STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2010
v	No. 289700 Jackson Circuit Court
JAMES FLEMING, Defendant-Appellant.	LC No. 07-004261-FH

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of prisoner in possession of a weapon, MCL 800.283(4). He was sentenced to 22 to 90 months' imprisonment and appeals as of right.[1] We affirm.

On appeal, defendant first argues that the trial court erred because it did not instruct the jury that self-defense is a valid defense against a charge of prisoner in possession of a weapon and the failure to instruct resulted in a denial of due process. We disagree. This issue is waived because defense counsel, at trial, actively participated in constructing the now challenged self-defense jury instruction, and defense counsel affirmatively indicated that he did not have any objections to the jury instructions. While a failure to object to jury instructions would not normally preclude review, failing to do so under these circumstances constitutes a waiver of the issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Next, we address the issues raised by defendant in his Standard 4 brief. First, he argues that his preliminary examination was adjourned without a showing of good cause, pursuant to MCR 6.110(B) and MCL 766.7. We disagree. This Court reviews a district court's finding of good cause and adjournment of the preliminary examination for abuse of discretion. MCL 766.7. Defendant's initial preliminary examination was set for October 30, 2007, but on October

[1] A second charge filed against defendant, assault with a dangerous weapon (felonious assault), MCL 750.82, resulted in a hung jury, and the prosecutor decided not to re-try that charge. The sentence for prisoner in possession of a weapon is to run consecutively to defendant's 20 to 30 year sentence for first-degree criminal sexual conduct that he was serving at the time of the convicted offense.

26, 2007, his trial counsel requested and received a temporary adjournment for the purpose of obtaining a mental competency evaluation. On March 11, 2008, the psychological evaluator issued her opinion that defendant was competent to stand trial, and the preliminary examination commenced nine days later, on March 20, 2008. Defendant subsequently moved for a mistrial for lack of good cause, and the trial court denied his motion, reasoning that the mental evaluation constituted good cause. We agree with the trial court that the mental competency evaluation constituted good cause for the adjournment under MCR 6.110(B) and MCL 766.7, and hold that the trial court did not abuse its discretion in granting the adjournment.

Next, defendant argues that his due process and Sixth Amendment rights were violated because he was not present for the October 30, 2007, preliminary examination. This claim clearly is without merit. As previously indicated, defense counsel obtained an adjournment of that examination on October 26, 2007. Defendant's attempt to seek relief for failing to attend a hearing that never occurred will not be granted by this Court.

Next, defendant argues that his Sixth Amendment right, US Const, Am VI, was violated because he was not present for the scheduled October 26, 2007, pre-examination conference despite the writ of habeas corpus issued by the trial court requiring his presence. We review this unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Constitutional claims of due process violations are reviewed de novo." *People v Hill*, 282 Mich App 538, 540; 766 NW2d 17 (2009). Our review of the lower court file reveals no information indicating that defendant was not present for this pre-examination hearing, and defendant has failed to provide any support for his claim that he was not present. He has also failed to provide any legal discussion as to why his absence would amount to a constitutional violation requiring reversal. Accordingly, this issue is deemed abandoned for defendant's failure to adequately brief it on the merits. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Next, defendant makes the puzzling argument that his first trial counsel[2] was ineffective because he should not have adjourned the preliminary examination, and because he failed to raise a substantial defense that resulted in the five-month delay caused by the adjournment. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court "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.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* (citations omitted). Because no evidentiary hearing was held, this Court's review is

[2] A second lawyer who represented defendant throughout trial and sentencing replaced defendant's first trial counsel on March 20, 2008.

limited to the mistakes apparent in the trial record.[3] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

In his Standard 4 brief, defendant has not indicated how or why his counsel's conduct fell below the objective standard for reasonableness. He merely states that he wishes his counsel had not requested the adjournment for the mental competency evaluation. Nor has he indicated what kind of defense his counsel should have presented during the ensuing five months, and how failure to provide such a defense fell below the objective standard for reasonableness. Thus, we conclude that defendant has not met his burden of proving that counsel's performance fell below an objective standard of reasonableness. *Gonzalez*, 468 Mich at 644. The claim fails.

Next, defendant argues that the amended trial information was defective because it incorrectly indicated that the assault occurred at the Cotton Correctional Facility, when it actually occurred at the Parnall Correctional Facility. Whether a defendant was adequately apprised of the charges against him invokes due process concerns. *People v McGee*, 258 Mich App 683, 699-700; 672 NW2d 191 (2003). "Constitutional claims of due process violations are reviewed de novo." *Hill*, 282 Mich App at 540. Defendant further argues that the amended trial information failed to indicate the time the assault occurred. As he failed to preserve this latter argument for appeal, we review for plain error affecting his substantial rights. *Odom*, 276 Mich App at 421.

"The dispositive question in determining whether a defendant was prejudiced by a defect in the information is whether the defendant knew the acts for which he was being tried so that he could adequately put forth a defense." *People v Waclawski (After Remand)*, 286 Mich App 634, 706; 780 NW2d 321 (2009), citing *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989). "MCR 6.112(G) places the burden on defendant to demonstrate prejudice and thus establish that the error was not harmless." *Waclawski*, 286 Mich App at 706.

[3] Defendant requested an evidentiary hearing in his Standard 4 brief, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). An appellate brief is not the proper place to request such a hearing. It should be raised to the clerk of the Michigan Court of Appeals in a motion to remand pursuant to MCR 7.215(C)(1). Thus, we deny defendant's request for a hearing.

Our review of the amended trial information indicates that it stated that the offense occurred in Jackson County, on June 25, 2007. Although the amended trial information incorrectly recites defendant's address, our reading of the document indicates that mistake pertained to defendant's physical address, not the location of the alleged crimes. The information properly alleged that defendant committed the crimes of felonious assault and prisoner in possession of a weapon in Jackson County. Further, although the specific time of the assault was not provided, defendant has failed to show time was of the essence. Accordingly, we conclude that the amended trial information meets all the requirements of MCL 767.45. Moreover, we note that defendant does not allege that he was prejudiced, and nor does he suggest that he was somehow unable to prepare for, and/or put forth, a defense. MCR 6.112(G). In fact, our review of the trial transcript indicates that defendant was very well aware of the charges against him and the facts of the case. Thus, we conclude that defendant has not met his burden of proving that he was prejudiced by the alleged minor defects in the amended trial information. *Waclawski*, 286 Mich App 706; *Carines*, 460 Mich at 763.

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis