

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ARTHUR HARRIS, JR.,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 283670

Ottawa Circuit Court

LC No. 06-030248-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant identity theft, MCL 445.65. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 300 days' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

In August 2005, Marivel Herrera-Brandle lost her purse, which contained her social security card, at a bus stop. A few weeks later, defendant began employment with Besser Lithibar, and filled out employment forms with the social security number assigned to Herrera-Brandle, which ended with the final four digits of 3537. Before defendant had completed the employment forms, the human resource specialist at Besser Lithibar wrote down a social security number that was orally recited by defendant, which ended with the final four digits of 2687. At trial, defendant testified that he simply made mistakes. Specifically, he claimed to have written down a social security number that was one digit off from his actual social security number. He testified his social security number ended with 3531, and he further testified that the social security number ending in 2687 belonged to his son.

II. Motion for Substitute Counsel

Defendant argues that the trial court abused its discretion when it denied defendant's motion for substitute counsel.

A. Standard of Review

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v T aylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). The

trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. Analysis

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991)].

Defendant contended in court that there was a breakdown in the relationship between him and defense counsel because counsel did not subpoena child support records repeatedly requested by defendant, failed to request a bond reduction hearing, and made discouraging remarks to defendant. Defendant's claim that the trial court abused its discretion primarily rests on his complaint that counsel failed to subpoena certain records. The records apparently would have established that defendant obtained his job through a program offered by child services. Defendant claims this evidence would refute the prosecution's theory that defendant used the victim's social security number to avoid paying child support. Although the alleged records were never secured, defense counsel elicited through defendant's testimony evidence that defendant obtained his job through a program offered by child services and that child services knew he worked at Besser Lithibar. Thus, defense counsel and defendant agreed on this fundamental trial tactic. Accordingly, good cause did not exist to substitute counsel. Further, there was no evidence presented below or on appeal that the alleged records existed. Thus defendant's claim must also be rejected as meritless. The trial court did not abuse its discretion when it denied defendant's motion for substitute counsel.

III. Adjournment

Defendant next argues that the trial court abused its discretion when it denied defendant's motion for an adjournment.

A. Standard of Review

The record demonstrates defendant never moved for an adjournment. Thus, defendant must establish that a plain error existed requiring reversal. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

This Court considers five factors when it reviews a trial court's decision to deny defendant's request for an adjournment in order to obtain new counsel: "(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was

negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision." *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003), citing *People v Echavarria*, 233 Mich App 356, 369, 592 NW2d 737 (1999). Contrary to defendant's claims, there was no legitimate reason for an adjournment because the alleged breakdown in the attorney-client relationship was insufficient to establish good cause for substitute counsel. Even if there was good cause and a legitimate reason for an adjournment, i.e. to enable substitute counsel to get ready for trial or to subpoena the records, defendant has not even discussed, much less shown prejudice resulting from the trial court's decision. *Id.* Thus, defendant failed to prove that plain error occurred.

IV. Effective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to subpoena defendant's child support records to refute the prosecution's theory defendant intentionally provided the incorrect social security number to avoid satisfying his child support obligations.

A. Standard of Review

Our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.*

B. Analysis

To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Butler*, 193 Mich App 63, 66-67; 483 NW2d 430 (1992), lv den 440 Mich 881 (1992). To satisfy the first component, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. In other words, defense counsel's conduct must fall below an objective standard of reasonableness. *Id.* at 688. The second component requires the defendant to show "the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant must satisfy both components to prevail. *Id.* at 599-600. In deciding the issue, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.*

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant argues defense counsel was ineffective in failing to subpoena records indicating that child support services was aware that he was employed at Besser Lithibar. Again, nothing in the lower court record supports defendant’s claim that records exist indicating that he landed the job through a program offered by child support services. Thus, defendant has not shown that “the result of the proceeding would have been different.” *Carbin, supra*. Further, as mentioned, the record indicates that defense counsel presented defendant’s own testimony to refute the prosecution’s theory and argued during closing argument that defendant could not avoid paying child support by simply using a different social security number. Because defense counsel presented evidence that rebutted the prosecution’s theory and because defense counsel presented a valid mistake defense, defendant is unable to demonstrate that, but for counsel’s conduct, the outcome of trial would have been different. Defendant has not shown that he was deprived of the effective assistance of counsel. *Carbin, supra* at 600; *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

V. Sufficiency of the Evidence

Defendant also argues that the prosecution did not present sufficient evidence to prove he provided a false social security number in order to obtain employment.

A. Standard of Review

“A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury’s finding that the defendant was guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

B. Analysis

In the present case, defendant was found guilty of identify theft, MCL 445.65. This statute provides, in relevant part, that “a person shall not . . .with intent to defraud or violate the law, use or attempt to use the personal identifying information of another person” to obtain employment. MCL 445.65.

At trial, evidence established that defendant was required by law and by Besser Lithibar to fill out employment forms, including state and federal tax forms, which required a social security number. Because Klungle was required by law to collect defendant’s social security number to employ defendant and because defendant provided a false social security number, the evidence was sufficient for a rational juror to conclude beyond a reasonable doubt that defendant was guilty of using the personal identifying information of another person to obtain employment. *McGhee, supra* at 622.

Defendant further maintains that there was insufficient evidence to prove that defendant provided another person’s social security number in order to commit an unlawful act, i.e. to avoid paying child support. A person cannot with the “intent to defraud or violate the law” use

“the personal identifying information of another person to . . . commit another unlawful act.” MCL 445.65. The plain language of MCL 445.65, however, requires only that the prosecution establish either that defendant used the personal identifying information of another to obtain employment *or* commit an unlawful act. The record reveals that the prosecution only argued that defendant attempted to obtain employment with the false information and that the trial court’s jury instructions indicate that this was the only element put forth for the jury’s consideration. The record does not support defendant’s claim that the prosecution presented and the jury considered evidence regarding whether he committed an unlawful act. Thus, defendant is not entitled to relief on the basis of this argument.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly