STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2009
v	No. 279861 Gratiot Circuit Court
JOBEY L. HENDERSON, Defendant-Appellant.	LC No. 05-005008-FH

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault of a prison employee, MCL 750.197c(1). He was sentenced as a fourth habitual offender, MCL 769.12, to serve four to 15 years in prison, consecutive to any sentences he was already serving. We affirm.

I. Facts

On March 25, 2005, defendant was an inmate in the St. Louis Correctional Facility. Officer Charles Cowling testified that he first noticed defendant in the programs building of the prison, getting resized for new inmate clothing. Cowling later saw defendant at the inmate bathroom, putting orange shorts and green sweat pants on under his inmate clothing. Cowling told defendant that it was "against policy to be wearing orange shorts or anything else underneath his [inmate clothing]." Defendant replied with expletives directed toward Cowling, and then defendant threatened to kill Cowling and another corrections officer. Cowling immediately radioed for assistance because defendant needed to be put in the segregation unit due to his threatening behavior. Defendant then said, "If I'm going to the hole, I'm going for real," he hit Cowling twice with his fist on the right side of Cowling's neck, and he ran down the hall.

II. Jury Instructions

Defendant first argues that the trial court erred by not instructing the jury on the lesser included offense of assault and battery, MCL 750.81. We disagree.

We review issues of law regarding jury instructions de novo, but we review for an abuse of discretion "a trial court's determination whether a jury instruction is applicable to the facts of the case." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A necessarily lesser included offense is one that must be committed as part of the greater offense, making it impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). "'A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a *disputed* factual element that is not part of the lesser included offense and a rational view of the evidence would support it.'" *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007) (citation omitted; emphasis added). To be supported by a rational view of the evidence, the evidence must justify a lesser included offense instruction. *People v Martin*, 271 Mich App 280, 289; 721 NW2d 815 (2006).

We conclude that a rational view of the evidence did not support instructing the jury on assault and battery, MCL 750.81. To be found guilty of assaulting a prison employee, the prosecution was required to establish (1) that defendant was in custody, and (2) that he committed an assault (3) on an employee or custodian, (4) knowing the person was an employee or custodian. Defendant asserts that if he did not know that Cowling was a corrections officer, then the jury might have found him only guilty of assault and battery. Defendant attempted to call his knowledge into question by asking Cowling whether he was wearing a tie on the day of the assault. However, Cowling testified that he was at a designated podium for guards, and that, absent the tie, he was wearing the standard uniform for a corrections officer at the facility: a gray shirt with black epaulets and a Michigan Department of Corrections insignia on the left shoulder and a flag on the right shoulder, and black paints. Cowling also wore his nametag, had a personal protective device, and had a radio strapped to his hip with a microphone attached to his shoulder. Accordingly, no rational view of the evidence would have supported the inference that defendant did not know that Cowling was a corrections officer. Therefore, the trial court's failure to give the assault and battery instruction was not an abuse of discretion. See *Gillis*, *supra* at 113.

III. Offense Variables 3 and 19

Defendant also argues that offense variables 3 and 19 were improperly scored because the trial court based those scores on factual findings that were not submitted and proved to a jury beyond a reasonable doubt. Given Michigan's indeterminate sentencing scheme, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), did not apply. *People v Drohan*, 475 Mich 140, 159-161, 155, 156; 715 NW2d 778 (2006). Thus, the trial court did not err by engaging in judicial fact-finding to score the offense variables for purposes of determining defendant's minimum sentence. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007).

IV. Defendant's Standard 4 Brief

Next, it appears defendant is claiming that his punishment within the prison system for his actions, coupled with the sentence imposed for this crime, violated his constitutional right protecting him against double jeopardy. However, this argument is without merit. "For double jeopardy protections to apply, defendant must first have been put in jeopardy by a criminal prosecution in a court of justice." *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357

(1996). Any punishment that the Michigan Department of Corrections imposed for his behavior did not result from a criminal prosecution in a court of justice. Accordingly, there are no double jeopardy concerns.

Likewise, defendant's argument that the prosecutor committed prosecutorial misconduct is also without merit. Defendant asserts that the prosecutor did not provide requested documents, but he does not provide any support for this assertion. We find no record evidence that defendant was denied any request. Defendant also alleges that the prosecutor called him a rapist and a molester. Again, defendant does not cite to the record and we find no such reference. Defendant has provided no evidence to support this allegation, and "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant further argues that he was denied a fair trial because he was not allowed to present certain defenses. However, defendant does not explain or cite the record to show how the trial court denied him such an opportunity. Again, he may not leave that task to this Court. *Mitcham*, *supra* at 203.

Next, defendant argues that he received ineffective assistance of counsel because his trial counsel did not help him perform research and did not make himself available to answer defendant's legal questions. But the record indicates that counsel did meet with defendant on multiple occasions, and that the trial court specifically set aside a particular day each week leading up to trial for defendant to speak by telephone with his counsel and have any questions answered. Defendant failed to support his argument that counsel's performance fell below an objective standard of reasonableness under professional norms. See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Accordingly, he has not overcome the presumption that counsel provided effective assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Finally, defendant argues that he is mentally ill and has not received the proper mental health treatment during his incarceration. Defendant argues that MCL 768.36 requires that he receive such treatment. However, this statute only applies where a defendant is found guilty but mentally ill or enters a plea to that effect. Defendant was not found guilty but mentally ill and no plea to that effect was ever entered. Rather, defendant argued in the trial court that he was competent to stand trial and elected to stand mute so that the trial court would enter a plea of not guilty on his behalf.[1]

[1] We note that defendant raises several other arguments in his Standard 4 Brief. However, defendant has abandoned these arguments on appeal by not identifying them in his statement of questions presented, *Michigan Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; ___ NW2d ___ (2008), by giving them cursory treatment in his brief, *In Re Application of Indiana Michigan Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007), and by not properly (continued…)

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey

(…continued)

supporting them with authority, *Woods v SLP Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).