

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WYATT ROBERT HAMPTON,

Defendant-Appellant.

UNPUBLISHED

September 29, 2000

No. 220069

Jackson Circuit Court

LC No. 98-089282 FH

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and assault and battery, MCL 750.81; MSA 28.276. The trial court sentenced defendant to five to fifteen years' imprisonment for the robbery conviction, and to nineteen days in jail for the assault conviction, with credit for all nineteen days served. Defendant appeals as of right. We affirm in part and reverse in part.

Defendant first contends that the trial court erroneously instructed the jury concerning his claim of right defense. Because (1) it appears from the trial transcript that the court in fact instructed the jury in the manner defendant on appeal suggests as correct, and (2) the trial court's claim of right instructions otherwise correctly apprised the jury of this defense's elements and the prosecutor's ultimate burden of proof, we find no error in the trial court's instructions. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998); *People v Karasek*, 63 Mich App 706, 710-713; 234 NW2d 761 (1975); CJI2d 7.5.

Defendant next argues that he received ineffective assistance of counsel. A successful ineffective assistance of counsel claim requires a defendant to show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999).

Defendant suggests that defense counsel erred by requesting against defendant's wishes an assault and battery jury instruction. In light of (1) the unanimous trial testimony, including defendant's, that defendant struck the victim and (2) the jury's verdict of guilty of the greater charge, we cannot conclude either that defendant inappropriately requested instruction regarding the lesser offense of assault and battery or that the jury likely would have acquitted defendant absent the assault and battery instruction. *Nimeth, supra*; *People v Thompson*, 69 Mich App 465, 466-468; 245 NW2d 93 (1976) ("Request for jury instructions is . . . an area within the unique competence of defense counsel."). Furthermore, we will not second guess defense counsel's strategic decision to "admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978).

Defendant lastly asserts that defense counsel should have challenged the jury pool. We find no basis for defendant's contention that defendant failed to properly challenge the jury pool's composition,¹ and absent defendant's citation of specific evidence or authority supporting his argument, we decline to consider it further. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

Although defendant did not raise before the trial court an alleged double jeopardy violation,² we nonetheless briefly consider this issue because it involves a significant constitutional question. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Because in this case the assault and battery charge represents a cognate lesser included offense of the unarmed robbery charge, *People v Bryant*, 80 Mich App 428, 432-434; 264 NW2d 13 (1978), the jury's finding of guilty of the greater charge precludes defendant's separate conviction of the lesser included offense. *People v Harding*, 443 Mich 693, 714, n 23; 506 NW2d 482 (1993). Thus, the assault and battery conviction should be vacated. *People v Campbell*, 165 Mich App 1, 7; 418 NW2d 404 (1987).

We affirm defendant's unarmed robbery conviction, but remand for ministerial correction of defendant's judgment of sentence to reflect the vacation of defendant's assault and battery conviction. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage

¹ While the caption to defendant's issue on appeal describes his challenge to defendant's assistance as relating to the composition of the jury pool, the text of defendant's brief argument on appeal only discusses the composition of the selected jury, to which the fair cross section requirement does not apply. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

² US Const, Am V; Const 1963, art 1, § 15.