

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY SHAWN LUSTIG,

Defendant-Appellant.

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UNPUBLISHED

April 10, 2008

No. 272994

Jackson Circuit Court

LC No. 06-003382-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and prisoner in possession of a weapon, MCL 800.283(4). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 10 to 20 years for the assault conviction and 8 to 15 years for the possession of a weapon conviction. He appeals as of right. We affirm defendant's convictions and sentences, but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for further consideration of this issue.

Defendant was convicted of assaulting Keith Faber, Jr., at the Parnell Correctional Facility where defendant and Faber were both prisoners at the time.

I. Sentencing Issues

Defendant first argues that resentencing is required because the trial court improperly scored 25 points for offense variable 19 of the sentencing guidelines. We disagree.

We review the trial court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports the trial court's score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Twenty-five points should be scored for OV 19 when "[t]he offender by his or her conduct threatened the security of a penal institution or court." MCL 777.49. The assault occurred in a prison yard at a time when at least a portion of the general population was present. Defendant's possession of a weapon in the prison yard, and his assaultive conduct toward another inmate, threatened the security of the institution. Indeed, at least three corrections

officers responded, thereby diverting staff resources from other areas. The trial court did not err in scoring 25 points for OV 19.

Defendant also argues that the trial court erred in ordering him to pay \$1,056 to reimburse the county for his court-appointed attorney fees without considering his ability to pay. Plaintiff agrees that remand for reconsideration of this issue is necessary. A defendant may be required to reimburse the county for the cost of a court-appointed attorney, but the court must order a fee that bears a relationship to the defendant's foreseeable ability to pay. *People v Dunbar*, 264 Mich App 240, 251, 254-255; 690 NW2d 476 (2004). A trial court's pronouncement of the costs without consideration of the defendant's present and future ability to pay is insufficient and warrants a remand to the trial court. *Id.* at 255. The sentencing court need not conduct a formal evidentiary hearing. *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007).<sup>1</sup> The record in this case is devoid of any indication that the trial court considered defendant's ability to pay. Therefore, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for reconsideration of this issue. On remand, if the trial court determines that reimbursement is appropriate, it must state the amount and repayment terms in a separate order. *DeJesus, supra* at 997; *Dunbar, supra* at 256.

## II. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to request a lesser offense instruction on simple assault. Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*<sup>2</sup> hearing, this Court's review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Defendant must overcome the presumption that counsel's conduct could be considered sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Here, defendant has failed to overcome the presumption that defense counsel elected to strive for acquittal by depriving the jury of the option of convicting defendant of a lesser assault offense. Indeed, defendant denied initiating any altercation and alleged that his responding conduct did not rise to the level of great bodily harm. The strategy employed by the defense attorney mirrored the testimony proffered by defendant. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.*

## III. Defendant's Standard 4 Brief

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<sup>1</sup> Although this holding was rendered in an order, not an opinion, an order of the Supreme Court is binding precedent when the rationale can be understood. See *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4.

Defendant first asserts that he was denied a fair trial because of improper statements by the trial court and the prosecutor. However, he does not state what evidence the trial court allegedly misrepresented or how it did so, what law the trial court allegedly misstated, or what statements the prosecutor allegedly made that were improper or prejudicial. An appellant who fails to adequately brief an issue has abandoned it on appeal. *People v Martin*, 271 Mich App 280, 334; 721 NW2d 815 (2006). Moreover, to the extent that defendant attempts to assert an ineffective assistance of counsel claim based on counsel's failure to object to the unidentified statements, he has failed to carry his burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also asserts that defense counsel was ineffective for failing to file a witness list, thereby leading to the exclusion of several defense witnesses. We find no merit to this claim. There is no indication in the record that the trial court prohibited defendant from calling any witness. Defense counsel stated at a pretrial hearing that he did not file a witness list because any witness he might call was already named in the prosecutor's witness list. Defendant does not identify any witness who he believes was excluded from testifying, or the substance of any witness's proposed testimony. Defendant also asserts that defense counsel failed to investigate and prepare for trial, but does not specify how. Again, defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra* at 6. In the absence of any factual support for defendant's claim, his ineffective assistance of counsel claim fails.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Michael J. Talbot  
/s/ Deborah A. Servitto