

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY CLARK,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 248824
Gratiot Circuit Court
LC No. 02-004391-FH

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction of assault of a prison employee, MCL 750.197c, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged as a result of an allegation that he spit on the shirt of complainant, a corrections officer. In his opening statement, defense counsel conceded that defendant was legally incarcerated in state prison and was aware that complainant was a corrections officer. Complainant and witnesses testified that defendant made a profane comment and spit on complainant's shirt. Defendant admitted that he made a comment using foul language, but denied that he spit at complainant.

The trial court instructed the jury that in order to convict defendant, it was required to find that the prosecution proved beyond a reasonable doubt that: defendant was lawfully confined at the correctional facility; defendant assaulted complainant; and defendant knew that complainant was a corrections employee. The trial court instructed the jury that assault was a specific intent crime and could not happen by accident. Defense counsel expressed satisfaction with the instructions.

Shortly after beginning deliberations, the jury informed the trial court that it was unable to reach a unanimous verdict. The trial court observed that defendant had conceded a number of elements of the charged offense, including that he was lawfully confined in a state corrections facility, and that he knew that complainant was a corrections officer. The trial court instructed the jury that the only element still in dispute was whether defendant assaulted complainant by spitting on him. Defense counsel expressed satisfaction with the court's instruction.

A directed verdict of guilt in a criminal trial is forbidden by the Sixth and Fourteenth Amendments. US Const, Ams VI, XIV. An instruction that amounts to a directed verdict, or otherwise improperly invades the province of the jury, constitutes error mandating reversal. *People v Gaydosh*, 203 Mich App 235, 237-238; 512 NW2d 65 (1994).

Defendant argues that the trial court committed reversible error by effectively directing a verdict and by misstating the law of assault in the supplemental instruction. We disagree and affirm. Waiver constitutes the intentional abandonment of a known right. Forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defense counsel stated that he had no objection to the supplemental instruction, and that he approved it. By expressly approving the instruction, defendant has waived the issue on appeal. *Carter, supra*.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski