

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SCOTT KLEEHAMMER,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 289570

Antrim Circuit Court

LC No. 08-004199-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions for operating while intoxicated, third offense, MCL 257.625(1), and operating a vehicle with a suspended or revoked license, second offense, MCL 257.904(3)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Failure to Have the Jury Sworn

Defendant first argues that the trial court erred where it failed to have the venire sworn prior to jury selection or to have the jury sworn prior to trial. Defendant failed to preserve this issue below; therefore we may grant relief only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant must demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A plain error affects a defendant's substantial rights when the error results in outcome determinative prejudice. *Id.* Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 763.

At the time of trial MCR 2.511(H) provided in pertinent part:

(1) The jury must be sworn by the clerk substantially as follows:

"Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are

discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.”

Here, prior to jury selection, the trial court remarked on the record, “Let me--first of all, you have been already sworn as to your qualifications.” While defendant contends that no actual oath is transcribed, he has presented nothing to support any claim before this Court that the trial court lied in its recitation with respect to what had occurred. Thus, defendant has failed to demonstrate plain error concerning the trial court’s alleged failure to swear the jury prior to voir dire.

Likewise, contrary to defendant’s claim, the trial transcript shows that the jury was, in fact, sworn in accordance with MCR 2.511(H) prior to the start of trial. After the jury was selected, the trial transcript shows they were administered an oath but the reporter did not transcribe the oath itself:

[THE COURT] Would you please swear the jury to hear the case.

All stand to take the oath of the jurors.

(9:28 a.m.–jury sworn).

Defendant cannot show plain error concerning the trial court’s actions in having the prospective jurors, and the jury, sworn prior to trial.

II. Voir dire

Defendant next argues that the trial court erred when he permitted a prospective juror, who was later dismissed by one of defense counsel’s peremptory challenges, to give a detailed account of a drunk driving incident that injured her husband, which ended in prosecution of the driver. Defendant contends that the prospective juror’s extended explanation was unnecessary for a fair answer. He also challenges the fact that the trial court spent more time questioning the juror about whether she could be impartial despite her husband’s experience than the trial court did discussing the impartiality of another juror whose husband had been represented by defense counsel in a drunk driving matter, whom the trial court dismissed for cause. However, plaintiff has presented nothing in support of his claim that the trial court is limited in its discretion in determining possible juror bias during voir dire, has not discussed the standard to use concerning a dismissal for cause, nor presented any case law in support of his position. “It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (citations omitted). See also *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), *aff’d* 482 Mich 851 (2008). Accordingly, this issue is abandoned.

Moreover, even were we to find this issue preserved, defendant has not demonstrated error. The record supports a finding that the trial court likely decided to further question the juror after she stated that she felt she should have been excused from her jury duty automatically because her husband was hit by a drunk driver. The trial court took the opportunity to expound

on the idea that disqualification is not automatic simply when a juror may have been involved in a similar situation in the past. The trial court's further questioning of the juror was related to this explanation.

Defendant next argues that the trial court should have further questioned two jurors who responded, "I believe so" and "I think so" when asked by the prosecutor whether they could disregard their personal knowledge of the area where the accident occurred and rely only on the testimony. As with the objection above, defendant has provided no support for his claim and has thus abandoned this issue. *Martin*, 271 Mich App at 315; *Prince*, 237 Mich App at 197. In addition, contrary to defendant's assertion, we find the responses sufficiently affirmative to act as a positive assertion that the jurors would rely only on the information presented at trial. Defendant has not shown clear error here.

III. Jury Instructions

Defendant next argues that the trial court failed to provide adequate and correct preliminary jury instructions concerning reasonable doubt, the prosecution's burden of proof, and the presumption of innocence. Defendant did not object to the preliminary instructions. As with the unpreserved errors above, this claim of error is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Defendant's claim that the trial court was required to provide the prosecution's suggested preliminary instructions is without merit. MCR 6.412(B) provides, in relevant part, that "[b]efore beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn." However, MCR 6.412(B) does not mandate preliminary instructions and, more importantly, does not prescribe a particular form or content for preliminary instructions.

As a whole, the trial court's initial instructions concerning reasonable doubt, the presumption of innocence, and the burden of proof were adequate to explain the concepts to the jury and to protect defendant's rights:

The procedure is that the prosecutor in every criminal case has the obligation to come forward with proofs to satisfy you, the fact finders, beyond a reasonable doubt that the defendant is guilty. He is presumed innocent, and that is the fundamental constitutional right that we all have and that the defendant sitting here has. He is presumed innocent. The burden of proof of proving this case is on the prosecuting attorney.

* * *

I told you earlier that one of the fundamental propositions of the way we do business courts and in this country throughout the country, criminal cases, is that the people have the responsibility, the burden of proving guilt beyond reasonable doubt, and I'll talk to you later about what some of those words mean, but it's a burden of proof, fairly high burden, that the prosecutor has in proving the case, the defendant doesn't have to prove anything, the defendant is presumed to be innocent. Any of you folks have any problem with that concept or even disagree with it? Some of the people don't think that's the right way to do things, other countries a person coming into the court either deck is even and nobody has any burden other than to come forward with proof and you decide [sic]. And, in some places a defendant has to prove their [sic] innocence, but we don't have those systems we have the one I described. Anybody have any problem with that?

Moreover, the trial court further told the jury that it would provide more detailed reasonable doubt instructions later and did so during its final instructions, by providing the instructions contained in CJI2d 3.2:

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty. Every crime is made up of parts called elements. And, in just a moment you will have in front of you the specific charges that I will give you that will include all the elements of the charges involved here. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence, it is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

As a whole, the jury was properly instructed on the relative burdens of proof and the concept of reasonable doubt.

Defendant further argues that the trial court erred when it told the jury that it should give an "equal playing field to both sides" and hear both sides before reaching its decision. Defendant asserts that the trial court's statement was wrong and violated due process, but does not cite why it was wrong or how it allegedly violated due process. This issue has been abandoned. *Martin*, 271 Mich App at 315; *Prince*, 237 Mich App at 197. In addition, we find that the thrust of the trial court's instructions, which involved a repeated caution not to be predisposed toward a certain outcome but to be objective and make a decision based on the evidence, was proper.

Thus, reviewing the instructions as a whole, we find that defendant cannot show he has suffered outcome-determinative plain error here.

IV. Ineffective Assistance

Defendant argues that trial counsel's failure to object to the alleged errors above constitutes ineffective assistance. Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*¹ hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Id.* A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*McGhee*, 268 Mich App at 625 (quotation and citations omitted).]

Defendant has not show that the trial court failed to have the jury sworn. Nor has defendant established error in the trial court's voir dire questions, or in the jury instructions. Therefore, defendant cannot show that counsel provided ineffective assistance by failing to object to these instances of alleged error. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) ("Counsel is not ineffective for failing to advocate a meritless position.").

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

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