# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 10, 2009 |
| v | No. 285174<br>Wayne Circuit Court |
| VANDEZ MAURICE WRIGHT,<br><br>Defendant-Appellant. | LC No. 07-024618-FH |

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82.[1] Defendant was sentenced to 4 to 15 years' imprisonment. We affirm.

Defendant argues that the trial court erred when it failed to instruct the jury regarding the definition of a dangerous weapon. We disagree.

"To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates," *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); MCR 2.515(C), " . . . stating specifically the matter to which the party objects and the grounds for the objection," *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999), citing MCR 2.516(C). Defense counsel did not object to the trial court's jury instructions. In fact, after instructing the jury regarding the elements of each offense, the trial court asked, "Has the court omitted any instructions?" In response, defense counsel stated, "No, your Honor."

"Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver occurs when a defendant "intentional[ly] relinquish[ed] or abandon[ed][] a known right." Waiver extinguishes all error. *Carter, supra* at 215 (citations omitted). See also, *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524

[1] Defendant was originally charged with four counts: (1) unlawful imprisonment, MCL 750.349(b), (2) assault with intent to do great bodily harm less than murder, MCL 750.84, (3) assault with a dangerous weapon (felonious assault) (broom), MCL 750.82, and (4) assault with a dangerous weapon (felonious assault) (belt), MCL 750.82. However, defendant was acquitted of counts one through three, but convicted of count four.

(2001). "A defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal." *Carter, supra* at 214 (citation omitted). As a result, defendant's issue is waived.

Defendant argues next that the evidence was insufficient to support his conviction. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution. The Court must determine "whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

According to the complainant's testimony, defendant straddled her and placed his hands around her throat. When the complainant ran toward the front door defendant grabbed her and dragged her back into her bedroom by her hair. Defendant and the complainant continued to argue. Defendant then took off his belt and began to strike the complainant with the buckle end of the belt. The complainant further testified that defendant told her to stop screaming because someone would hear her and call the police. Defendant also told the complainant that if he went to jail, he was going to kill her.

However, defendant testified that he was not wearing a belt that day, and that he had never seen that particular belt before. Defendant admitted that he argued with the complainant verbally, but he denied that a physical altercation took place. The complainant's testimony, if believed, was sufficient to establish that she was in reasonable apprehension of an immediate battery. Moreover, Officer Dan Jones's testimony established that the complainant had sustained physical injuries. Officer Jones also testified regarding the nature of the complainant's injuries. Officer Jones recovered a belt and belt buckle from the floor in the bedroom where defendant was found. The shape of the belt buckle matched impressions on the complainant's skin.

On cross-examination, defendant testified he and the complainant were sexually intimate the night before the incident. However, defendant did not recall seeing any "marks" on her body when she took her clothes off. A belt can become a dangerous weapon, when "use[d] against another in furtherance of an assault." *People v Lange*, 251 Mich App 247, 256; 650 NW2d 691 (2002). Viewing the evidence in the light most favorable to the prosecution, the evidence is sufficient to support defendant's conviction.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel did not object to the trial court's failure to instruct the jury regarding the definition of a dangerous weapon. We disagree.

"A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defendant did not move for a new trial or an evidentiary hearing. Therefore, this Court's review of defendant's issue is "limited to the existing record." *Snider, supra* at 423. "Whether a

defendant has been denied the effective assistance of counsel is a mixed question of law and fact." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient" and thus there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *Riley, supra* at 140. "[T]o demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley, supra* at 140 (citations omitted). Counsel's performance should not be assessed with the benefit of hindsight. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel." *People v Mitchell*, 454 Mich 145, 171; 560 NW2d 600 (1997); see, also, *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Counsel is not ineffective for failing "to advocate a meritless position."" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), (citation omitted).

Trial counsel based his defense not on whether a belt or a broom was a dangerous weapon, but on the theory that the entire charge was a fabrication. A review of the transcript reveals that the complainant testified that the belt buckle and the broom were used to strike her on the chest and elsewhere. Officer Hinojosa testified that the imprint on the complainant's chest matched a buckle found in her home. Defendant asserted that there was no assault with any item. The failure of defense counsel to request a jury instruction defining a dangerous weapon when that definition was not an issue in his defense was a matter of trial strategy. Therefore, defense counsel's performance was not deficient, and, consequently, did not violate defendant's Sixth Amendment right to the effective assistance of counsel.

Defendant argues finally that the trial court erred in sentencing him as a habitual offender. We disagree.

Ordinarily, this Court will not consider an issue that is not set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Defendant did not present this issue in his statement of questions presented. Thus, defendant has not properly presented this issue on appeal. In any event, "[i]n order to properly preserve an issue for appeal, a defendant must 'raise objections at a time when the trial court has an opportunity to correct the error. . . .'" *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). At sentencing, defendant did not challenge the trial court's application of the habitual offender act. Rather, defendant asked the court for mercy in sentencing because he had been the product of a broken home. Ultimately, the trial court sentenced defendant to 4 to 15 years' imprisonment. Therefore, the issue was not preserved below. As a result, we will review the issue for plain error. Defendant "must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774.

Pursuant to MCL 769.12(1), "a person . . . [previously] convicted of any combination of [three] or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony," may be sentenced as a habitual offender. According to defendant's presentence investigation report (PSIR), defendant had been convicted of nine prior felonies at the time he committed the instant offense (felonious assault). Therefore, the trial court did not err in sentencing defendant as a fourth habitual offender.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens