

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 22, 2011

v

JASON RONALD ZABORSKI,  
Defendant-Appellant.

No. 300061  
Macomb Circuit Court  
LC No. 2010-001446-FH

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Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of resisting and obstructing a police officer, MCL 750.81(d)(1). We affirm.

On appeal, defendant first appears to argue that the evidence neither established that he knew a police officer was involved nor that the officer was performing his official duties; thus, the evidence was insufficient to support his conviction. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Phelps*, 288 Mich App 123, 131; 791 NW2d 732 (2010). The evidence is construed in a light most favorable to the prosecution to determine whether it was sufficient for a rational trier of fact to find the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 131-132; *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Circumstantial evidence and reasonable inferences arising from the evidence can establish the elements of a crime. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010).

MCL 750.81d(1), provides, in relevant part:

[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony . . . .

Under MCL 750.81d(7)(b)(i), a “person” includes a police officer. Thus, to establish this crime, the prosecutor had to prove that defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, who defendant knew or had reason to know was performing his duties. See, also, *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010).

In this case, Officer Randy Plante testified that he responded to a report of a fight in progress at an apartment complex in his fully marked police car while in full uniform. When he arrived in the parking lot, he could hear a heated argument taking place inside. Officer Plante then entered the apartment building and saw defendant, who was standing in the threshold of an apartment, forcefully push with both of his hands a female who was standing directly in front of him in the doorway. Officer Plante immediately ran the 12 to 15 feet between himself and defendant, grabbed and then pulled defendant away from the female victim, and pushed defendant face-first against the opposite wall. Officer Plante felt defendant tense up, saw his jaws clench, and saw defendant make a fist—indicators of potentially escalating aggression. Officer Plante, who was in full uniform, told defendant not to fight him and that he was a police officer. Defendant did not respond. Officer Plante then told defendant several times to drop the coat that was clenched in defendant's fist, and he did not. Officer Plante then attempted to pull defendant's arm behind his back and defendant began to forcibly pull his arm away from him. Another officer, Officer Sharrow, arrived and began to assist Officer Plante in an attempt to get defendant to comply with his verbal directions. Defendant refused to comply with the officers' directions to place his hands behind his back and drop the coat. After several forcible and failed attempts, Officer Plante finally was able to physically pull one of defendant's arms behind his back and apply a handcuff. However, defendant would not put his other arm behind his back, but was instead placing it between his body and the wall so that it could not be grabbed by the officers. In an effort to secure defendant's free arm and control him, Officer Plante pulled defendant to the ground but, when defendant landed, he pulled both of his arms underneath his body which was laying face-down. Officer Plante and Officer Sharrow both told defendant to stop resisting and put his hands behind his back. Defendant did not. Eventually Officer Plante was able to secure the handcuffed arm, but every time the officers got defendant's other arm partially out from underneath him, defendant would jerk it back, breaking their grip.

At some point a third officer, Officer Morabito, seeing the continued struggle with defendant, came over to assist. Officer Morabito warned defendant that a taser was going to be used against him if he did not comply with their commands. Defendant did not respond, and the shock was applied. Defendant still refused to put his free arm behind his back. After additional warnings, a second shock was applied. After defendant continued to refuse to put his free arm behind his back, additional warnings followed and then a third shock was applied. Finally, Officer Sharrow was able to forcibly pull defendant's arm out from under his body and place it behind his back for handcuffing.

After defendant was taken to the police station, Officer Plante testified, defendant continued to refuse to obey commands. Officer Plante and Officer Sharrow were in the booking room with defendant and were attempting to remove his property, take photographs and fingerprints, and gather information from defendant, but they were unsuccessful. Defendant refused to cooperate with verbal commands. For example, if defendant was told to sit, he would stand. If he was told to stand, he would sit. At one point, defendant stood up and, with clenched jaws, verbally threatened the officers. Eventually, because of defendant's behavior, the booking process was delayed and defendant was taken to a holding cell.

In light of the evidence presented, considered in the light most favorable to the prosecution, a rationale trier of fact could find that defendant knew at least one police officer was involved and that the officer was performing his official duties. Accordingly, defendant's

conviction of resisting and obstructing a police officer was supported by sufficient evidence and is affirmed.

Next, defendant argues that he was denied his right to a fair trial when the prosecutor made statements during closing argument that shifted the burden of proof and misled the jury. We disagree.

Defendant failed to raise his objections below or request a curative instruction; therefore, our review is limited to determining whether plain error affected his substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant bears the burden of showing that the prosecutorial misconduct denied him a fair trial, and must demonstrate that the misconduct resulted in a miscarriage of justice. *Id.* This Court will reverse only if it determines that defendant was actually innocent but the plain error caused him to be convicted, or the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings . . . .” *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis by examining the record and evaluating the remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). This Court must review the prosecutor’s statements as a whole, and evaluate them in light of the defense’s arguments and their relationship to the evidence presented at trial. *Brown*, 279 Mich App at 135. “Generally, prosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). However, a prosecutor may not misstate the facts or argue facts not introduced into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Even when a prosecutor misstates the law or argues facts not in evidence, proper jury instructions cure most errors because jurors are presumed to follow the trial judge’s instructions. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

Here, defendant claims that the following argument shifted the burden of proof to defendant and misstated the testimony:

He didn’t get up here and tell you he put his hands behind his back. In fact, he specifically said he didn’t, somebody else did that and put the handcuffs on. He didn’t tell you that he was doing everything that he was told to do. He says I don’t remember. I don’t remember anything, which is very, very different from I didn’t do it.

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And also based on the testimony of the officers and the testimony of Jessica and Shannon, Jessica Cole and Shannon Esler, where they remember there was a battery on Jessica Cole when he wouldn’t leave.

First, defendant claims that the prosecution impermissibly suggested that defendant had to prove his innocence when she referenced defendant’s testimony that he did not remember anything, as opposed to denying that he committed the crime. It is true that a defendant may not be asked to prove his innocence, but defendant was not asked to prove his innocence here. The prosecutor merely commented on defendant’s testimony, and did not state or imply to the jury that

defendant bore the burden of proof. A prosecutor has the right to comment on testimony, even a defendant's testimony. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). The prosecutor noted that defendant testified he did not know whether he resisted the officers. She did not state that the jury should imply guilt from defendant's failure to deny the charge; instead, she pointed out that defendant's testimony was not contradictory of the officers' testimony. This is permissible.

Second, defendant claims that the prosecutor's misstatement of the testimony denied him a fair trial. That is, the prosecutor incorrectly stated that Jessica Cole and Shannon Esler testified that defendant pushed Jessica, when only Officer Plante's testimony supported that statement. While it is true that the prosecution misstated the facts, defendant has failed to establish plain error that affected his substantial rights. See *Brown*, 279 Mich App at 134. In fact, the jury found defendant not guilty of assault and battery, and the misstated testimonial evidence was not relevant regarding whether defendant resisted the police officers. The mistake appears to have been an unintentional error that occurred while the prosecutor was summarizing the evidence. An objection and request for curative instruction would have cured the error; but, in any case, the jury instruction that the lawyers' statements and arguments were not evidence cured any prejudicial effect of the comment. See *Mesik*, 285 Mich App 542.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens