

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

TAMMY LYNN SPEERS,

Defendant-Appellant.

No. 300700
Ottawa Circuit Court
LC No. 10-034674-FH

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of concealing or harboring a felon, MCL 750.199(3). Defendant was sentenced to 12 months' probation and 80 hours of community service. For the reasons stated in this opinion, we affirm.

Defendant's conviction stems from her actions before and during the arrest of Ryan Brock. Brock was arrested in defendant's apartment after the Grand Haven Police Department learned that Brock was there. Defendant, who was aware that a bench warrant charging a felony had been issued for Brock's arrest, allowed Brock to enter her apartment on the day of his arrest. When police officers arrived at defendant's apartment to arrest Brock, she did not respond to the officers and did not allow them into her apartment. The officers returned with a warrant to enter defendant's apartment and arrest Brock. Defendant again did not respond when the officers knocked on her door after returning with the warrant. Consequently, the officers broke down defendant's door and arrested Brock in defendant's bedroom. Defendant was charged and convicted of concealing or harboring a felon for her actions. Defendant appeals her conviction and maintains that she intended to allow the police into her apartment, but Brock restrained her and prevented her from going to the door.

Defendant first argues that the jury instructions were confusing and misleading due to the trial court's failure to give special instructions. Specifically, defendant argues that the trial court should have informed the jury that she had to hide defendant from view in order to "conceal" him within the meaning of the statute. Defendant also argues that the trial court erred by failing to instruct the jury regarding the constitutional right of a citizen to deny entry to a police officer without a warrant.

Because defendant did not object to the jury instructions or request additional instructions during trial, we review defendant's alleged instructional errors for plain error affecting

defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has the burden of demonstrating that a plain error affecting her substantial rights occurred. *Id.* Substantial rights are affected when defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.*

The trial court's instructions must clearly present the case and the applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *Id.* A trial court errs by giving a misleading or erroneous jury instruction. *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000). An instruction is erroneous and misleading if it omits an element of the crime. *People v Fennell*, 260 Mich App 261, 277; 677 NW2d 66 (2004). Special jury instructions must be requested by a party; a trial court does not err by failing to sua sponte provide special jury instructions. See MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused"); *People v Allen*, 466 Mich 86, 87; 643 NW2d 227 (2002) (Concluding that the trial court's failure to sua sponte define reasonable doubt was not error when the instruction was not requested and the given jury instructions presented the applicable law); *People v Caldwell*, 20 Mich App 224, 230; 173 NW2d 751 (1969) (Concluding that if defense counsel was not satisfied with the given jury instructions "it was his privilege and his duty to have asked the court for further instructions, and, failing in this, he is estopped from asserting error").

In this case, the trial court instructed the jury on the elements of concealing or harboring a felon pursuant to MCL 750.199(3). The trial court told the jury that the prosecution had to prove three elements beyond a reasonable doubt. The trial court stated the jury must find:

First, that on April 3, 2010, Ryan Brock was a person subject to arrest on a bench warrant in a felony case. The second element is that at that time Tammy Speers knew that Ryan Brock was a person subject to arrest on a bench warrant in a felony case. And, three, that Tammy Speers knowingly or willfully concealed Ryan Brock or harbored Ryan Brock for the purpose of concealment.

Defendant did not request any special instructions, and when the trial court asked if either party objected to the instructions defense counsel stated "we're satisfied."

We find that defendant has failed to establish plain error affecting her substantial rights in regard to the jury instructions. Defendant is guilty of concealing or harboring a felon if defendant "knowingly or willfully conceals or harbors for the purpose of concealment from a peace officer a person who is the subject of . . . [a] bench warrant in a criminal case if the underlying crime charged is a felony." MCL 750.199(3). Accordingly, the trial court's jury instructions were not confusing or misleading because the instructions clearly included all the elements of the charged crime. *Fennell*, 260 Mich App at 277.

Further, it was not necessary for the trial court to instruct the jury regarding the meaning of the term "conceal" because a trial court is not required to define words with ordinary meanings, and "when a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension and there will be no error warranting reversal as a result of a

trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

Finally, because defendant failed to request a special instruction regarding a citizen's constitutional rights, she is not entitled to reversal based on the trial court's failure to sua sponte provide a special instruction when the trial court's given instructions fairly presented all the elements of the charged crime and the proper burden of proof. See *Allen*, 466 Mich at 87. Consequently, the trial court's failure to sua sponte provide special instructions to the jury was not error.

Defendant next argues that defense counsel was ineffective for failing to request special jury instructions.

Because no evidentiary hearing was held regarding defendant's ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 312 (quotation and citation omitted).

We conclude that defendant has failed to demonstrate defense counsel was ineffective for failing to request an instruction defining "conceal" because the term is within the common understanding of the jury. Defense counsel is not ineffective for failing to make a frivolous request. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, because the term "conceal" is one that can be commonly understood by a jury, it cannot be said that but for defense counsel's failure to request an instruction defining the term, there is a reasonable probability that the result of the proceedings would have been different. Accordingly, defendant has not met her burden of demonstrating ineffective assistance of counsel.

In regard to defense counsel's failure to request an instruction on constitutional rights, defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. In this case, defendant has not overcome the presumption that defense counsel's failure to request an instruction regarding the constitutional right of a citizen to deny entry to a police officer without a warrant was reasonable trial strategy. During trial, defendant presented the defense that she was prevented from allowing the police to enter her apartment and arrest Brock because she was physically restrained by Brock. Accordingly, the special instruction that was not requested was not relevant to defendant's theory of the case. A trial court is only required to provide instructions regarding theories that are supported by the evidence. *McGhee*, 268 Mich App at 606. The evidence that was presented in this case does not support defendant's claim on appeal that the jury might have convicted her for exercising her constitutional rights, specifically in light of defendant's theory of the case and the fact that the

police had a warrant to enter defendant's apartment to arrest Brock. Because the special instruction was not supported by the evidence, the trial court would not have been obligated to give it even if it had been requested; therefore, defense counsel was not ineffective because counsel is not required to make a futile request and there is not a reasonable probability that but for counsel's failure to request the instruction the result of the proceedings would have been different. *Darden*, 230 Mich App at 605; *Pickens*, 446 Mich at 312. Consequently, defendant has not overcome the presumption that she received effective assistance of counsel.

Defendant also challenges the sufficiency of the evidence. Defendant argues that the evidence produced at trial was insufficient to sustain her conviction because Brock admitted while testifying that he held defendant down to prevent her from answering the door. Accordingly, defendant maintains that there is no evidence that she willfully concealed Brock.

We review challenges to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When we review a claim of insufficient evidence, "we examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). It is up to the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

As previously discussed, defendant is guilty of concealing or harboring a felon if defendant "knowingly or willfully conceals or harbors for the purpose of concealment from a peace officer a person who is the subject of . . . [a] bench warrant in a criminal case if the underlying crime charged is a felony." MCL 750.199(3).

We conclude that when the evidence in this case is viewed in a light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt that defendant committed the offense of harboring or concealing a felon. First, the prosecution presented uncontroverted evidence that a bench warrant had been issued for Brock's arrest, and that the underlying charge for the warrant was a felony. Defense counsel conceded this point during closing argument and defendant concedes the fact in her brief on appeal. Second, the prosecution presented evidence to show that defendant knew that Brock was the subject of such an arrest warrant. Defense counsel also conceded this point during closing argument and defendant admits knowledge of the arrest warrant in her brief on appeal. Third, the evidence produced at trial was sufficient to show that defendant knowingly and willfully concealed Brock from the police. Defendant's neighbors testified that they saw Brock at her apartment after the warrant for Brock's arrest had been issued. Her neighbors also testified that they saw Brock enter defendant's apartment on the day of his arrest, and that it appeared that defendant had driven Brock to her apartment. Additionally, defendant failed to allow the officers into her apartment after they returned with a valid warrant for Brock's arrest, and the officers had to knock down defendant's door to gain entry.

Defendant's attempt to refute the evidence of concealment at trial by presenting evidence that Brock prevented her from opening the door when the police arrived does not establish that there was insufficient evidence to support her conviction. In reviewing a sufficiency challenge,

we must resolve evidentiary questions in support of the jury's verdict. *Ericksen*, 288 Mich App at 196. Further, the jury reasonably could have determined that Brock was not a credible witness. *Wolfe*, 440 Mich at 514-515. Accordingly, the prosecution presented sufficient evidence to convict defendant beyond a reasonable doubt because a rational jury could have found that defendant knowingly or willfully concealed Brock for the purpose of hiding him from the police.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering