

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEXTER BRAXTON POOLE,

Defendant-Appellant.

UNPUBLISHED

December 21, 2010

No. 291389

Muskegon Circuit Court

LC No. 06-054253-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a controlled substance with intent to deliver less than 50 grams, MCL 333.7401(2)(a)(iv), and prisoner in possession of contraband, MCL 800.281(4). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 76 months to 30 years' imprisonment for possession with intent to deliver, and 7 to 30 years' imprisonment for prisoner in possession of contraband. We affirm.

Defendant was incarcerated at E.C. Brooks Correctional Facility in Muskegon when a prison official observed him place something in his mouth after visiting with his fiancée in the facility's visitor center. Defendant was placed in segregation and 12 days later passed two heroin-filled balloons through his digestive system. Defendant moved to suppress evidence of the two balloons on the basis that prison officials compelled him to pass the balloons, as he did so only after they promised him immunity. The trial court held that the heroin evidence was admissible.

On appeal, defendant argues that the trial court erred in ruling that the evidence was admissible "as a matter of law." We review a trial court's ruling at a suppression hearing for clear error. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). "Where a trial court's decision concerned a mixed question of fact and law, the court's findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo." *Id.*

We uphold the trial court's decision for two reasons. First, the trial court's finding that defendant was not offered immunity was not clearly erroneous. The question whether defendant was offered immunity, something the prosecutions' witnesses denied, involved a credibility contest and we will defer to the trial court with respect to the assessment of the credibility of witnesses. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Second, in light of the evidence of defendant's condition immediately before he evacuated his bowels, defendant cannot

claim that he would not have had his bowel movement had he not been promised immunity. The trial court did not err in admitting the heroin evidence.

Next, defendant raises three claims of ineffective assistance of counsel, which were preserved for review by moving for a remand and a *Ginther*¹ hearing; however, because the trial court denied defendant's motion, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error and issues of constitutional law de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "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 600.

First, defendant contends that counsel rendered ineffective assistance when he conceded the lesser offense of prisoner in possession of contraband. "[W]here the evidence obviously points to defendant's guilt, it can be better tactically to admit guilt and assert a defense or to admit guilt on some charges but maintain innocence on others." *People v Matuszak*, 263 Mich App 42, 60-61; 687 NW2d 342 (2004). Defense counsel could not dispute that defendant possessed the heroin, so counsel made a strategic decision to challenge the greater offense of possession with intent to distribute. Defense counsel advanced a well-prepared argument concerning the distribution offense. Although defense counsel was not successful with his argument, given the overwhelming evidence against defendant, counsel acted reasonably when he decided to pursue the strategy. See *id.* at 61 ("A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.").

Second, defendant argues that counsel was ineffective when he failed to call defendant as a witness. The decision whether to call a witness at trial is presumed to be a matter of trial strategy that we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id.* A "substantial defense" is a defense that "might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defendant was not deprived of a substantial defense when counsel failed to call him as a witness, as defendant did not indicate how his testimony would have made any difference where there was overwhelming evidence of his guilt. *Id.* Defendant has not shown that counsel acted deficiently in failing to call him as a witness. *Dixon*, 263 Mich App at 398.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Third, defendant contends that counsel rendered ineffective assistance when he failed to object to excerpts of a police interview of defendant. Defendant contends that counsel should have objected under MRE 106 and requested that the trial court play the entire recording so that the jury would be aware that prison officials refused to honor their alleged offer of immunity. MRE 106 provides as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The entire recording did not have to be considered contemporaneously with the portion of the recording played in court in order to ensure fairness. MRE 106. Whether the jury was aware that defendant believed he was granted immunity was irrelevant and concerned a matter that the trial court already addressed and decided. Moreover, even if the jury heard defendant's self-serving statements, it would not have made a difference at trial where there was overwhelming evidence of defendant's guilt. In sum, defendant has failed to show that counsel acted deficiently with respect to the recorded interview. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").²

Next, in a Standard 4 brief defendant alleges that several aspects of the trial served to deprive him of his due process right to a fair trial under the Fourteenth Amendment. Unpreserved constitutional issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Under the plain error standard, a defendant must show: 1) that an error occurred, 2) the error was plain, i.e., clear or obvious, 3) that the plain error affected his substantial rights in that the error affected the outcome of the lower court proceedings. *Id.* at 763.

Defendant argues that the trial court did not rely on law in its rulings and he states that the trial court improperly "limited cross-examination" Defendant fails to cite to the record to show where the trial court failed to rely on law or refused to allow counsel to cross-examine any of the witnesses and he has therefore abandoned this aspect of his appeal for review. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant additionally contends that he was denied the opportunity to testify at trial, denied his request to represent himself, and was denied his request for a bill of particulars. With respect to all of these arguments, defendant

² Defendant argues that the trial court abused its discretion when it admitted an edited version of the police interview of defendant. Because defense counsel explicitly agreed to admit the audio recording, as presented by the prosecution, defendant has waived any claim that the trial court erred in admitting the recording. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." (quotation omitted)).

again fails to cite to the record or provide authority to support his assertions and he has therefore abandoned these issues. *Id.* at 640-641.

Next, defendant argues that officers who interrogated him tricked, lied, and cajoled him when they refused to honor their offer of immunity. Defendant has not shown that there was anything arising from his interactions with prison staff that would have changed the outcome of this trial. *Carines*, 460 Mich at 763. We also disagree with defendant's argument that counsel acted deficiently when he failed to call his "main accusers" to the witness stand. As discussed above, decisions regarding what witnesses to call are matters of trial strategy that we will not second-guess on appeal. *Dixon*, 263 Mich App at 398.

Defendant also argues that he was subjected to an unconstitutional interrogation and that he suffered an unconstitutional delay in arraignment. Defendant fails to provide any relevant supporting authority and fails to cite to the record. He has therefore abandoned these issues for review. *Kelly*, 231 Mich App at 640-641.

Next, defendant raises several more claims of ineffective assistance of counsel. After reviewing defendant's claims, we conclude that defendant has failed to show that counsel rendered deficient performance that affected the outcome of the trial and all of his claims fail. *Carbin*, 463 Mich at 599-600.

In the remainder of defendant's issues in his Standard 4 brief, he merely continues to raise allegations related to his assertion that the trial court erred in admitting the heroin evidence. In doing so, he fails to provide any meaningful analysis, citation to the record, or authority to support his arguments. Defendant has therefore abandoned these issues for review. *Kelly*, 231 Mich App at 640-641.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto