

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW JORDAN MILLER,

Defendant-Appellant.

UNPUBLISHED

September 23, 2021

No. 352000

Berrien Circuit Court

LC No. 2019-001967-FH

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of attempted resisting and obstructing a police officer, MCL 750.81d(1). We affirm.

Because of a domestic violence incident, defendant was prohibited from contacting his ex-wife, Jordan, as a condition of his bond. On May 31, 2019, Jordan contacted the police asserting that defendant had been texting her, in violation of the no-contact condition. Deputy Wesley Koza of the Baroda Lake Township Police Department and Sergeant Scott Scalf of the Benton Township Police Department went to defendant's place of employment to effectuate an arrest of defendant for violation of his bond condition. They located defendant and placed him under arrest. Defendant was uncooperative with the officers during the arrest, refusing their direct orders and struggling to preclude the placement of handcuffs on him. Defendant was eventually walked to a police car for transport to the jail and both during his entry into the car and while in the police car, defendant again refused direct orders of a police officer and struggled with an officer who was attempting to prevent defendant from tampering with items in the back of the patrol car. Defendant was thus charged with two counts of resisting and obstructing a police officer. The matter proceeded to a jury trial at the conclusion of which the jury found defendant guilty of the lesser-included offenses of attempted resisting and obstruction of a police officer.

On appeal, defendant first argues that there was insufficient evidence to support his convictions. We review challenges to the sufficiency of the evidence de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact

could have found every essential element proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195–196; 793 NW2d 120 (2010).

To convict a defendant of resisting or obstructing a police officer, MCL 750.81d, the prosecutor must prove two elements: (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties. *People v Quinn*, 305 Mich App 484, 491–92; 853 NW2d 383 (2014). As an additional element of the offense, the prosecutor must also establish that the officers’ actions were lawful. *People v Moreno*, 491 Mich 38, 51–52; 814 NW2d 624 (2012). For an arrest to be lawful, the police officer making the arrest must have probable cause to effectuate the arrest. *People v Vandenberg*, 307 Mich App 57, 69; 859 NW2d 229 (2014); see also *People v Freeman*, 240 Mich App 235, 236; 612 NW2d 824 (2000) (“An arrest is legal if an officer has reasonable cause to believe that a crime was committed by the defendant.”).

Defendant contends that there was insufficient evidence establishing that he knew the police were performing their lawful duties or making an arrest at the time of the alleged struggle. Notably, however, defendant admitted that in May 2019, there was a bond condition in place precluding him from contacting Jordan and he realized it was a violation of his bond to contact her. Defendant testified, in fact, that he was out of jail on bond for various cases on the date of the incident. Jordan testified that she told defendant several times on May 31, 2019, to stop contacting her or she would call the police on him. Defendant did not deny that he had contacted Jordan in violation of his bond condition on May 31, 2019.

Both Koza and Scalf testified that they went to defendant’s place of employment dressed in police uniforms to arrest him. They both also testified that they asked defendant several times if he was, in fact, defendant. Scalf was wearing a body camera (bodycam) during the incident and the bodycam footage played for the jury establishes that rather than answer the officers, defendant asked what they were doing there. The officers continued to try and verify that the person they were speaking to was defendant and defendant continued to refuse to respond. Defendant was clearly put on notice that the officers were seeking him out and, given his admission that a bond condition precluded him from contacting Jordan and Jordan’s testimony that defendant had violated the bond condition and she told him she was calling the police to report him, defendant was well aware that the police were there to perform their lawful duties.

Koza testified that after defendant’s continued refusals to provide his name to the officers, he advised defendant that he was being detained and was not free to go. The bodycam footage and testimony of Koza establish that Koza asked defendant to put his hands behind his back and he did not immediately do so. Koza then told defendant he was under arrest. Both officers testified that when they tried to put defendant’s hands behind his back, defendant pulled his hands forward so that he could not be handcuffed. He was nonetheless eventually handcuffed and Scalf testified that as he walked defendant toward Koza’s patrol car, he had to use an “escort” technique to make defendant keep walking. Scalf further testified that when they arrived at the patrol car, defendant tried to stop and Scalf had to forcefully place him in the car.

Koza testified that he drove defendant to the jail and while he was driving, he heard defendant remove the lid from a container of Koza's tools that were in the backseat. When they arrived at the jail, Koza entered into the backseat to replace the lid and defendant turned his face toward Koza causing Koza to be concerned that defendant was going to spit on him. Audio from the dashcam in Koza's patrol car supports Koza's testimony that he repeatedly told defendant to turn his head away and defendant did not do so. Rather, defendant continually screamed at Koza to get off of him. Defendant thus engaged in several incidences of resisting and obstructing, all of which occurred while the police were making a lawful arrest and performing their lawful duties.

Based upon the testimony, defendant's assertion that he did not know the officers were performing their lawful duty holds no water. He has clearly had several prior contacts with the police and was, by his own admission aware that he was precluded from contacting Jordan. Defendant provided no reason why he refused to give the police his name other than that he was at his workplace and wanted to know what was going on. He testified that he was on bond for various things at the time of the incident and "I just wanted to know what was going on because there was so much going through my mind." He also testified that he was getting irritated and "they were trying to do their job and I was trying to do my job and we weren't helping each other at all." He was thus aware the officers were performing their lawful duty. Moreover, the jury was properly instructed of the requirement for conviction that defendant knew or had reason to know the police were performing their lawful duties at the time of the resistance/obstruction. "A jury is free to believe or disbelieve, in whole or in part, any of the evidence presented," *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and the jury clearly believed the officers' testimony, defendant's admissions, and the video evidence in finding that defendant knew or should have known the officers were lawfully performing their duties.

Defendant next contends that even if he was aware the officers were performing their lawful duties, the evidence did not establish that he intended to resist them. The testimony and bodycam footage indicate otherwise.

Defendant refused to respond to the officers' questions regarding his identify and refused to turn around and put his hands behind his back. According to both officers, defendant pulled his hands away when they were trying to place handcuffs on him. According to Scalf, defendant had to be essentially forced to keep walking out to the patrol car because he wanted to walk a different route, and had to be forcibly placed in the patrol car when he kept insisting he be allowed to turn around. One does not accidentally refuse to provide one's name, refuse to walk, or refuse to get into a patrol car. And defendant was told, prior to being placed in handcuffs, that he was being placed under arrest. Thus, any actions thereafter of pulling his hands away from handcuffs, refusing to walk the way the officer was taking him, refusing to get into the car, and refusing to comply with officer instructions were knowing and intentional incidents of resisting or obstructing. There was thus sufficient evidence to convict defendant of the two counts of attempted resisting and obstructing.

Defendant next argues that defense counsel was ineffective for failing to object when witnesses made conclusions of law during trial and for failing to request a cautionary instruction. We disagree.

Defendant did not move in the trial court for a new trial or a *Ginther*¹ hearing. This issue is thus unpreserved. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Where an evidentiary hearing was not held on a claim of ineffective assistance of counsel, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

As succinctly stated in *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008):

To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is accordingly a strong presumption of effective assistance of counsel. [quotation marks and internal citations omitted]

Here, defendant's assertion of ineffective assistance of counsel, concerns counsel's failure to object to witnesses' testimony regarding resisting and/or obstructing. Lay witnesses are permitted to testify as to their opinions where such opinion testimony is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony or the determination of a fact at issue. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995). In addition, MRE 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Further, MRE 704 states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Questions of law, however, are within the exclusive responsibility of the trial judge. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994). Thus, lay witness testimony may not include legal conclusions because such testimony would invade the province of the trial judge, and is not based on the perception of the witness.

Defendant points to four instances of purported legal conclusion testimony. The first instance of such testimony cited by defendant occurred during defense counsel's cross-examination of Koza. Counsel asked how long it took for defendant to put his arms behind his back: ". . . as I looked at the video, it might have taken seconds, ten, 15, 20 seconds to have his arms behind his back, is that correct?" Koza responded, "I didn't time it. It wasn't—like I said, it

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

wasn't very long. But if you're asking was he resisting, yes." Defense counsel then said to Koza, ". . . the determination as to whether or not he was resisting is their determination, not yours, not mine."

The second instance pointed out by defendant also occurred during defense counsel's cross-examination of Koza. The following exchange took place:

Q: So, the—what—what is it that he did that you are claiming was resisting/obstructing? Was it him not answering [the] question about who he was?

A: I would take everything in—in totality, him not answering our questions, him not verifying who—or, you know answering who he was, him struggling with us when we tried to handcuff him, him struggling with us while we were trying to put him in the car, him struggling with me at the jail and with the jail deputies.

Q: So, I guess, in answer to my question, you are not saying that him refusing to answer the question when you wouldn't answer his question, wasn't the basis you are charging him with resisting/obstruction for?

A: Everything I just listed, that's my interpretation of him resting/obstructing. Yes.

The third assertion of counsel's ineffectiveness occurred during Emma Sue Patrautzky's testimony wherein the prosecutor asked her to describe what she saw. Patrautzky, who was with Koza as a citizen ride-along during the entire incident, responded, "So they could positively identify that he was Andrew Miller. He kept denying that was his identification. Basically, they tried to arrest him, and he resisted arrest."

The final instance of asserted ineffectiveness of counsel took place during Scalf's testimony. Scalf testified, on direct examination, that when he forcibly put defendant's hands behind his back, defendant attempted to pull his hands forward. The prosecutor asked what the problem with that was and Scalf responded, "That's resisting."

The two instances cited by defendant that took place during defense counsel's cross-examination of Koza were elicited by counsel's questions. The first incident was not prompted by a specific question by counsel concerning what constituted resisting/obstructing, and counsel immediately corrected Koza that whether defendant did, in fact, resist or obstruct was a question for the jury. The second instance, however occurred during what could be considered unclear or questionable cross-examination questions. The second instance could be deemed deficient performance by counsel insofar as counsel appears to be directly asking Koza what constituted illegal resisting/obstructing by defendant. On the other hand, Koza was viewing and perceiving defendant's actions during arrest and his opinion as to whether defendant was cooperating with him and Scalf or was resisting their attempts to place him under arrest could also be viewed as rationally based on Koza's perception and helpful to a clear understanding of his testimony. *Ryder Truck Rental, Inc*, 213 Mich App at 455.

Moreover, the crime of resisting/obstructing requires that the prosecution prove that defendant assaulted, battered, wounded, *resisted*, obstructed, opposed, or endangered a police

officer. MCL 750.81d. The word “resist” acquires a legal connotation when combined to make the phrase “resisting arrest,” but is, by itself commonly defined as “to exert oneself so as to counteract or defeat.” Merriam-Webster’s Collegiate Dictionary (11th ed.). Thus, Koza’s testimony that he felt defendant was resisting him during arrest can be viewed as a shorthand expression of the common definition and also serve to explain why he and Scalf had to forcibly handcuff defendant, rather than be viewed as Koza’s statement of a legal conclusion concerning the crime of resisting/obstructing.

The two instances of ineffectiveness of counsel cited by defendant that occurred during direct examination of witnesses likely should have been objected to by defense counsel. Patrautzky, in particular, specifically stated that defendant resisted arrest. In context and as it was stated, she was providing a legal conclusion. Nevertheless, even if *all* of the cited instances were viewed as constituting deficient performance by defense counsel, there is no reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *Unger*, 278 Mich App at 242.

The jury had the benefit of the live testimony of the witnesses as well as the bodycam video and dashcam audio footage. The testimony and footage establish that defendant refused to give the officers his name despite their asking him many, many times. The testimony suggests that the officers were trying to establish that defendant was, in fact, the person they were there to arrest. Defendant, having been arrested on at least two prior occasions, and admittedly out of jail on bond for a couple of different charges was presumably aware that the police were there for something other than polite conversation with him. Defendant was also told several times to put his hands behind his back. If he had done so willingly the first time he was told, there would have been no need for the police to repeat themselves and, according to their testimony, have to forcibly put defendant in handcuffs. Scalf also testified that defendant did not want to walk to the police car where he was being directed and Scalf had to use a holding mechanism on defendant to ensure he kept walking, and then defendant had to be forcibly placed in the police car when he refused to comply with direct orders to get into the car. The jury heard the audio of a scuffle in the backseat of the patrol car between Koza and defendant and heard Koza direct defendant several times to turn his head away from Koza while defendant yelled profanities and repeatedly told Koza to get his hands off him. Despite the officers’ testimony and the video and audio footage, defendant testified several times that he was respectful and cooperative. The jury clearly found defendant to not be credible and could easily have convicted defendant of attempted resisting and obstructing even absent the four instances of witness testimony challenged by defendant.

Defendant’s last argument on appeal is that the prosecutor engaged in misconduct, thereby depriving him of due process and a fair trial and that defense counsel was ineffective for failing to object to the misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Under this standard, we will reverse only if we determine that the defendant was actually innocent, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence. *Id.* at 449 (quotation marks and citation omitted). As previously stated, our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *Matuszak*, 263 Mich App at 48.

The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

A prosecutor may not vouch for the credibility of a witness on the basis of special knowledge, otherwise unavailable to the jury, *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995), but a prosecutor may argue facts in evidence and reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

The single instance of prosecutorial misconduct alleged by defendant is not, in fact, prosecutorial misconduct. Contrary to what defendant asserts, the prosecutor did not state in her closing argument that "Officer Scalf was telling the truth." What she actually said was, "And the defendant, he told you today that Officer Scalf was telling the truth about what happened." This statement was an accurate reflection of the record.

At trial, defendant testified that he did not have a problem with Officer Scalf. He testified, "And I feel like he was somewhat fair with his testimony today. I don't feel like he tried to lie in any way, unlike others." On cross-examination, defendant again testified that Officer Scalf "tried to be as honest as he could" and that Scalf "was somewhat fair with his testimony." The prosecutor's comment during closing argument was simply her acknowledgment that defendant testified that Officer Scalf was honest in his testimony. Because it was a fair commentary on the testimony and evidence at trial, this statement does not constitute prosecutorial misconduct. Additionally, because this was not prosecutorial misconduct, there was no basis to object to the comment and defense counsel was not ineffective for failing to raise a meritless objection. *People v Putman*, 309 Mich App 240, 245; 870 NW2d 593 (2015).

Affirmed.

/s/ Mark T. Boonstra

/s/ Jane E. Markey

/s/ Deborah A. Servitto