STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

        Plaintiff-Appellee,

v

NORMAN TYRONE HODGES,

        Defendant-Appellant.

UNPUBLISHED
November 17, 2009

No. 286177
Wayne Circuit Court
LC No. 07-024228-FC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, as a lesser included offense of the charged crime of assault with intent to commit murder, MCL 750.83. Defendant was also convicted of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 42 months to ten years for the assault with intent to commit great bodily harm conviction, one to four years for the felonious assault conviction, and two years for the felony-firearm conviction.[1] Because we conclude that defendant was not denied the effective assistance of counsel, we affirm.

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to request the trial court to instruct the jury that the felonious assault charge was an alternative charge to the assault with intent to commit murder charge and the lesser included offense of assault with intent to commit great bodily harm. Defendant claims that counsel's failure to request the instruction prejudiced him because, had the jury only been allowed to convict him of assault with intent to commit murder or felonious assault, ten points could not have been scored under prior record variable 7, MCL 777.57, and the recommended minimum sentence range would have been 10 to 23 months, not 29 to 57 months. Because no *Ginther*[2] hearing was held below, our review of defendant's claim is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

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[1] The trial court subsequently vacated defendant's sentence for felonious assault.

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

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). "Counsel is not ineffective for failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (quotation omitted).

Defendant was not entitled to have the jury instructed that the felonious assault charge was an alternative charge to the assault with intent to commit murder charge and the lesser included offense of assault with intent to commit great bodily harm. See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007) ("The Court of Appeals erred in concluding that the defendant's convictions for both assault with intent to commit great bodily harm and felonious assault violated his double jeopardy protections. Because the crimes have different elements, the defendant may be punished for each.") (citations omitted); *People v Smith*, 478 Mich 292, 300, 316; 733 NW2d 351 (2007) (punishment for two crimes does not violate double jeopardy protections if each crime requires proof of an element that the other does not).[3] Accordingly, any request by counsel that the jury be instructed that the felonious assault charge was an alternative charge to the assault with intent to murder charge would have been without legal merit. Counsel was not ineffective for failing to make the futile request. *Mack*, *supra*. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

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[3] Although defendant argues that *Strawther* and *Smith* were wrongly decided, we are bound to follow the decisions of the Supreme Court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007).