STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 330623 Marquette Circuit Court
RANDOLPH SCOTT DIABO, Defendant-Appellant.	LC No. 15-053288-FH

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of being a prisoner in possession of a weapon, MCL 800.283(4). We affirm.

MCL 800.283(4) provides as follows:

> Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

During a search of defendant's prison cell, two corrections officers, Tyler Hattamer and Matthew Schroderus, discovered a pair of eyeglasses with the plastic on the sides pieces cut through. These eyeglasses constitute the "weapon" or "implement" defendant was convicted of possessing. On appeal, defendant argues that there was insufficient evidence to convict him of the charged offense, a challenge we review de novo on appeal. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). Evidence is sufficient to support a criminal conviction if, when viewed in a light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Hattamer testified that during a search of defendant's cell for contraband, he found a broken pair of eyeglasses with the plastic (temple) covers on the end of the side pieces cut down all the way to the metal underneath. He stated that when he pulled the plastic he observed that it had a pointed metal end, and thought that it was some sort of weapon that could possibly harm

anyone. Schroderus conducted the search with Hattamer and testified that he observed that the plastic ends of the glasses appeared to have been cut through, and that when pulled off, exposed pointed ends on both sides of the glasses. Schroderus stated that the glasses appeared to be an implement that could be used to injure another person, a sentiment echoed by Michigan State Police Detective Sergeant Jeff Marker. Marker testified that with the plastic ends removed, the glasses could be used to injure by sticking the temples into someone's jugular vein, in between a person's ribs and causing the victim's lungs to collapse, or stabbing someone repeatedly.

Marker also noted that in "the past seventeen weapons cases, six of them have actually been eyeglasses. So it's actually a pretty common weapon in the prison because . . . it's issued to them." He further explained: "[T]hey do the same thing that's been done here where the earpiece has been scored and removed to expose that sharp end." And when asked if a sharpened toothbrush would be a more effective weapon, Marker responded, "This would push into somebody easier, I would think, because it's a sharper point, and it's narrower."

It was established that defendant's eyeglasses were issued by the Department of Correction and that he was authorized to have them in his possession. But once they had been modified, they also constituted "a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment." Authorization to have a particular item does not mean that a prisoner has authorization to have a modified version of the item. When the character of the item has been altered to the point where it can serve as a weapon or an implement that could be used to injure someone, any authorization for the original use does not insulate the holder from MCL 800.283(4).

Defendant also argues that trial counsel was ineffective for failing to request a jury instruction on the definition of a weapon. Because this claim of error was not raised in a motion for a new trial or an evidentiary hearing filed below, this Court's review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, the defendant must show (1) that counsel's performance fell below the objective standard of reasonableness under the prevailing professional norms, and (2) that there is reasonable probability that but for the counsel's error, the result of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 699; 821 NW2d 288 (2012). A defendant must overcome a strong presumption that counsel's tactics constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d (2002). "This Court will not substitute its judgment for that of counsel regarding matters of strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

The trial court instructed the jury that the prosecution must prove, among other things, that "defendant possessed or had under his control a weapon or other implement," and "the weapon or other implement could be used to injure a prisoner or another person or to assist a prisoner in escaping from imprisonment." Defendant argues that trial counsel should have requested that the court instruct the jury on the definition of weapon, using M Crim JI 11.19:

> (1) A dangerous weapon is any object that is used in such a way that is likely to cause serious injury or death.

(2) Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that is likely to cause serious physical injury or death, it is a dangerous weapon.

(3) You must decide from all of the facts and circumstances whether the evidence shows that the _____ in question was a dangerous weapon.

Defendant's proposed jury instruction deals with the "definition of a dangerous weapon" while the plain language of the statute requires only "a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment." MCL 800.283(4). A weapon is "something (as a club, knife, or gun) used to injure, defeat, or destroy." *Merriam-Webster's Collegiate Dictionary* (11th ed). An implement is a device that "serves as an instrument or tool." *Id*. Thus, unlike the model jury instruction, which concerns a "dangerous weapon" that could "cause serious injury or death," MCL 800.283(4) prohibits the possession of any "weapon or other implement" which could be used to injure someone or assist a prisoner to escape. This Court "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (internal citations and quotation marks omitted). The jury could find that the modified glasses were a weapon or an implement that could be used to injure someone. The trial court did not err by instructing the jury in accordance with the plain text of the statute.

"Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Read as a whole, the trial court's instructions to the jury in this case fairly presented the triable issues. *Id*. As discussed, a jury instruction concerning "dangerous" weapons was inapplicable; consequently, a request by counsel to give such an instruction would have been meritless. Trial counsel is not ineffective when failing to advocate a meritless position. See *Snider*, 239 Mich App at 425.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause