

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETTY GEAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 12, 2009

No. 284570

Oakland Circuit Court

LC No. 2007-217234-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of unlawful practice as a health-care professional, MCL 333.16294. The trial court sentenced defendant to serve two years' probation, the first 273 days in jail, and granted defendant 16 days' sentencing credit. The court additionally imposed some financial assessments, including that defendant reimburse the costs of her court-appointed defense attorney. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Defendant's conviction arose from her temporary employment as a licensed practical nurse (LPN) with Job Corps. She was placed in the job by the temporary employment agency Entech. Two Entech employees testified that defendant presented herself as an LPN both verbally and through her résumé, which listed several previous jobs held in that capacity. The Entech employees testified that they repeatedly asked defendant to provide a copy of her nursing license for their records, but that defendant never did so. After working as a temporary with Job Corps for four months, the company expressed an interest in hiring defendant as a permanent employee. Only then was it discovered that defendant was not an LPN. Entech reported the matter to the police, and criminal prosecution followed.

At trial, after the prosecution rested its case, defense counsel asked for a recess to consult with defendant. When trial resumed, counsel informed the court that it would rest its case without calling any witnesses.

On appeal, defendant asserts that defense counsel was ineffective for having suppressed her expressed desire to testify in her own defense,¹ and that the trial court erred in ordering her to reimburse attorney fees without inquiring into her ability to pay.

II. Assistance of Counsel

“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel’s poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel’s decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

The decision whether to testify is ultimately the defendant’s to make personally. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). But suppressing that decision by way of declining to clarify a defendant’s otherwise incomprehensible testimony can be deemed sound trial strategy. *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000). However, even where such a failure to give effect to the defendant’s decision to testify is not deemed proper strategy, relief is still properly denied where the evidence of guilt is overwhelming. See *Toma v Cason*, 2006 WL 2193813, *11-*14 (No. 02-10168-BC, ED Mich, August 2, 2006) (disapproving recognition as legitimate strategy the failure to present the defendant’s account intelligibly, but denying habeas corpus relief in light of overwhelming evidence of guilt).

In this case, defendant asserts that she admonished trial counsel to allow her to testify in her own defense, and disagreed with counsel’s advice to the contrary. Defendant further asserts that she would have testified that she had never held herself out to be a LPN, and would have additionally exposed some prosecution documents as falsified, and thus that counsel’s failure to honor her wish to testify prevented her from presenting a defense.

Defendant offers an affidavit and other documents in support of her position on appeal. However, these exhibits are not properly before this Court, because “[a]ppeals to the Court of Appeals are heard on the *original* record,” and there has been no motion to enlarge the record. MCR 7.210(A) (emphasis added). We therefore decline to examine these exhibits.

¹ This Court denied a motion to remand this case to the trial court for an evidentiary hearing on this issue. *People v Williams*, unpublished order of the Court of Appeals, issued January 21, 2009 (Docket No. 284570).

Defendant frankly admits that the trial court record is devoid of support for her assertion that trial counsel thwarted her desire to testify. That dearth of record support is fatal to her claim. “[T]here is no requirement in Michigan that there be an on-the-record waiver of a defendant’s right to testify.” *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991), citing *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). Accordingly, “when a tactical decision is made not to have the defendant testify, the defendant’s assent is presumed.” *United States v Webber*, 208 F3d 545, 551 (CA 6, 2000). A defendant wishing to overcome that presumption must inform the trial court of the disagreement. *Id.* The lack of any such record in this instance leaves defendant’s acquiescence in counsel’s advice that she not testify presumed, and this issue waived. *Id.*; *Simmons*, *supra* at 685.

Moreover, given that the prosecution presented the testimony of two Entech employees who asserted that defendant presented herself as a LPN, and also defendant’s résumé, which in several places lists employment with the status of “LPN,” one item specifically stating that she had earned a bachelor’s degree “in nursing, (LPN),” defendant cannot show that had she testified the result would have been different. See *Messenger*, *supra*.

For these reasons, we must reject defendant’s claim of ineffective assistance of counsel.

III. Attorney Fees

The question whether an award of attorney fees is permitted, required, or prohibited is one of law, calling for review de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994). Where a trial court was legally authorized to award attorney fees, its award is reviewed on appeal for an abuse of discretion. *In re Condemnation of Private Property for Highway Purposes (Dep’t of Transportation v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459, lv den 456 Mich 911 (1997). However, because defendant did not preserve this issue by timely objection below, our review is for plain error. *People v Trapp (On Remand)*, 280 Mich App 598, 601; 760 NW2d 791 (2008).

MCR 6.005(A) and (D) provide for publicly funded defense counsel for indigent defendants. MCR 6.005(C) in turn states, “If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.” MCL 769.1k(1)(b)(iii) authorizes a court to include as part of a criminal sentence an assessment covering “expenses of providing legal assistance to the defendant.” See also MCL 769.34(6) (authorizing a trial court, “[a]s part of the sentence,” to “order the defendant to pay any combination of a fine, costs, or applicable assessments,” as well as restitution as provided by law).

A trial court making a determination of a defendant’s ability to afford counsel is normally obliged to consider the factors set forth in MCR 6.005(B), all of which relate to the defendant’s ability to pay. But where a defendant fails to object to a reimbursement amount at the time it is ordered, the trial court need not make a finding on the record concerning the 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.* at 254-255. See also *Trapp supra* at 600.

In this case, we note that, at sentencing, the trial court stated that it had “carefully” reviewed defendant’s presentence investigation report (PSIR), and further note that the PSIR indicates that defendant “has held employment in the past,” “apparently has marketable job skills,” and “is physically capable of holding employment in the future.” The PSIR further states that defendant has completed high school and earned an on-line degree in nursing, and that defendant reported having “no significant financial debts.” Defense counsel did not raise any objection as to the accuracy of the PSIR in this regard. Because the trial court emphasized that it had reviewed the PSIR with care, and because that report provided information on defendant’s job prospects and lack of current debts, that combination alone might satisfy the requirement that the court give some indication that it had considered defendant’s ability to pay attorney fees. But we need not so decide, because there are additional such indications. The court stated from the bench, “defendant worked in the past and has marketable job skills,” and ordered defendant to “maintain or seek steady employment.” The trial court thus adequately, in light of the lack of objections below, indicated that it had taken defendant’s ability to pay into account when ordering her to reimburse attorney fees.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens