STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUKE JUNIOR DeMEYERS,

Defendant-Appellant.

UNPUBLISHED
November 18, 1997

No. 195250
Ingham Circuit Court
LC No. 95-69344-FH

Before: Michael J. Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant was convicted by jury of resisting and obstructing a police officer, MCL 750.479; MSA 28.747. Thereafter, the trial court determined that defendant was an habitual fourth offender, MCL 769.12; MSA 28.1084. He was sentenced to four to fifteen years' imprisonment. Defendant appeals by right. We affirm.

On the evening of July 2, 1995, Lansing police officers were on bicycle patrol in the area of a high-crime apartment complex. One officer testified that the complex had been designated a "zero tolerance" area, in which police officers routinely arrested people for ordinance violations. Officer David Blackman spotted a car parked in the parking lot of the complex. The engine was running and a person, defendant, was sitting in the passenger seat. Blackman approached the car and noticed an open beer can in defendant's lap, as well as another open container of beer that had been placed in the console between the driver's and passenger seats. At Blackman's request, defendant passed the beer cans through the car window. Blackman decided to arrest defendant "for open alcohol," but, as he did not have a vehicle to transport defendant, he obtained defendant's license and called for a back-up patrol car. While he was waiting, Blackman saw defendant move his hand under the driver's seat. Suspecting that defendant had a weapon, Blackman and another officer drew their weapons and ordered defendant to show his hands. Instead, defendant locked the doors of the car and refused to exit the vehicle. After a violent altercation ensued, police finally extracted defendant from the vehicle and forced him into submission. Police found a gun under the driver's seat.[1]

Defendant first argues that a judgment of acquittal should have been entered because his arrest was unlawful as a matter of law and, under Michigan law, a person has a right to resist

unlawful arrest. He contends the arrest was unlawful because only City of Lansing Ordinance § 608.03 was applicable to his conduct of possessing an open alcohol container in a motor vehicle and the police were implicitly precluded from making an arrest for its violation. City of Lansing Ordinance § 608.03 provides, as pertinent:

> (a) No person shall:
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> * * *
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> (6) Transport or possess any alcoholic beverage in a container which is open or uncapped, or upon which the seal is broken, within the passenger compartment of a motor vehicle. If the motor vehicle does not have a trunk or compartment separate from the passenger compartment, a container which is open or uncapped or upon which the seal is broken shall be encased or enclosed. . . .
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> * * *
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> (b) Any police officer who witnesses a violation of this section may stop and detain the person for the purposes of obtaining satisfactory identification, seizing illegally possessed alcoholic beverages and issuing an appearance ticket.

We will assume, as defendant argues, that the trial court found that only Lansing Ordinance § 608.03 applied to defendant's possession of an open container of alcohol in a motor vehicle. Nevertheless his arrest was authorized for violation of this ordinance. We conclude that the trial court did not err in denying defendant's post-trial motion for acquittal, because the police did not act illegally by arresting defendant for violation of this ordinance.

We review a lower court's construction of an ordinance de novo. *Folands Jewelry Brokers, Inc v Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995). By its clear language, Lansing Ordinance § 608.03 provides that police officers who witness a violation of its terms have the option, within their discretion, of merely issuing an appearance ticket to the violator: "Any police officer who witnesses a violation of this section *may* stop and detain the person for the purposes of obtaining satisfactory identification, seizing illegally possessed alcoholic beverages and issuing an appearance ticket" (emphasis added). See *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993) ("The term 'shall' ordinarily designates a mandatory provision, and the term 'may' designates a permissive provision."). Therefore, in the situation presented here, officers are free to arrest a defendant pursuant to MCL 764.15(1)(a); MSA 28.874(1)(a), which authorizes peace officers to make warrantless arrests when ordinance violations are committed in their presence. *People v Wood*, 450 Mich 399, 403; 538 NW2d 351 (1995). Accordingly, the trial court did not err in finding that defendant's arrest was legal.

Next, defendant asserts that he received ineffective assistance of counsel based on his counsel's cross-examination of Blackman about why he delayed in telling defendant that he was being arrested. Thereafter, the trial court permitted the prosecution to elicit testimony from Blackman on redirect about

prior encounters with the police during which defendant had attempted to evade arrest. The trial court had indicated that it would allow the prior acts testimony if defense counsel cross-examined the officer regarding the officer's motive for calling for backup. Defendant contends that the prior acts testimony was highly prejudicial because the jury may have convicted him of resisting and obstructing because of the evidence of prior similar offenses.

We will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). We indulge a strong presumption that counsel's conduct fell within a wide range of professional assistance that would be regarded as reasonable. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). In this case, defendant's counsel could reasonably have determined that the importance of undermining the credibility of the police officers by establishing their arguably deceptive behavior outweighed the risk that the questions might result in the prosecutor being allowed to elicit testimony about past encounters between defendant and the police. We note that defendant focuses on the resisting and obstruction charge of which he was convicted. However, defense counsel was attempting to undermine the prosecution's case with regard to this offense and three other charged offenses for which defendant was acquitted. Defendant has not established his claim of ineffective assistance based on defective performance because he has not demonstrated that counsel's performance fell below an objective standard of reasonableness. *Id*. at 157-158.

We disagree with defendant's position that remarks by the trial court while imposing sentence show that the court improperly considered defendant to have committed the offenses of which he was acquitted (assault with intent to do great bodily harm, carrying a pistol in an automobile and possession of marijuana). See *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996) (trial court may not make an independent finding of guilt and impose sentence based on that finding). While the trial court expressed that Blackman's life was endangered by the acceleration of the car when defendant tried to resist arrest, it did not express that defendant acted with an intent to inflict great bodily harm on the officer. Rather, without regard to defendant's intent, the trial court stated that defendant's conduct of resisting arrest resulted in circumstances that endangered the officer. With regard to the gun and marijuana offenses, the trial court did not state that defendant committed those offenses, but rather that, if he did not, then he was associating with someone who did commit them.[2] Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] During the struggle, defendant also allegedly jettisoned a bag of marijuana from his person, which police also confiscated. The jury acquitted defendant of carrying a pistol in an automobile, possession of marijuana, and assault with intent to do great bodily harm.

[2] Defendant also appears to argue on appeal that he is entitled to resentencing because his sentence was based on inaccurate information. No objection was raised to preserve this issue at sentencing nor was it raised at his *Ginther* hearing. He states in his brief, "There was absolutely no evidence that [defendant] 'associated' with anyone who possessed that baggie of marijuana." To the extent that this is taken as argument that he is entitled to resentencing because his sentence was based on inaccurate information, we note that no objection was raised at sentencing nor was any claim of attorney error raised at the *Ginther* hearing. To the extent that defendant has attempted to interject this issue on appeal, it is unpreserved because it was not set forth in defendant's statement of questions involved. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).