

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 31, 2011

v

TIMOTHY WAYNE PUTMAN,
Defendant-Appellant.

No. 296672
Gratiot Circuit Court
LC No. 09-005856-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a prison employee, MCL 750.197c, and sentenced, as a fourth habitual offender, MCL 769.12, to serve 76 to 240 months' imprisonment consecutive to his existing sentence. Defendant appeals by right and we affirm.

Defendant argues that the trial court committed plain error by failing *sua sponte* to instruct the jury on provocation, and that his trial counsel was ineffective for failing to request an instruction on provocation or the lesser included offense of assault and battery. We disagree.

Because defendant failed to preserve this instructional issue, our review is for plain error affecting substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Where plain error is shown, a "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." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (chart).

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The lack of an instruction on provocation was not plain error. Provocation is what mitigates an intentional homicide from murder to voluntary manslaughter. *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346 (1991). Defendant fails to explain how a provocation instruction is in any way applicable to the charge of assaulting a prison employee. Because the

provocation instruction was inapplicable to the charged offense, it was objectively reasonable for defendant's counsel not to request it. For the same reasons, there is not a reasonable probability that, had the trial court given the provocation instruction, the result of the proceedings would have been different. For these reasons, defendant has failed to establish his claim of effective assistance of counsel. *Rodgers*, 248 Mich App at 714.

Defendant also briefly argues that trial counsel "should have requested an instruction on . . . a lesser offense such as simple assault and battery." An instruction on the lesser offense of assault and battery was not warranted because no elements differentiating the charged offense from that of the lesser offense were disputed; a rational view of the evidence would not support convicting on the lesser while acquitting on the charged offense. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *Lakin v Stine*, 358 F Supp 605, 618-619 (ED Mich, 2005). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also raises a number of arguments in a Standard 4 brief. They were without merit. They are without merit in any event. It is well settled that the Fifth Amendment Grand Jury Clause does not extend to the states through the Fourteenth Amendment. *People v Sierb*, 456 Mich 519, 526; 581 NW2d 219 (1998); *Williams v Haviland*, 467 F3d 527, 531-533 (CA 6, 2006). Michigan follows a dual system that criminal charges may be initiated by either a grand jury indictment or through an information. See MCL 767.2; *People v Glass (After Remand)*, 464 Mich 266, 276-280; 627 NW2d 261 (2001); *People v Manning*, 243 Mich App 615, 624; 624 NW2d 746 (2000). The circuit court's jurisdiction to hear and decide this criminal matter can hardly be questioned. MCL 761.1(d); MCL 767.1; *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). And defendant has failed to specify any defects in the procedures required for enacting legislation that would throw into doubt the validity of the statutes under which he stands convicted. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro