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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2026 12:03 PM
v	No. 375301 Wayne Circuit Court
JAYVON KENTRELL MONTGOMERY, Defendant-Appellant.	LC No. 23-002445-01-FH

Before: KOROBKIN, P.J., and RICK and MALDONADO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of resisting or obstructing a police officer (R&O), MCL 750.81d(1). Defendant was also charged with multiple counts of criminal sexual conduct (CSC) but the jury acquitted him of those charges. On appeal, defendant contends that his conviction should be reversed because (1) the trial court failed to provide a proper jury instruction regarding probable cause for his warrantless arrest, and (2) trial counsel's failure to seek such a jury instruction deprived defendant of his right to the effective assistance of counsel. For the reasons stated in this opinion, we disagree with defendant's arguments and therefore affirm.

I. BACKGROUND AND FACTS

At trial, VG testified that she met defendant on a mobile dating app called BLK. On April 17, 2023, defendant invited VG to his apartment where defendant offered to give VG a massage, which she agreed to. While defendant massaged VG, who was lying in bed, defendant pulled VG's shorts off. VG told defendant she did not intend to have sex with him. Defendant said, "ok," and agreed to only massage VG. Soon after, VG noticed there were condoms and sexual lubricant placed on the bed, and defendant removed his pants and underwear. VG turned onto her back and insisted she did not want to have sex with defendant. According to VG, defendant attempted to force VG to perform oral sex on him. VG eventually fled defendant's apartment and went to another apartment unit in the same building where a man helped her call the police.

Detective Kenneth Robinson of the Canton Township Police Department testified that he investigated the April 17, 2023 incident by reviewing body camera footage from the police

response, speaking with VG, and obtaining a written statement from her about what occurred. Canton Township Police Officer Jontae Burress testified that on April 21, 2023, he was sent to defendant's apartment to arrest him based on VG's allegations. Officer Burress located defendant inside of his vehicle, which was parked in the apartment parking lot. Officer Burress approached defendant and said he was under arrest. Defendant responded asking for an arrest warrant. Officer Burress told defendant a warrant was not needed. Officer Burress and other officers testified that they unsuccessfully attempted to convince defendant to exit his vehicle for approximately twenty minutes, explaining on multiple occasions that he could be arrested without a warrant based on probable cause that he committed CSC. Defendant did not comply with any of the responding officers' orders, and the officers police eventually broke a window and pulled defendant from his vehicle, using a taser to effectuate the arrest.

Before trial, defendant moved to quash evidence obtained from his arrest, arguing that the responding police officers did not have an arrest warrant or probable cause. The trial court denied defendant's motion to quash, finding there was probable cause to arrest defendant based on the collective knowledge of the police regarding VG's allegations against defendant. At trial, defense counsel attempted to question one of the police officers about whether they would have handled the situation differently had there been an arrest warrant for defendant, which elicited an objection from the prosecutor. The trial court sustained the objection, stating that the line of questioning was speculative because there was no arrest warrant. The trial court then stated: "If there's probable cause, they have the opportunity to arrest him." The prosecution brought up probable cause shortly after, and the trial court instructed the jury: "[A]s a matter of law . . . individuals can be arrested via a warrant or if there is probable cause."

After all of the evidence was presented, and following a sidebar discussion, the trial court noted that the parties agreed to the trial court's jury instructions, stating: "Both parties agree with all of the instructions as given, and there is no issue." Moments later the trial court again that the parties agreed with the instructions, and defense counsel stated, "Yes." Regarding the R&O charge, the trial court instructed the jury as follows:

> . . . Defendant is charged with the crime of assaulting, resisting, obstructing, or opposing a police officer who was performing his duties. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant assaulted, resisted, obstructed, or opposed Jontae Burress, who was a police officer with the Canton Township . . . Police Department.
>
> Obstruct includes the use or threatened use of physical interferences, or force, or a knowing failure to comply with a lawful command. The Defendant must have actually resisted by what he said or did, but physical violence is not necessary.
>
> Second, that the Defendant knew or had reason to know that Jontae Burress was a police officer performing his duties at the time.
>
> Third, that Officer Jontae Burress gave the Defendant a lawful command, was making a lawful arrest, or was otherwise performing a lawful act.

The jury found defendant guilty of R&O but not guilty of the charged CSC counts. This appeal followed.

II. ANALYSIS

A. JURY INSTRUCTIONS

Defendant contends that his conviction must be reversed because the trial court failed to instruct the jury on probable cause. Specifically, defendant points to the trial court's jury instruction regarding the third element of the R&O charge. For the jury to find that Officer Burress gave defendant a lawful command, was making a lawful arrest, or was otherwise performing a lawful act, the jury would have to find that Officer Burress had probable cause to arrest defendant. But the trial court never instructed the jury on its duty to find—or the definition of—probable cause. This omission from the jury instructions, defendant argues, was reversible error.

We conclude that defendant is not entitled to relief on this claim because it is waived.

We review de novo claims of error regarding jury instructions. *People v Spaulding*, 332 Mich App 638, 652; 957 NW2d 843 (2020). However, when a defendant expressly approves a jury instruction at trial, the approval waives any opportunity to challenge the jury instruction on appeal. *Id*. at 653. Waiver, the intentional relinquishment of a known right, is distinguishable from forfeiture, the mere failure to object in a timely manner. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). When a defendant merely fails to object, the issue is not preserved, but in a criminal case this Court will still review the unpreserved issue for plain error affecting substantial rights. *Id*. at 215-216; *Spaulding*, 332 Mich App at 652-653. Waiver, by contrast, entirely precludes appellate review. *Id.* at 653; *People v Smith*, 336 Mich App 79, 115; 969 NW2d 548 (2021).

"When the trial court asks whether a party has any objections to the jury instructions and the party responds negatively, it is an affirmative approval of the trial court's instructions." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). That is essentially what happened here. Following a sidebar discussion, the trial court specifically stated that the prosecution and defendant had agreed to the jury instructions. Defense counsel repeated his agreement when the trial court asked if the parties agreed with the instructions and he responded, "Yes." Therefore, defendant waived any claim of error regarding the jury instructions, precluding judicial review. See *People v Traver*, 502 Mich 23, 40-41; 917 NW2d 260 (2018); *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that he was deprived of his right to the effective assistance of counsel because his trial counsel failed to object to the above-referenced alleged error in the jury instructions. We disagree.

"Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law, and a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo." *People v Johnson*, 315

Mich App 163, 174; 889 NW2d 513 (2016) (citations omitted). "In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing," *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000), or file "in this Court a motion for remand to the trial court," *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). In this case, because defendant did not move for a new trial or for an evidentiary hearing, the ineffective-assistance claim is unpreserved. Our review of such claims is limited to "errors apparent on the record." *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011).

"Criminal defendants are entitled to the assistance of counsel under both the Michigan and United States Constitutions." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023). "The constitutional right to counsel is not merely the right to have a lawyer stand or sit nearby; rather, a criminal defendant has the right to the effective assistance of counsel." *People v Otto*, 348 Mich App 221, 231; 18 NW3d 336 (2023). Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "To establish a claim of ineffective assistance of counsel a defendant must show [1] that counsel's performance was deficient and [2] that counsel's deficient performance prejudiced the defense." *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010). Ordinarily, this means that "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Our Supreme Court has explained that a reasonable probability that the outcome would have been different "is a probability sufficient to undermine confidence in the outcome." *Yeager*, 511 Mich at 488 (quotation marks and citation omitted). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, the prejudice prong of the ineffective-assistance inquiry is dispositive. In defendant's brief on appeal, he implies[1] that his trial counsel performed deficiently by failing to a request a standard jury instruction, M Crim JI 13.5, that would have required the jury to determine whether the officers had probable cause to arrest him and would have defined probable cause to properly inform the jury as to what would constitute a lawful arrest. We are not unsympathetic to this suggestion. But even if trial counsel performed deficiently in this regard—an issue we do not decide—defendant cannot prevail on his ineffective-assistance claim because he has not shown there to be a reasonable probability that, had the jury been equipped with such an instruction, the outcome of the trial would have been different.

[1] Defendant asserts that trial counsel was ineffective for not objecting to the trial court's failure to include a probable-cause jury instruction, but his brief does not identify or address the well-established two-prong test for ineffective-assistance claims. Defendant's failure to adequately brief this issue could be deemed an abandonment of the claim. See *People v Jarrell*, 344 Mich App 464, 488; 1 NW3d 359 (2022). However, we exercise our discretion to address it. See *Bitterman v Village of Oakley*, 309 Mich App 53, 66; 868 NW2d 642 (2015).

Essentially, to prevail, defendant must show a reasonable probability that the jury would have found that the police lacked probable cause to arrest defendant. But there is no support for that proposition in the record. Before the trial started, the trial court found there was probable cause to arrest defendant based on the collective knowledge of the police regarding the allegations against him.[2] And evidence was presented at trial regarding the allegations known to the police at the time of the arrest. Although the jury did not find proof of defendant's guilt beyond a reasonable doubt (they acquitted him on the underlying CSC charges), evidence that the police had probable cause to support arresting defendant, based on the allegations known to them at the time, was not reasonably in question.[3] Furthermore, the court, during the examination of a witness, reiterated as a matter of law that probable cause is sufficient for police to arrest an individual without a warrant. And when the trial court read the instructions to the jury, it included the third element of the R&O charge, stating that the jury was required to find that Officer Burress gave defendant a lawful command, was making a lawful arrest, or was otherwise performing a lawful act.

Based on the foregoing, we conclude that it is unlikely that the jury would have found an absence of probable cause to support defendant's arrest had trial counsel requested M Crim JI 13.5. Defendant has not shown a reasonable probability that the alleged jury-instruction error affected the outcome, and thus has not established that the trial court's alleged deficiency in not objecting to the jury instructions prejudiced the defense. Defendant is therefore not entitled to a new trial on grounds that he was deprived of the effective assistance of counsel. See *Strickland*, 466 US at 697.

III. CONCLUSION

To summarize our analysis, defendant waived his claim of error regarding the jury instructions at trial, precluding our review on appeal. And, assuming without deciding that trial counsel performed deficiently by waiving that claim, defendant has not shown a reasonable probability that the outcome at trial would have been different had the alleged instructional error not occurred. Accordingly, defendant cannot prevail on his claim regarding an error in the jury instructions or his claim that he was deprived of his right to the effective assistance of counsel. Defendant's conviction is therefore affirmed.

/s/ Daniel S. Korobkin
/s/ Michelle M. Rick
/s/ Allie Greenleaf Maldonado

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[2] Although Officer Burress did not personally investigate the allegations, Detective Robinson did so and Officer Burress was sent to arrest defendant based on the investigation. See *People v Nguyen*, 305 Mich App 740, 751; 854 NW2d 223 (2014) (recognizing that probable cause for a warrantless arrest may be based on information possessed by the "arresting officer, or collectively the officers involved in an investigation ('the police team' approach)").

[3] "The probable-cause standard of proof is, of course, less rigorous than the guilt-beyond-a-reasonable-doubt standard of proof. . . . The . . . gap between probable cause and guilt beyond a reasonable doubt is broad." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).