STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
v	No. 306186 Wayne Circuit Court
ROBERT JAY HOWELL, Defendant-Appellant.	LC No. 11-001370-FH

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of resisting or obstructing a police officer causing injury, MCL 750.81d(2). Because defendant's warrantless arrest in his apartment was not unconstitutional and he waived appellate review of his claim of instructional error, we affirm.

Defendant's conviction stems from a domestic disturbance that occurred on December 31, 2010. The police responded to defendant's Lincoln Park apartment after a woman called 911 and reported that her father was "out of control." When the police arrived, they could hear loud music and a man screaming inside the apartment. When the officers knocked on the door, defendant answered and appeared agitated and upset. Defendant began yelling and wanted to know why the officers were there. The officers eventually convinced defendant to turn down the music. Officer David Cowell observed a young woman, 23-year-old Bobbie Howell, crying inside the apartment and, because of the nature of the dispatch, wanted to ensure that she was safe. Defendant, however, refused to allow Howell, his daughter, to talk to the officers. According to Cowell, after negotiating with defendant, defendant eventually stepped aside and allowed the officers to enter the apartment.

Once they were inside the apartment, it appeared to the officers that a struggle had occurred because items had been knocked over. After Cowell's partner, Officer Pierson, talked to Howell, Pierson gave Cowell a signal to arrest defendant. Cowell handcuffed defendant and led him out of the apartment. As they were walking down the stairs of the apartment building, defendant struggled with the officers and Cowell and defendant fell down the last four steps. Cowell received injuries to his forehead and wrist. At trial, Howell denied that she had called 911, denied that defendant had allowed the officers to enter the apartment, and denied that she had allowed the officers into the apartment.

Defendant first argues that this Court should vacate his conviction and sentence because his warrantless arrest in his apartment was unconstitutional. Defendant failed to preserve this issue for our review by raising it below. We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights." *Id*. at 763. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (quotation marks and citations omitted).

Defendant contends that the police officers' entry into his apartment was unconstitutional because he did not give them permission to enter, they did not have a warrant for his arrest, and there were no exigent circumstances that would have justified their entry into the apartment. The record belies defendant's contention that he did not consent to the officers' entry. Officer Cowell testified that after negotiating with defendant and attempting to calm him down, defendant stepped aside and allowed the officers to enter the apartment. Defendant's conduct in stepping aside and allowing the officers to enter constituted consent to enter the apartment without a warrant. See *United States v Sanchez*, 635 Fed 2d 47, 55 (CA 2, 1980) (police officers obtained consent to enter when the 13-year-old son of the apartment resident opened the door wider and stood aside). Therefore, the record shows that defendant consented to the officers' entry into the apartment.

The officers' entry into the apartment was also proper because there existed exigent circumstances that justified the officers' entry.

> Pursuant to the exigent circumstances exception, . . . the police may enter a dwelling without a warrant if the officers possesses probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. [*People v Beuschlein*, 245 Mich App 744, 749-750; 630 NW2d 921 (2001) (citation omitted).]

Here, the police officers had probable cause to believe that a crime had recently been committed in the apartment and that defendant had committed it. The officers were dispatched to defendant's apartment because of a 911 call regarding a domestic disturbance. The caller had indicated that her father was "out of control." When the officers arrived, they heard loud music and a man screaming inside the apartment. When defendant opened the door, he appeared agitated and upset and wanted to know why the officers were there. Officer Cowell observed Howell crying near the back of the living room. Because of the nature of the dispatch, Cowell wanted to talk to Howell to ensure that she was safe. Defendant, however, told Howell that she was not permitted to talk to the officers and told the officers, "[y]ou're not f_cking talking to her." Thus, specific and objective facts indicated that immediate action was necessary to ensure Howell's safety. See *id*. at 750. Therefore, based on the exigent circumstances that existed, the

police officers' entry into defendant's apartment was lawful. Accordingly, defendant's warrantless arrest inside his apartment did not violate his constitutional protections.

Defendant's reliance on *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), is misplaced. In that case, our Supreme Court held that in enacting MCL 750.81d the Legislature did not abrogate the common-law right to resist an unlawful arrest or the police's unlawful entry into a person's home. *Id*. at 41, 58. The Court explained that "'one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest' and that 'the basis for such preventive or resistive action is the illegality of an officer's action, to which a defendant immediately reacts.'" *Id*. at 47, quoting *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965) (brackets omitted). As previously explained, the police officers' entry into defendant's apartment was lawful. As such, *Moreno* is inapplicable. Moreover, defendant did not resist until after the officers arrested him and were escorting him down the stairs outside of his apartment. Thus, defendant's resistance was not an immediate reaction to his arrest. Accordingly, defendant's reliance on *Moreno* is misplaced.

Alternatively, defendant argues that he is entitled to a new trial because the jury should have been instructed that the prosecution must prove the lawfulness of his underlying arrest and that he had a common-law right to resist an unlawful arrest. Defendant did not request such an instruction below and defense counsel expressed satisfaction with the jury instructions as provided. As such, defendant waived appellate review of this claim of error. See *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000) (counsel's expression of satisfaction with the instructions provided waives any claim of error). In any event, such an instruction would not have been appropriate because, as previously discussed, defendant's resistance was not an immediate reaction to his arrest, but rather, defendant resisted only after his arrest as the officers were escorting him to the patrol car. Moreover, defendant's theory at trial was that he and Officer Cowell accidentally fell down the stairs, not that he intentionally resisted the officers' actions. Accordingly, the record does not support the jury instruction that defendant now claims the trial court should have provided.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto