STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
V	No. 283573 Montmorency Circuit Court
ROBERT KENNETH BECKER, Defendant-Appellant.	LC No. 07-001722-FC

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of escape while awaiting trial, MCL 750.197(2); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to prison terms of two to four years for escape, two years for felony-firearm, 21 to 35 years for assault with intent to murder, two to five years for felon in possession of a firearm, and 13 months to two years for resisting and obstructing a police officer. We affirm.

This case stems from an incident occurring at the Montmorency County Circuit Court. Upon hearing the jury verdict in a prior case, defendant fled the courtroom and the courthouse and ran to his vehicle. Defendant pulled a 20-gauge shotgun from his vehicle and pointed it at an officer who was pursuing him. The officer testified that defendant pulled the trigger, but the shotgun misfired. Defendant was taken into custody where he was charged with and convicted of the above-cited offenses.

Following his convictions, defendant filed the instant appeal arguing, among other things, that there was no reviewable record of the instructions given to the jury. Defendant asserted that, as a result, he was denied his rights to due process, equal protection, and to an accurate record for appellate review. Defendant also moved for a remand to the trial court to "settle the record" with respect to the jury instructions. This Court granted the motion and remanded the matter to the trial court for "appropriate proceedings to settle the record as to the content of the written jury instructions on the elements of the charged crimes." A transcript of the proceedings held to settle the record was provided to this Court.

On appeal, defendant first argues that his convictions should be reversed because the judge was disqualified to hear the case based on personal bias under MCR 2.003(B)(1), (2), and (6) or, in the alternative, based on the high probability of actual bias. These claims are based upon the fact that the trial judge witnessed defendant's escape from the courtroom.

A party must file a motion to disqualify a judge within 14 days after discovering the ground for disqualification. MCR 2.003(C). The failure to file such a motion may waive the issue for appeal. See *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). Waiver extinguishes the underlying error, and the relevant issue generally cannot be appealed. *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001).

Here, defendant did not file a motion for judicial disqualification despite the fact that he had full knowledge of the grounds for disqualification long before the trial began. Clearly, when defense counsel raised the issue at arraignment, he knew the potential grounds for disqualification. However, despite this knowledge, defendant did not file a motion for judicial disqualification. It would be unjust for defendant to have full knowledge of a potential disqualification issue before a criminal trial has even begun, decline to raise the issue in the lower court, and then seek redress on appeal after obtaining an unfavorable result at trial. For these reasons, we consider this issue waived. To allow defendant to proceed on this allegation of error would contravene the longstanding rule against a party harboring error as an appellate parachute. *Polkton Charter Tp v Pellegrom*, 265 Mich App 88, 96; 693 NW2d 170 (2005).

In addition to disqualification under MCR 2.003, in some circumstances due process will require disqualification because of the high probability of bias, including when the judge has a pecuniary interest in the outcome of the case, has been the target of personal abuse or criticism from a party, is enmeshed in other matters involving a party, or has previously participated in the case as accuser, investigator, factfinder or initial decisionmaker. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 599; 640 NW2d 321 (2001). The "[Michigan Supreme Court] has examined the issue of judicial disqualification pursuant to the Due Process Clause and has found that disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996).

In this matter, the fact that the judge witnessed defendant's escape from the courtroom gave him no more interest in the case than he would have had in any criminal case assigned to his docket. It was not for the trial court to decide defendant's guilt or innocence; this was left to the jury. Presiding over a trial where the judge has had prior contact with the defendant does not provide the judge with a vested interest. Because this situation does not coincide with the type of extreme case that would justify a due process disqualification, the trial court was not required to *sua sponte* recuse himself.

Defendant next argues that he was denied due process when the trial court provided written elements of the crimes charged to the jury in lieu of reading them in open court, and when the trial court failed to make the written instructions a part of the lower court record. However, defendant was given an opportunity to object to the trial court's decision on how to instruct the jury. Instead of objecting or requesting the instructions be read to the jury, defendant (through counsel) affirmatively agreed with the trial court's proposed procedure of reading the general instructions and providing separate pieces of paper to the jury that set forth the elements

of each crime. This affirmative approval waives this issue for appeal. *People v Hall* (*On Remand*), 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant next argues that defense counsel was ineffective for agreeing to the jury instruction procedure described above. "To establish ineffective assistance of counsel the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008), citing *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant claims that there is no strategic reason for an attorney to agree to a "constitutionally impermissible" procedure related to something as fundamental as proper instructions on the elements of the charged and lesser offenses, and also argues that there is no way to ascertain whether the jury read the instructions while in the jury room. While traditionally trial courts read the instructions to the jury or read the instructions *and* provide written copies of the instructions to the jury, we find no authority for defendant's claim that the procedure utilized by the trial court was constitutionally impermissible. It is possible that defense counsel was of the opinion that giving written instructions to the jury to read would clarify the instructions and lead to a more advantageous result for defendant. Defendant has not overcome the strong presumption that defense counsel's agreement with the procedure utilized was sound trial strategy.

Defendant next contends that his conviction must be reversed given that the parties were unable to successfully settle the record regarding the instructions on remand. According to defendant, because no witness could testify with one hundred percent certainty as to the actual written instructions given to the jury, the record remains unsettled on this issue and, therefore, defendant was denied due process. We disagree.

This Court has held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right to appeal that a new trial must be ordered. *People v Horton*, 105 Mich App 329, 331; 306 NW2d 500 (1981); *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If, however, the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied. *People v Audison, supra*, at 834-835.

At the hearing on remand, defendant's trial counsel testified that he found a set of jury instructions, in his file on defendant's case, with his own handwritten notes on them. Counsel recalled looking at the instructions and reviewing them with the trial judge and the prosecutor, and agreeing that they could be submitted to the jury, but could not confirm that they were actually sent to the jury. Counsel testified that he assumed the written instructions were provided to the jury, but did not independently recall them actually being handed to the jury.

The prosecutor testified that she believed, with 90-95% certainty, that the instructions found in defense counsel's file were those that were provided to the jury (with the exception of

one instruction containing defense counsel's notes). The prosecutor specifically recalled going over the elements of the charged crimes with the trial judge and defense counsel.

The trial judge testified that the jury instructions setting forth the elements of the charged offenses were not read in open court, but were provided in written form to the jurors. The now-retired trial judge testified that he used this procedure in every criminal trial that he presided over during his 18 years on the bench. According to the trial judge, a clerk typed up the elements for each offense, using the Criminal Jury Instructions. In preparation for the hearing, the trial judge testified that he called the clerk who prepared the instructions for him for the last 15 or 16 years of his career and asked her to retrieve the list of elements used in defendant's trial. The judge testified that the instructions would have been kept in a separate office file that he maintained for every case that went to verdict or in a file that the clerk kept containing lists of the elements of criminal charges. The trial judge testified that he compared the list provided by the clerk to the charges contained on defendant's jury verdict form, and the list matched defendant's charges. To the best of the trial judge's recollection, the instructions provided to him were exactly the same as those that were provided to the jury at defendant's trial.

The clerk, Ms. LaMarre, testified that the written instructions she provided to the trial judge were retrieved from her computer. Ms. LaMarre testified that when she received the request, she retrieved defendant's verdict form, which she had saved on her computer, then looked up the offenses listed on the verdict form from a folder stored on her computer entitled "elements of the offense."

The record reflects that the trial judge and each counsel recalled reviewing written instructions concerning the elements of each offense. Defense counsel produced written instructions from his file that he had no reason to believe were not a copy of those that were provided to the jury. The trial judge, after requesting the written instructions that were used in defendant's case from a clerk at the court, compared them to the verdict form used in defendant's case and opined that they were the instructions he provided to the jury. The clerk testified that the instructions she provided to the trial judge were those that appeared on her computer and were used in defendant's case. Defendant having offered no real argument that any instructions other than those produced at the remand hearing were provided to the jury, the record was sufficiently settled so as to allow evaluation of defendant's claims on appeal. *Audison, supra,* at 834-835.

Next, defendant claims that the written jury instructions provided by the trial judge at the remand hearing, as well as those that were provided to the jury at trial, contained an erroneous instruction as to the felony firearm offense and that this conviction must therefore be reversed. We disagree.

The written jury instructions provided to the jury concerning the elements of the offense of possession of a firearm at the time of commission or attempted commission of a felony (felony firearm) read as follows:

The Defendant is also charged with the separate crime of possessing a firearm at the time he committed the crime of Assault With Intent To Murder. To prove this charge, the Prosecutor must prove each of the elements beyond a reasonable doubt:

1. That at the time the Defendant committed a felony*, he knowingly carried or possessed a firearm.

*Assault With Intent to Murder, Assault With Intent to Do Great Bodily Harm, and Assault With a Dangerous Weapon are all felonies.

CJI2D 11.34, the standard jury instruction concerning felony firearm provides:

(1) The Defendant is also charged with the separate crime of possessing a firearm at the time [he/she] committed [or attempted to commit] the crime of _____.

(2) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(3) First, that the defendant committed [or attempted to commit] the crime of _____, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.

(4) Second, at the time the defendant committed [or attempted to commit] that crime [he/she] knowingly carried or possessed a firearm.

As pointed out by defendant, the instruction provided to the jury differs from the standard criminal jury instruction as to the offense elements of felony firearm. However, when given the opportunity to review the instructions and object to the same, defense counsel expressed satisfaction with the instructions. While a party who forfeits a right might still obtain appellate review for plain error, a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Because defendant affirmatively approved of the instructions as given, he has waived any review of the propriety of the same. However, regardless of defense counsel's failure to object, it would be impossible for this Court to assign error when the missing portion of the standard criminal jury instruction involved the jury's obligation to find that the defendant committed or attempted to commit the underlying felony and, in the instant matter, the jury was advised of the elements of the underlying felony and found defendant guilty of the underlying felony.

Finally, relying on *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004), defendant argues that the trial court erred in imposing attorney fees without indicating that it had considered defendant's ability to pay. However, *Dunbar* was recently overruled on the very point now argued. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009):

> Thus, we conclude that *Dunbar* was incorrect to the extent that it held that criminal defendants have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court-appointed attorney. With no constitutional mandate, *Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. See MCL 769.1k and 769.1*l*.

The *Jackson* Court also noted, "for purposes of an ability-to-pay analysis, we have recognized a substantive difference between the imposition of a fee and the enforcement of that imposition." *Jackson, supra* at 291-292. *Jackson* further noted that:

> Indeed, whenever a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency. Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. [*Id.* at 292 (emphasis omitted).]

Finally, *Jackson* concluded, "MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency." *Id* at 295. An "imprisoned defendant bears a heavy burden of establishing . . . extraordinary financial circumstances" sufficient to overcome this presumption. *Id.*

On February 5, 2008, on a form approved by the Supreme Court Administrative Office, the court ordered enforcement of the fee imposition, which included attorney fees. In accordance with MCL 769.1*l*, the court ordered the following:

> 2. For payment toward the obligation, the Department of Corrections shall collect 50% of all funds received by the defendant over $50.00 each month.
>
> 3. If the amount withheld at any one time is $100.00 or less, the Department of Corrections shall continue collecting funds from the defendant's prisoner account until the sum of the amounts collected exceeds $100.00, at which time the Department of Corrections shall remit that amount to this court . . . .

Although defendant filed an affidavit of indigency along with his request for an appointed appellate attorney, he has not contested his ability to pay the imposed fees. Thus, we resolve this issue as did *Jackson*:

> In this case, the trial court did not err by imposing the fee for his court-appointed attorney without conducting an ability-to-pay analysis. Further, it did not err by issuing the remittance order under MCL 769.1*l* because defendant is presumed to be nonindigent if his prisoner account is only reduced by 50 percent of the amount over $50. However, if he contests his ability to pay that amount, he may ask the trial court to amend or revoke the remittance order, at which point the trial court must decide whether defendant's claim of extraordinary financial circumstances rebuts the statutory presumption of his nonindigency. [*Jackson, supra*, 483 Mich at 298-299.]

Defendant also argues that the amount charged for attorney fees did not bear any relationship to the actual cost of attorney services in the case. Defendant cites no authority for this position, nor argues what a reasonable rate for this case would be. An appellant may not

merely announce a position and leave it up to this Court to discover the basis for the argument. *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto