STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 277818 Wayne Circuit Court
STEVEN CARTER, Defendant-Appellant.	LC No. 06-008572-01

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

MEMORANDUM.

Defendant appeals as of right his jury trial conviction of misdemeanor assault and battery, MCL 750.81. The trial court suspended sentence pending a determination by the Michigan Department of Corrections regarding defendant's apparent probation violation. We affirm.

Among other issues raised, defendant asserts that he was denied the effective assistance of counsel when his attorney requested the jury be instructed on assault and battery in addition to the charged offenses of second-degree criminal sexual conduct (CSC-II) and fourth-degree criminal sexual conduct (CSC-IV). Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to preserve the issue of ineffective assistance, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to prevail on an appeal based on ineffective assistance of counsel, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id*. In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *Id.* at 302-303. The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

We acknowledge at the outset that assault and battery, which is a specific intent crime, is a cognate lesser offense of fourth-degree criminal sexual conduct (CSC-IV), a general intent

crime. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). Consequently, a trial court could not typically consider the lesser offense of assault and battery. *People v Cornell*, 466 Mich 335, 354-355, 359; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 655 (2003). However, a thorough review of the lower court record indicates that, as part of their trial strategy, defendant and his counsel actively pursued assault and battery as an alternative for the jury to consider through argument in opening and closing statements. Although the record is not clear that defendant was present when his attorney initially requested an instruction on this uncharged offense, defendant was present throughout the trial when counsel argued that his conduct did not rise to the level of CSC-IV and constituted, at most, a misdemeanor assault and battery. Defendant was also clearly present in the courtroom when the trial court instructed the jury on assault and battery and failed to object. Because defense counsel, with the implicit consent of defendant, requested an instruction on the lesser offense of assault and battery, we find any error has been waived. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Williams*, 412 Mich 711, 714-715; 316 NW2d 717 (1982).

A party is precluded from seeking an action by the trial court and then challenging the trial court's grant of their request on appeal as erroneous. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). When a party seeks an instruction on a lesser cognate offense that was not included among the originally charged offenses, the prosecutor fails to object, and the court grants the request, this sequence of events serves to effectively amend the information to include the additional offense. *People v McKinley*, 168 Mich App 496, 506-507; 425 NW2d 460 (1988), citing *Williams, supra* at 714-715. Simply put, defendant gambled that placing the alternative of assault and battery before the jury would lessen the potential for his conviction of CSC-IV. Defendant won this gamble and cannot now cry error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

We have also reviewed in detail defendant's additional claims of error and find they have no merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray