

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 224668

Marquette Circuit Court

LC No. 99-035719-FH

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a prison employee, MCL 750.197c, and was sentenced as a second habitual offender to two to six years' imprisonment, MCL 769.10. We affirm.

Defendant first argues that the trial court abused its discretion when it failed to give a requested jury instruction on assault and battery. We disagree. This Court reviews claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Further, whether the facts or evidence support the giving of a requested instruction is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

A trial court must give a requested misdemeanor instruction if the instruction is supported by a rational view of the evidence adduced at trial unless undue confusion, a violation of due process, or some other injustice would occur if the instruction was given. *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). Five factors are considered to determine if a requested misdemeanor instruction should be given, *People v Steele*, 429 Mich 13, 19-22; 412 NW2d 206 (1987): First, the party must request the specific misdemeanor instruction; second, an appropriate relationship must exist between the charged offense and the relevant misdemeanor; third, the misdemeanor instruction must be supported by a rational view of the evidence; fourth, the defendant must have adequate notice of the misdemeanor charge if the prosecutor requests the instruction; and fifth, the requested instruction cannot result in injustice or undue confusion. After reviewing the evidence adduced at trial, we conclude that the trial court did not abuse its discretion by denying defendant's requested instruction on assault and battery because the instruction was not supported by a rational view of the evidence.

Defendant next argues that his two- to six-year prison term was disproportionate. We disagree. This Court reviews sentences imposed on habitual offenders for an abuse of discretion.

People v Hansford (After Remand), 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995).

The policy of this state favors individualized sentencing for every defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). Under the principles of proportionality, a defendant's sentence must be proportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Sentencing guidelines do not apply to the sentencing of habitual offenders. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). A trial court does not abuse its discretion by imposing a sentence on an habitual offender that is within the statutory limits where his underlying felony and previous felonies show that he cannot conform his conduct to the law. *Hansford, supra* at 326.

Defendant's claim that his sentence is disproportionate is without merit because his two-to six-year prison term is within the statutory limits and is, therefore, presumed proportionate. *Id.* Further, defendant was in prison for felony carjacking at the time he committed the assault in this case and has committed thirty-six major misconducts while in prison – of which he has six convictions ranging from assault on a fellow prisoner to possession of dangerous contraband to threatening behavior toward a prison officer. In light of these facts, including that this is defendant's second felony conviction, defendant has shown that he cannot conform his behavior to the law. Therefore, defendant's sentence is proportionate to the specific offense and offender. *Id.*

Defendant next argues that he was denied effective assistance of counsel. We disagree. Whether defendant was denied the effective assistance of counsel is a constitutional question, which this Court reviews de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

To establish a claim for ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that there is a reasonable probability that, but for the deficiency, the jury would not have found the defendant guilty. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

At defendant's motion for new trial hearing, defendant asserted that his attorney was ineffective because he failed to (1) argue that videotapes presented at trial were tampered with;¹ (2) consult with defendant before and during voir dire; (3) prepare defendant for cross-examination; (4) discuss trial strategy; and (5) object more often during trial. On appeal, defendant argues that this case hinged on the witnesses' credibility – shown by way of his acquittal of the second charge against him for assaulting another prison employee. However, defendant's appellate brief simply lists the alleged deficiencies raised during his motion for new trial hearing and argues merely that trial counsel's failure to undertake unidentified actions

¹ The videotapes presented at trial did not show the assault in this case. Further, nothing on those tapes could have changed the outcome of defendant's trial.

requested by defendant would have changed the outcome of the trial. Therefore, this issue has been abandoned and review waived on appeal because defendant failed to argue the merits of how his trial attorney's performance fell below an objective standard of reasonableness and how, but for the alleged deficiencies, the jury would have found defendant not guilty. *People v Cantor*, 197 Mich App 550, 565; 496 NW2d 336 (1992). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis of his claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1998).

In any event, defendant was not denied effective assistance of counsel because there was sufficient evidence to prove beyond a reasonable doubt that defendant, a prisoner lawfully imprisoned at the Marquette prison, assaulted a fully uniformed prison officer when he jumped on the officer's back and struck the officer in the face with his fist. MCL 750.197c.

Affirmed.

/s/ Richard Allen Griffin

/s/ Harold Hood

/s/ David H. Sawyer