

IN THE COURT OF APPEALS OF IOWA

No. 1-023 / 10-0642
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DIONDRE JAMES GROSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen Romano,
Judge.

Diondre James Gross appeals from his conviction for willful injury causing
serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, John P. Sarcone, County Attorney, and James Ward, Assistant County
Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

EISENHAUER, J.

Diondre James Gross appeals from his conviction for willful injury causing serious injury in violation of Iowa Code section 708.4(1) (2009). He contends the district court erred in proceeding with the trial in his absence without an adequate finding his absence was voluntary. In the alternative, Gross contends his trial counsel was ineffective in failing to request a continuance and file a motion for new trial.

Gross was charged with and ultimately convicted of willful injury causing serious injury following an incident in August 2009. During a late-night attempted exchange of custody of a child, an altercation occurred between Gross and his child's maternal stepfather, Raymond Freeman. Gross punched Freeman and later struck Freeman with his vehicle. Freeman's ear had to be surgically reattached and a fracture of his leg required a plate, two rods, and six screws to repair.

Trial commenced on March 1, 2010. Opening statements by the State and the defendant were completed and testimony was taken from three witnesses, including Mr. Freeman. Gross failed to appear after the first day even though a notice of self defense had been filed and his attorney indicated during opening statement he intended to testify. On the morning of March 2 the court waited until 9:45 and then made a record concerning Gross's absence. Gross's trial counsel detailed her efforts to reach him by phone and stated Gross had "mental health issues" and "was upset after leaving trial yesterday." Counsel then stated her belief, citing Iowa Court Rule 2.27(2), that "because trial has

commenced, even though this is a felony, that we must proceed without him.” Trial resumed without Gross present and on March 3, 2010, the jury convicted him.

Gross contends the court erred in continuing the trial outside of his presence without properly ascertaining whether his absence was voluntary. Iowa Court Rule 2.27(2)(a) provides: “In all cases, the progress of a trial shall not be prevented whenever a defendant, initially present: (a) Is voluntarily absent after the trial or other proceeding has commenced.” He argues the court had a duty to inquire about his mental health problems and whether they might provide a basis for finding his absence was not voluntary. Because Gross’s counsel consented to continuing trial in his absence, we conclude this issue was not preserved for our review. See *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) (holding rule requiring a defendant to make an objection at the earliest opportunity after the grounds for the objection become apparent in order to preserve error applies equally to constitutional issues).

In the alternative, Gross contends his trial counsel was ineffective in failing to preserve error. Specifically, he contends she should not have consented to continuing the trial outside his presence and should have filed a motion for new trial based on the trial proceeding in Gross’s absence.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show: “(1) counsel failed to perform an essential duty; and (2) prejudice resulted.” Normally ineffective-assistance-of-counsel claims are brought in postconviction relief actions. “We will address such claims on direct appeal only if we determine the development of an additional factual record would not be helpful and one or both of these elements can be decided as a matter of law.”

State v. Barnes, 791 N.W.2d 817, 822-23 (Iowa 2010) (citations omitted).

Because the record here is not adequately developed to determine whether counsel's assistance was ineffective, we preserve this issue for possible postconviction relief proceedings.

AFFIRMED.