial counsel. We disagree. Defendant failed to seek a new trial or a *Ginther*¹ hearing before the trial court.² “When no *Ginther* hearing has been conducted, our review of the defendant’s claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Constitutional error warranting reversal does not exist unless counsel’s error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994).

Trial counsel is presumed effective; a defendant seeking to demonstrate the constitutional ineffectiveness of counsel bears a “heavy burden.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). A claim of ineffective assistance of counsel requires that a defendant establish the following: (1) “that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing

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

² After defendant was convicted, he filed a claim of appeal, and seven months later filed an untimely motion for remand for a *Ginther* evidentiary hearing. This Court denied that motion, finding a “failure to persuade the Court of the necessity of a remand at this time.”

professional norms;” and (2) “that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

“Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *Dixon, supra* at 398, quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to present a particular defense, or a decision to employ one of several available defense strategies instead of another, does not, in and of itself, constitute ineffective assistance of counsel. *People v LaVearn*, 448 Mich 207, 212-216; 528 NW2d 721 (1995).

Defendant first argues that defense counsel was ineffective in asserting the defenses that he did because those defenses were “nonsense” defenses. This argument is without merit. In his opening statement, defense counsel stated that the evidence would show that this was a case of vigilante justice surrounding the sale of a defective vehicle, where defendant had justification for his actions. Counsel also indicated that the evidence would not support a finding of kidnapping. The complainant’s and others’ use of narcotics, consumption of alcohol, and “partying” would indicate the opposite. Supporting the first theory, defense counsel elicited testimony from the complainant that he told no one he came into contact with during the events at issue that he was being held against his will. Counsel elicited testimony from two store clerks that the complainant gave no indication that he was being held against his will. Testimony suggested that the van was defective, supporting defendant’s claim for restitution. Regarding the second theory, defense counsel questioned the complainant concerning his alleged acquisition and use of cocaine, which the complainant denied. Counsel also questioned the complainant’s friend concerning his and the complainant’s acquisition and use of alcohol and narcotics during the incidents at issue, which again was denied. Evidence suggested that alcohol was potentially involved in the incident. There is no evidence to suggest that the defenses put forward were anything less than reasonable trial strategies. It appears that in the face of strong evidence against his client, counsel elected to try to minimize the damaging effect of the complainant’s testimony and to attempt to limit the crimes for which defendant could be convicted. Pursuant to *Matuszak, supra* at 58, defense counsel was not ineffective in presenting the chosen defenses.

Defendant further argues that defense counsel was ineffective in failing to present or preserve the defense of insanity or temporary insanity. This argument also is without merit. There is no evidence on the record to support a defense of insanity or temporary insanity. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In this regard, the highly purposeful nature of defendant’s conduct as testified to by the complainant, including the extortion of money, would tend to undermine an insanity claim.

Defendant next argues that his constitutional right to an appeal has been infringed by defective transcripts.³ He claims that complete and accurate transcripts would enable him to demonstrate that defense counsel pursued a meritless defense during closing argument, one he pursued throughout trial. This, defendant argues, establishes that defense counsel was ineffective. We disagree. We review such constitutional questions de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).

Trial transcripts are presumed accurate. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). “Where a defendant is able to make a colorable showing that inaccuracies in transcription have adversely affected the ability to secure postconviction relief, and such matters have seasonably been brought to the trial court’s attention, the defendant is entitled to a remedy.” *Id.* at 475-476. “[T]he inability to obtain the transcripts of criminal proceedings may so impede a defendant’s right of appeal that a new trial must be ordered.” *People v Horton*, 105 Mich App 329, 331; 306 NW2d 500 (1981). However, “[a] defendant’s constitutional right to appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal. Whether the record is sufficient depends upon the question asked of it.” *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987).

Having reviewed the record and the transcripts, we conclude that defendant incorrectly argues that defense counsel proffered unsupported defenses during closing argument. In fact, counsel argued that the evidence indicated that the complainant was not being held against his will. Counsel sought to impugn the complainant’s credibility by implying that the complainant was not kidnapped as he suggested, but that he knew and was voluntarily with defendant. There was some evidence to support this argument. Particularly given that the complainant was the prosecution’s primary witness, counsel’s attempt to attack his credibility during closing argument was sound trial strategy based on the evidence presented. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996) (noting that reviewing courts will not second-guess matters of trial strategy).

Because defendant’s appeal is fully reviewable, defendant has failed to demonstrate that “the claimed inaccuracy in transcription has adversely affected . . . [his] ability to secure postconviction relief . . .” *Abdella, supra* at 476. Defendant has suffered no prejudice from the transcript defects. *Elazier, supra* at 249-250.

³ Defendant asserts that the trial transcript does not include the attorneys’ closing arguments. Defendant filed a show cause motion before this Court requesting the court reporter below to produce the transcripts at issue. A hearing was scheduled but then dismissed when the transcripts were filed. The transcripts proved incomplete. A second show cause hearing was scheduled, and again dismissed when transcripts were filed, which again were incomplete. This Court issued a record request, and the transcripts filed in response were again incomplete. Upon the second record request and third show cause hearing, the transcripts were again filed, with portions of the closing arguments legible and portions not. Two audio cassettes were filed with the transcripts, and taken together, the cassettes and transcripts provide the parties’ entire closing arguments.

Defendant next argues that the trial court erred in failing to make a downward departure from the sentencing guidelines, and as a result, his sentence constituted unconstitutional cruel and/or unusual punishment. We disagree. To preserve a sentencing issue for appeal, a defendant must raise the issue “at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” MCR 6.429(C). See also *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Defendant failed to properly raise this issue. It is therefore unpreserved. Unpreserved sentencing issues are reviewed by this Court for plain error affecting a defendant’s substantial rights. *McLaughlin, supra* at 670. Regardless, defendant has not established any sentencing error.

We understand defendant to be challenging the trial court’s imposition of an 81-month minimum sentence for kidnapping as unconstitutional cruel and/or unusual punishment. A sentence does not constitute cruel or unusual punishment if it is proportionate “in light of the circumstances surrounding the offense and the offender.” *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), lv gtd on other grounds 472 Mich 881 (2005). Defendant’s conviction was based on testimony detailing an incident in which he kidnapped the complainant and threatened him with a gun—including by firing the gun. It is readily apparent that a minimum sentence of 81-months (less than seven years) is proportionate to this offense and offender. Thus, defendant has not shown that he received unconstitutional cruel and/or unusual punishment.

Defendant finally argues that his sentences were improper because they reflected facts not decided by the jury. We disagree. Defendant bases this argument on the United States Supreme Court’s ruling in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* does not apply to Michigan’s indeterminate statutory sentencing scheme. *People v Morson*, 471 Mich 1201 (2004).

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello