# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 25, 2007 |
| v | No. 270876<br>Wayne Circuit Court |
| THURMON LEE NELSON,<br><br>Defendant-Appellant. | LC No. 06-002789-01 |

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted of felonious assault, MCL 750.82, following a bench trial. He was sentenced to two years' probation, the first 90 to 120 days at the Special Alternative Incarceration Boot Camp. Defendant appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The victim, Toney Stewart, was a business agent for the carpenter's union. Defendant worked as a carpenter and knew Stewart through a carpenter apprenticeship program and other contacts. Defendant spoke with Stewart about obtaining a check for a job defendant had completed the week prior. When he did not receive an immediate answer about when he would receive the check, defendant called the union hall and spoke with a dispatcher. Although their accounts differ, it is undisputed that defendant and Stewart subsequently engaged in a heated telephone discussion about the arrival of the check. The following morning, defendant went to the union hall where he encountered Stewart. The two argued again, went to separate parts of the building, but eventually ended up in the same elevator. During the elevator ride, defendant cut Stewart with a box cutter knife. Defendant contends that Stewart had threatened him and then attacked him in the elevator, and that he cut Stewart in self defense. Stewart disputes having threatened defendant in any fashion.

Defendant argues that the prosecution failed to present legally sufficient evidence to show beyond a reasonable doubt that defendant committed a felonious assault and did not act in self-defense. We disagree. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We review the evidence in the light most favorable to the prosecution to determine if it was sufficient to permit a trier of fact to reasonably

conclude that the defendant is guilty beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

Defendant claims that he did not have the intent required for assault as he was acting in self-defense. "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In the instant case, defendant admitted striking Toney Stewart, the victim, with a knife, satisfying the first two elements. Intent, the last element, may be inferred from all the facts and circumstances, *People v Hardrick*, 258 Mich App 238, 246; 671 NW2d 548 (2003), resolving all conflicts in the evidence in favor of the prosecution, *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). Stewart's testimony was that defendant swung his knife at Stewart without provocation. The intent to injure or place Stewart in reasonable apprehension of an immediate battery may be properly inferred from these circumstances. *Hardrick, supra* at 246.

There are differences between the accounts given by Stewart and defendant, and defendant argues this conflict raises reasonable doubt. Further, defendant claims that it is not reasonable to assume that defendant, who is five inches shorter and 75 pounds lighter than Stewart, would attack Stewart except in self-defense. For defendant to prove self-defense, he must show that he honestly and reasonably believed that his life was in imminent danger or that he was threatened with serious bodily harm. *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002). Once a defendant introduces evidence of self-defense, the prosecutor must disprove it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant's testimony was that Stewart attacked him and defendant responded, swinging his knife in self-defense. However, questions of credibility are left to the trier of fact, *Avant, supra* at 506, and all conflicts in the evidence must be resolved in favor of the prosecution, *Fletcher, supra* at 561-562. The trial court concluded that Stewart's testimony, that defendant attacked him after Stewart got in the elevator, was more credible than defendant's testimony. The absence of blood on defendant's white shirt lent further support to Stewart's version of events. Joseph Kanan's testimony was that there was "a lot of blood" in the elevator. Had events occurred as defendant testified, with Stewart holding defendant's face against Stewart's chest as defendant swung his knife, at least some of Stewart's blood would likely have gotten on defendant's shirt. When remaining testimonial conflicts are resolved in favor of the prosecution, defendant's argument that the testimony supports his account must fail.

Defendant also asserts defense counsel was ineffective for failing to introduce medical records at trial that support his self-defense claim. Defendant first mentions the issue in the argument section of his brief, rather than in his "Questions for Review" section as required by MCR 7.212(C)(5). Because defendant did not state this claim as a question raised on appeal, we may decline to consider the issue; nevertheless, we will address it. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Because defendant did not move for a new trial or request a *Ginther*[1] hearing, appellate review of the ineffective counsel assertion is limited to

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

mistakes apparent on the already-existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law, with findings of fact reviewed for clear error and questions of law reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To support his claim, defendant submits medical records with his brief on appeal. Because defense counsel did not seek to admit these records at trial, they are not part of the lower court record and may not be considered. See MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628-629 n 1; 584 NW2d 740 (1998). Nothing in the record supports defendant's contention, so the issue is waived. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Additionally, defendant neither cites any law nor points to anything from the record to support his claim. A defendant may not announce a position and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Defendant's ineffective assistance of counsel assertion is not supported.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder