STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2008
v	No. 276170 Kalamazoo Circuit Court
KEVIN DELANDO TURNER, Defendant-Appellant.	LC No. 05-000022-FH

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Pursuant to MCL 769.11, defendant was sentenced as a third habitual offender to consecutive prison terms of six months to ten years for the felon-in-possession conviction and two years for the felony-firearm conviction. Defendant appeals as of right, and we affirm. This appeal is being decided without oral argument. MCR 7.214(E).

An unknown person called 911, reported that she heard a gunshot, and stated that she had seen a man with a firearm walking away from a gray four-door car and into the park across the street. A responding officer found defendant leaving the park and entering a gray four-door car. The officer followed the vehicle away from the park and conducted a traffic stop. Defendant told the officer "that he had been assaulted by some subjects and he got hit in the head." Other officers went to the park and found a set of footprints in the snow. The prints led from the parking area, through a pedestrian gate, to a pavilion in the park. A tracking dog followed the footprints to the corner of the pavilion and alerted; a loaded shotgun was lying in the grass near the corner of the pavilion. The tread on defendant's boots was similar to that of the footprints.

Defendant was questioned after being advised of his rights. He initially stated that he knew nothing about the gun and that the gun was not his. However, he eventually admitted that he had left the gun in the park. Defendant told police that he had been robbed outside an illegal gambling house and that another man who was armed with a shotgun had chased him to an area near the park. Defendant stated that the man had fired the gun into the air, that a struggle had ensued, and that he was able to disarm the man. Defendant confirmed that he had then disposed of the gun by leaving it in the park. Defendant was seen to have multiple bruises about his face and head.

The parties stipulated that defendant had been convicted of a specified felony and was ineligible to possess a firearm. At trial, defendant testified that he had driven away from the gambling house, followed by three men in a gray car. The men signaled for defendant to pull over and he did. When they stopped, two men exited the gray car and the driver left the scene. Defendant testified that one of the men had a shotgun. He further testified that the men attacked him and robbed him. Just as the armed man was about to shoot him, defendant grabbed the gun and pushed it away. After the gun discharged, the two men ran off, leaving the gun behind. Defendant testified that rather than leaving the gun on the street, he picked it up and took it into the park.

Defendant first argues that his convictions must be reversed because he was not arraigned on the information. Defendant first raised this issue in a post-trial motion. Because the issue was not timely raised in the trial court, it has not been preserved for appeal. *People v Willis*, 1 Mich App 428, 430-431; 136 NW2d 723 (1965). Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has a constitutional right to adequate notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). A defendant has a right to be arraigned on the information, at which time the information is read to the defendant or the court informs him of the substance of the charges contained therein. MCR 6.113(A) and (B). A defendant may, however, waive arraignment on the information by signing a written statement acknowledging that he has received and read the information, that he understands the substance of the charges, and that he waives arraignment and enters a plea of not guilty or stands mute. MCR 6.113(C). When the record fails to show that a defendant was arraigned, reversal is generally required. *Grigg v People*, 31 Mich 471, 471-472 (1875); *People v Thomason*, 173 Mich App 812, 815; 434 NW2d 456 (1988). But when the record shows that the defendant entered a not guilty plea to the charge and proceeded to trial without objection, automatic reversal is not required. *People v Weeks*, 165 Mich 362, 364-365; 130 NW 697 (1911).

Defendant was arraigned in district court but not in circuit court. However, once in circuit court, a not guilty plea was entered on defendant's behalf pursuant to a written waiver of arraignment.[1] Further, defendant proceeded to trial without objection. Therefore, while error occurred because defendant did not personally sign the waiver form, the error here does not require automatic reversal.

Defendant contends that he was prejudiced by the error because, absent a circuit court arraignment, he was not aware that he was subject to sentencing as an habitual offender and was thus unable to make an informed choice regarding a subsequent plea offer. However, sentence enhancement as an habitual offender is not a substantive offense, *People v Boatman*, 273 Mich App 405, 407; 730 NW2d 251 (2006), and a defendant need not be arraigned on a notice of sentence enhancement. Rather, all that is required is that the prosecutor file a written notice no

[1] The waiver was not signed by defendant; it was signed by defense counsel on defendant's behalf.

later than 21 days after the arraignment or the filing of the information, and serve the defendant or his attorney with the notice, either by personal delivery at the arraignment or later by mail as provided by law or court rule. MCL 769.13(1) and (2). The notice of sentence enhancement filed in the present case contains a proof of service and was served on defense counsel by mail. Accordingly, we cannot conclude that defendant was prejudiced by the error in this regard.

Defendant next argues that trial counsel was ineffective for failing to request instructions on the defenses of duress and self-defense. Defendant preserved this issue by moving for a new trial below. However, because the trial court did not conduct an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

Whether to request a particular instruction is generally a matter of trial strategy. See, e.g., *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). "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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Duress is a common-law affirmative defense. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). It is applicable in situations in which the crime was committed to avoid a greater harm. *Id*. at 246. A successful duress defense excuses the defendant from an otherwise-criminal act because he was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required mens rea. *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975).

The defense of duress requires that the defendant act in response to an imminent threat of serious harm by another person. See *Lemons*, *supra* at 247. "[A] defendant has the burden of producing a prima facie defense of duress." *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998). Defendant testified that he did not pick up the gun and take it into the park until after his attackers had fled. Therefore, the evidence did not support a duress instruction in this case. Because defendant was not entitled to an instruction on duress, counsel was not ineffective for failing to request such an instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

"A claim of self-defense . . . first requires that a defendant has acted in response to an assault." *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). The defense of self-defense permits a defendant who is in reasonable fear of imminent danger to repel the attack with that amount of force necessary to defend himself. *People v Riddle*, 467 Mich 116, 119; 649

NW2d 30 (2002); *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Self-defense might conceivably apply to a possessory weapons offense such as felon-in-possession where the defendant takes temporary possession of a gun to defend himself against an attacker. See *United States v Panter*, 688 F2d 268, 271-272 (CA 5, 1982). Here, however, defendant was not charged with an offense that involved the use of force against another. Even if defendant's account is believed, he simply did not use his assailants' weapon to defend himself. Rather, the charges arose out of defendant's continued possession of the firearm after his assailants had fled. Therefore, the evidence did not support the defense, and defense counsel was not ineffective for failing to request an instruction on self-defense. *Snider*, *supra* at 425.

Finally, we note that the "self-protection" defense, cited in *People v Green*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket No. 252727), refers to the justification defense recognized in *United States v Newcomb*, 6 F3d 1129, 1134-1136 (CA 6, 1993), and *United States v Singleton*, 902 F2d 471, 472-473 (CA 6, 1990). This defense is essentially another form of the "momentary or innocent possession of a weapon" defense recognized in *People v Coffey*, 153 Mich App 311, 314-315; 395 NW2d 250 (1986). However, *Coffey* has now been overruled. *People v Hernandez-Garcia*, 477 Mich 1039, 1040; 728 NW2d 406 (2007). Therefore, defendant was not entitled to such an instruction.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis