

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDGAR CONERLY,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 274206

Saginaw Circuit Court

LC No. 05-026810-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of resisting or obstructing a police officer causing injury, MCL 750.81d(2), resisting or obstructing a police officer, MCL 750.81d(1), furnishing false identification, MCL 257.324, and driving while license suspended or revoked, MCL 257.904(1), entered after a jury trial. We affirm.

Two Michigan State Police troopers observed defendant driving a vehicle while not wearing a seat belt. When the troopers began following defendant's vehicle, defendant stopped the vehicle, exited, and fled on foot. One trooper pursued and caught defendant, and the men engaged in a physical struggle. Defendant refused all orders to stop struggling. Both troopers eventually restrained defendant. One trooper sustained an elbow injury that required treatment.

The trial court took a recess after the prosecution presented its evidence, but when the court was prepared to resume proceedings, defendant was absent from the courtroom. Defense counsel indicated that he had been unable to locate defendant in the courthouse. Defense counsel moved for a mistrial, but the trial court denied the motion. The court declared a lunch recess, but after proceedings reconvened, defendant was still absent.¹ The trial court instructed the jury that defendant had voluntarily absented himself from the trial, and that the jury was not to use that fact as evidence that defendant committed the crimes with which he was charged. The jury found defendant guilty as charged.

¹ The trial court noted that surveillance video showed defendant leaving the courthouse.

Defendant moved for a new trial, arguing that he was denied the effective assistance of counsel at trial, that he was denied his constitutional right to be present at trial and to testify on his own behalf, and that the trial court abused its discretion by denying the motion for mistrial. The trial court denied the motion, and declined to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel at trial. He alleges that counsel failed to: contact a witness who allegedly observed the incident with the troopers, discuss trial strategy or confer with defendant, make necessary objections, and implement a strategy to call character witnesses to testify on defendant's behalf. We disagree.

Defense counsel has wide discretion regarding matters of trial strategy. *Odom, supra* at 415. The failure to investigate the case can constitute ineffective assistance if the failure resulted in prejudice. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), lv pending 477 Mich 1303 (2007). *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to present evidence or call witnesses can constitute ineffective assistance only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 585 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). In this case, defendant's allegations are completely unsubstantiated. Defendant does not identify the witness who allegedly observed the confrontation, and does not specify what this witness might have said if called to testify at trial. Defendant does not specify what character witnesses should have been called to testify for him, or what those witnesses might have said. Defendant has not shown that any failure of counsel to interview the witness, otherwise investigate the case, or call particular witnesses resulted in prejudice. *Carbin, supra* at 600. Counsel's decisions constituted trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not overcome the presumption that trial counsel rendered effective assistance. *Rockey, supra* at 76.

A criminal defendant has the statutory right to be present at his trial. MCL 768.3. This right is also impliedly recognized by the federal and state constitutions. *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). A defendant may waive his right to be present for trial by failing to appear. "A valid waiver of a defendant's presence at trial consists of a specific

knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right.” *Id.* A valid waiver cannot be presumed from a silent record. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). However, reversal of the defendant’s conviction is not required if no reasonable possibility exists that the defendant was prejudiced by his absence. *Woods, supra* at 480.

We review constitutional questions de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

Defendant argues that the trial court denied him due process when it continued the trial after he absented himself from the proceedings. We disagree.

Defendant voluntarily absented himself from his trial without notice or explanation. We conclude that although a valid waiver cannot be presumed from the silent record, defendant’s convictions need not be reversed because no reasonable possibility exists that defendant’s absence resulted in prejudice. Defendant was properly convicted of the charged offenses.² The trial court instructed the jury that it was not to consider defendant’s “absence against him or as evidence that he committed the crimes of which he is charged.” The trial court gave this instruction both after the lunch recess, and following closing arguments. Defendant has not indicated how his presence would have affected closing arguments and the instruction of the jury, and does not indicate that he would have testified had he been present at trial. Defendant has failed to demonstrate that his absence made a difference in the outcome of the trial, and thus has failed to establish any reasonable possibility that his absence resulted in prejudice. *Woods, supra* at 480.

We review a trial court’s denial of a motion for a mistrial for an abuse of discretion. A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

Defendant argues that the trial court abused its discretion by denying defense counsel’s motion for a mistrial. Defendant asserts that his very absence from the trial might have prompted the jury to convict him; thus, he did not receive a fair trial. We disagree.

An abuse of discretion occurs where a trial court’s decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The trial court concluded that defendant had voluntarily absented himself from the trial. The trial court

² Defendant does not argue that the evidence was insufficient to support his convictions.

acted reasonably under the circumstances, and defendant was not denied a fair trial. No abuse of discretion occurred. *Id.*

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood