STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2008
v	No. 278310 Jackson Circuit Court
RICKEY HAROLD WILKEY, Defendant-Appellant.	LC No. 06-003521-FH

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to five years' probation for the felonious assault conviction after first serving a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

On August 24, 2005, Artis Slater, a used car dealer, and his cousin, Christopher Slater, attended an auction at a business operated by defendant. According to Artis, he bid $1,400 for a Jeep Cherokee, but was told after the auctioneer stopped the bidding that he had bid $1,800. Artis followed defendant to his office, expecting that a videotape of the auction would resolve the price discrepancy, but instead was asked to leave. Artis was waiting for the police in a lobby area when defendant told three men to "get him." The men threw Artis to the floor and tied his hands behind his back. As Christopher tried to pull the men off of him, defendant hit Christopher on the head with a gun. After leaving Artis's sight, defendant returned and pointed the gun at Artis and around the area as he told everyone to "get back." Another person at the auction, Golden Gibson, testified that he saw defendant hit Christopher on the head with the butt of a gun. Christopher testified that defendant hit him with an object, but he did not realize it was a gun until defendant ran away. Christopher chased defendant outside, where defendant pointed the gun toward him and said, "Where you going? Come on. Come on. Come on." Gibson grabbed Christopher and pulled him back inside. Defendant then returned to the lobby, where he waved the gun around.

The prosecutor's theory at trial was that a felonious assault occurred when defendant struck Christopher on the head with the gun. Defendant presented a defense based on self-defense and defense of others, but also raised credibility issues.

On appeal, defendant argues that he was denied the effective assistance of counsel, that the prosecutor's conduct denied him a fair trial, and that the judge who presided at trial was not properly assigned by the chief judge, as set forth in MCR 8.111(C). We first address defendant's claim based on MCR 8.111(C). Because defendant did not object to being tried before a substitute judge, he failed to preserve this issue for appeal. A defendant's failure to timely assert a right constitutes a forfeiture of the issue. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Therefore, we review defendant's claim for plain error affecting his substantial rights. *Id.* at 763.

In general, only a properly assigned judge can enter dispositive orders in a case. *Schell v Baker Furniture Co*, 461 Mich 502, 515; 607 NW2d 358 (2000). Further, a chief judge is required to enter a written order when reassigning a circuit judge, stating the reason for the reassignment. MCR 8.111(C). But a chief judge "may also designate a judge to act temporarily . . . during a temporary absence of a judge to whom a case has been assigned." *Id.*

In this case, the substitute judge did not enter any order or judgment, but rather presided at the two-day jury trial because the assigned judge had a family medical emergency. Contrary to defendant's argument on appeal, the substitute judge's oral rulings at trial are not equivalent to orders. "The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). In any event, defendant has not established a plain violation of MCR 8.111(C). It is not obvious from the record that the chief judge did not "designate a judge to act temporarily . . . during a temporary absence" of the judge to whom the case was assigned, as permitted by MCR 8.111(C). *Carines, supra* at 763. Moreover, even if MCR 8.111(C) requires a chief judge to file a written order for a temporary assignment, a nunc pro tunc order may be used by a court to supply an omission in a record for action previously taken by a court, but not properly recorded. *Sleboede v Sleboede*, 384 Mich 555, 558-559; 184 NW2d 923 (1971). Further, "[a]utomatic reversals are not favored," and therefore, defendant would be required to show prejudice arising from the failure of the chief judge to enter an appropriate order to warrant reversal. *People v Bell*, 209 Mich App 273, 275-277; 530 NW2d 167 (1995) (substitute judge's failure to certify familiarity with the trial record under MCR 6.440(A)[1] did not require reversal, where the substitute judge only presided during jury deliberations and there was no showing of prejudice). Defendant has not established any such prejudice. Therefore, a new trial is not warranted. *Carines, supra* at 763; *Bell, supra*.

Next, defendant argues that the prosecutor's remark during closing argument referring to Artis as the "son of two ministers" warrants a new trial. Although there was no factual support for the remark, defendant did not object to the remark at trial. Because the trial court's instruction to the jury that the lawyers' statements and arguments are not evidence was sufficient

[1] Unlike 8.111(C), MCR 6.440(A) is specifically directed at disabilities that arise during a criminal jury trial. It provides that "[i]f, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial."

to dispel any prejudice and protect defendant's substantial rights, appellate relief is not warranted. *People v Schutte,* 240 Mich App 713, 720-722; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Further, the record does not support defendant's newly raised claim that the prosecutor presented testimony that he knew or should have known was false. Having failed to show a plain error, reversal is not warranted. *Carines, supra* at 763; *Schutte, supra* at 720.

Defendant also argues that he was denied the effective assistance of counsel. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Dendel,* 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 114 (2008). We review the trial court's factual findings for clear error. *Id.* Where resolution of a disputed fact turns on the credibility of witnesses, we give deference to the trial court. *People v Sexton (After Remand),* 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). A finding is clearly erroneous if a reviewing court, on the whole record, is left with a definite and firm conviction that a mistake was made. *Dendel, supra* at 130. Questions of constitutional law are reviewed de novo. *Id.* at 124.

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [*People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001).]

Defendant argues that trial counsel's performance during pretrial plea negotiations was deficient because counsel (1) failed to inform him that a felony-firearm conviction has a mandatory two-year sentence, (2) failed to inform him that a sentence for a felonious assault conviction would be consecutive to the sentence for a felony-firearm conviction, and (3) advised him not to accept the prosecutor's offer that he plead to a misdemeanor charge of brandishing a firearm in public.

Where the prosecutor makes a plea offer, the focus of a claim of ineffective assistance of counsel is generally on whether the defendant was advised of the offer. *People v Williams,* 171

Mich App 234, 240-241; 429 NW2d 649 (1988). As this Court explained in *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995):

> The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision. While an attorney may elect to offer a client a specific recommendation whether to go to trial or to plead guilty in the course of that consultation, we decline to hold that such a recommendation is required or that the failure to provide such a recommendation necessarily constitutes ineffective assistance of counsel. The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea. Absent unusual circumstances, where a counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, an informed and voluntary choice whether to plead guilty or go to trial can be made by the defendant without a specific recommendation from counsel. [Citations omitted.]

At a *Ginther*[2] hearing conducted in this case, defendant and trial counsel gave different accounts of the circumstances surrounding the prosecutor's plea offer. Defendant testified that he was advised that the prosecutor would add felonious assault and felony-firearm charges if he did not plead to the existing charge of brandishing a firearm in public. Defendant also testified that trial counsel recommended that he not accept the plea offer, without providing any advice regarding the sentencing consequences of convictions for felony-firearm and felonious assault. Trial counsel testified that he advised defendant on a number of occasions that felonious assault was a four-year felony and that felony-firearm was a mandatory two-year offense. Further, while counsel did not recall if defendant received a copy of the information containing the felony charges, he testified that defendant was given a copy of the complaint, which was identical to the information. Trial counsel testified that he recommended that defendant not go to trial with the felony-firearm charge, but that defendant was concerned that he would still be incarcerated if he tendered a plea to the misdemeanor charge. Defendant was not interested in a plea until after the substitute judge took over at trial and the prosecutor withdrew the offer.

The trial court found trial counsel's testimony to be credible. The trial court also observed that a waiver of arraignment form signed by defendant indicated that defendant had read the information or had it read or explained to him. The information, like the complaint, indicates that a sentence for felony-firearm is consecutive with and preceding any term of imprisonment imposed for the other felony offense.

Examined as whole, and giving deference to the trial court's assessment of credibility, defendant failed to meet his burden of showing that trial counsel's performance was deficient. Trial counsel's assistance enabled defendant to make an informed and voluntary decision regarding whether to accept the prosecutor's plea offer before it was withdrawn. *Corteway, supra* at 446. As indicated in the trial court's findings, it appears that defendant was not willing

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

to accept the plea offer because he was concerned that he could still be incarcerated even if he accepted the offer.

Defendant next argues that trial counsel was ineffective by not calling him as a witness to support the defense theory of self-defense or defense of others. Decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call a witness "only constitutes ineffective assistance of counsel if it deprives a 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 Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Because defendant did not testify at trial, we can only conclude that defendant acquiesced in trial counsel's decision that he not do so. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Defendant's testimony at the *Ginther* hearing does not indicate otherwise; defendant stated that he did not testify because trial counsel did not believe it was necessary. Defendant offered little detail regarding his proposed trial testimony, except to indicate that he gave a written summary to trial counsel, which indicated that he "whacked" Christopher on the head because he thought that Christopher was choking or assaulting his father or James Dollaway. Trial counsel testified that defendant had the final decision regarding whether to testify, but that he did not want him to do so because he did not believe that defendant could undergo rigorous cross-examination without getting very upset.

Defendant had the burden of establishing the factual predicate for his claim. *Carbin, supra* at 600. The trial court found, and we agree, that the decision not to call defendant as a witness was a matter of strategy.

The evidence that defendant possessed a gun was overwhelming. The material issue at trial was whether defendant used the gun to commit an assault. A felonious assault requires proof that the defendant assaulted another person "with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon . . . ." MCL 750.82(1). Defendant must have intended to injure or place the person in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A claim of self-defense or defense of others requires that the defendant responded to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). The defendant's belief regarding the danger must be honest and reasonable. *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002). The defense of lawful self-defense is not available to a defendant who uses more force than necessary to defend himself, or to an initial aggressor, unless he or she withdrew and communicated the withdrawal to the victim. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993).

At trial, defendant was able to present evidence of the circumstances surrounding the scuffle through a number of witnesses, including one of defendant's former employees, Dennis Gray, who testified that he assisted Dollaway in restraining Artis after Artis made a movement toward defendant. Gray described how defendant came to his aid, after Christopher intervened, by hitting Christopher with his fist. Gray testified that he saw Christopher shove defendant's father after he got up and seemed to by trying to move away. Raymond Hyden, who was attending the auction as a seller, testified regarding Christopher's aggressive behavior toward defendant after the scuffle. He testified that Christopher chased defendant and threatened to take

defendant's gun away and use it to shoot defendant. Further, defendant's statements regarding the scuffle were presented to the jury through Jackson County Sheriff's Deputy Danny Deering, who testified that defendant told him that Artis was restrained after coming after defendant in an aggressive manner, that Christopher was wildly swinging his arms during the scuffle, and that he pointed the gun in the air to try to take control of the situation at one point, but used his hand to strike Christopher on the head.

We find nothing in the testimony presented at the *Ginther* hearing to overcome the presumption that trial counsel's failure to call defendant as a witness was reasonable trial strategy. Defendant failed to satisfy his burden of establishing deficient performance.

Defendant next argues that trial counsel was ineffective for arguing to the jury that defendant could not be found guilty of brandishing a firearm because the underlying incident did not occur in a public place. Because the jury found defendant not guilty of this charge, we find no merit in defendant's claim that trial counsel's performance was either deficient or prejudicial.

Defendant also argues that trial counsel was ineffective by not objecting to the jury instruction for felonious assault. Defendant argues that the instruction allowed the jury to consider three distinct acts as a basis for finding him guilty, namely, pointing the gun at Artis, pointing the gun at Christopher, and hitting Christopher on the head with the gun, without unanimity as to any particular act.

The jury was instructed generally that the "verdict in a criminal case must be unanimous. In order to return a verdict, it's necessary that each of you agrees upon the verdict." A general instruction on unanimity is adequate unless the prosecutor presents alternative acts of the defendant to establish the actus reus element of a charged offense and

> 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

Although the specific felonious assault instruction indicated that it applied to Christopher and Artis, the prosecutor's theory at trial was that the assault occurred when Christopher was hit on the head. With respect to the felonious assault charge, the prosecutor asserted in opening statement, "I have to prove that the Defendant, Rickey Wilkey, took out a gun and hit Christopher Slater on the top of the head with it. That's Count 1." The prosecutor argued in closing argument:

> If you believe Artis and Chris and Mr. Gibson, who all say the exact same thing, he was hit on the head, later they found out it was a gun, then he's guilty of both 1 and 2. They go together. He was hit in [sic] the head with a weapon; that weapon happened to be a gun. He's guilty of assault with a dangerous weapon, and he's guilty of felony-firearm.

Defendant's trial counsel similarly focused on this act when asserting in closing argument that defendant acted defensively, and the prosecutor replied in rebuttal by arguing that there was no need for self-defense or defense of others when Christopher was hit on the head.

Trial counsel testified at the *Ginther* hearing that he did consider it possible that the jury would convict defendant without a unanimous verdict. But he did not object to the jury instruction because he was concerned that the prosecutor would move to amend the information to add an additional count of felonious assault to conform to the evidence presented at trial.

A trial court may allow an amendment to the information at trial to conform to the evidence, unless the proposed amendment would unfairly surprise or prejudice the defendant. See MCL 767.76; *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005). Considering counsel's strategic reason for not objecting to the instruction, and the absence of any confusion in the trial record with respect to the particular act that was presented to the jury to establish the felonious assault charge, defendant has not met his burden of showing deficient performance. Trial counsel's failure to object was not objectively unreasonable. *Rockey, supra* at 76.

Defendant next argues that trial counsel was ineffective for failing to object to the prosecutor's "son of two ministers" remark in closing argument. Defendant asserts that there was no strategic reason for not objecting. Because defendant did not explore this issue at the *Ginther* hearing, we limit our review to what is contained in the trial record. *Rockey, supra* at 77.

As previously indicated, the trial court's jury instruction that the lawyers' statements and arguments are not evidence was sufficient to dispel any prejudice caused by the prosecutor's remark. It can be presumed that the jury followed the court's instruction. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Further, it is possible that trial counsel made a strategic decision not to make a contemporaneous objection to the prosecutor's remark to avoid highlighting it. We will not substitute our judgment for that of counsel on matters of trial strategy. *Rockey, supra* at 76. We therefore conclude that defendant has failed to show either deficient performance or the prejudice necessary to succeed on a claim of ineffective assistance of counsel. *Carbin, supra* at 600.

Finally, although defendant asserts that trial counsel was also ineffective by not presenting relevant and material exculpatory evidence, he does not address or explain the basis for this claim. Accordingly, we deem this claim abandoned. See *Matuszak, supra* at 59 (appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis of the claim, such cursory treatment constitutes abandonment of the issue).

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell