STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS KIM ELLER,

Defendant-Appellant.

UNPUBLISHED
November 17, 1998

No. 201831
Montcalm Circuit Court
LC No. 96-000170 FH

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, malicious destruction of police property, MCL 750.377b; MSA 28.609(2), and resisting or obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced as a third felony habitual offender, MCL 769.11; MSA 28.1083, to concurrent prison terms of 160 to 240 months, 64 to 96 months, and 32 to 48 months, respectively. Defendant appeals as of right. We affirm.

Defendant argues that he is entitled to a new trial because the trial court failed to give CJI2d 13.2, CJI2d 13.5, and an instruction on self-defense. Because defendant did not request the instructions at trial, review may be granted only if a miscarriage of justice would otherwise result. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). It would not. The trial court did not err in failing to give CJI2d 13.2 because CJI2d 13.1 was applicable to the facts of this case. Further, the trial court did not err in failing to sua sponte give CJI2d 13.5 because the jury expressed no confusion with regard to the lawfulness of the arrest element and defendant presented no plausible evidence to support an inference of unlawful police conduct. Finally, given the evidence, the trial court properly did not sua sponte instruct on self-defense. In sum, the trial court's instructions included all of the elements of the crimes charged and did not exclude any material issues, defenses or theories for which there was evidentiary support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant also claims that he was denied the effective assistance of counsel at trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell,* 454 Mich 145, 164; 560 NW2d 600 (1997). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole,* 218 Mich App 702, 718; 555 NW2d 485 (1996). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

For the reasons discussed above, defense counsel was not ineffective for failing to request CJI2d 13.2 and 13.5. In addition, defendant has failed to overcome the presumption that defense counsel's inaction was sound 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). Further, defense counsel was not ineffective for failing to impeach officer Todd Graham's testimony that he stopped the car in which defendant was riding because it was weaving. Defendant claims that counsel should have impeached the officer with a transcript of his call to central dispatch in which he stated that he was at "Smith and Main on a vehicle with no plate." However, defense counsel elicited from the officer on cross-examination that when the officer called central dispatch to report the stop of defendant's car, he gave his location and indicated that the car did not have a license plate. The officer also explained that his practice was to call in the location of a traffic stop and to give the license plate number of the stopped vehicle, but in this case the car had a temporary, paper tag in the window so he could not give a plate number. Because the transcript was consistent with, and cumulative of, the officer's testimony, the transcript would have added little, if anything, to defendant's case. On the basis of the evidence presented, it is unlikely that, but for counsel's inaction, the result of the proceedings would have been different. *Poole, supra,* p 718.

Defendant next argues that the trial court erred in refusing his request for an instruction on simple assault and battery as a lesser included misdemeanor of assault with intent to commit great bodily harm less than murder. We disagree. A trial court must instruct on a lesser included misdemeanor where (1) there is a proper request; (2) there is an "inherent relationship" between the charged offense and the requested misdemeanor instruction; (3) the requested misdemeanor instruction is supported by a rational view of the evidence; (4) if the prosecution requests the instruction, the defendant has adequate notice; and (5) the requested instruction does not result in confusion or some other injustice. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). See also *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). A trial court's decision to grant or deny a lesser included misdemeanor instruction will be reversed only upon a finding of an abuse of discretion. *Stephens, supra,* p 265.

In this case, the third *Stephens* condition – that the evidence justifies a conviction of the misdemeanor – was not satisfied. Three witnesses testified that after Officer Graham pulled over the car

defendant's wife was driving, defendant got out of the car and approached the officer shouting profanities and swatting at him. The men struggled and eventually landed on the ground. Defendant pinned the officer and locked his hands around his throat, choking him. As the officer began to black out, another individual who had witnessed the incident was able, with some difficulty, to loosen defendant's grip. Based on this evidence, a jury could not reasonably convict defendant of simple assault and battery. The trial court did not abuse its discretion in denying defendant's request for an instruction on that offense.

We also reject defendant's claim that the trial court abused its discretion at sentencing. A sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, any sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Here, defendant had numerous prior convictions, and the present case was serious and life-threatening to Officer Graham. Under the circumstances, the trial court properly considered defendant's criminal history and repeated failure to abide by the law in imposing a lengthy sentence. The sentences are within the statutory authorization for a third offense habitual offender and are not disproportionate.

Defendant claims that the trial court abused its discretion when it denied his request for a jury view of the damage to Graham's patrol car. The decision whether to admit or exclude evidence is within the sound discretion of the trial court. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). There was no abuse of discretion in this case. Defendant himself testified that he kicked the patrol car. In addition, three witnesses observed defendant kick and hit the patrol car, and the body shop manager, who assessed the damage to the car, also testified with regard to the damage. Accordingly, sufficient evidence was presented to show that the patrol car was damaged. Defendant's claim that he wanted to show "the amount of damage" is irrelevant because the amount of damage is not an element of the offense of malicious destruction of police property. See *People v Richardson*, 118 Mich App 492; 325 NW2d 419 (1982).

We also reject defendant's claim that the prosecutor engaged in misconduct by allowing false testimony that he was the sole cause of the damage to the patrol car, even though defendant's wife had also kicked the rear doors. Because defendant failed to object to the prosecutor's alleged presentation of false testimony, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect, or the failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). It would not. Contrary to defendant's claim, the officer never testified that defendant was the only individual who kicked the car doors during the incident. In addition, there was overwhelming evidence that defendant damaged the police car. The fact that defendant's wife also allegedly kicked on the rear door does not negate defendant's actions. Reversal is not required on this ground.

Finally, defendant contends that he was entitled to a directed verdict on the resisting or obstructing charge. We disagree. A directed verdict of acquittal is appropriate only if, considering all

the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. Questions regarding the credibility of witnesses are left to the trier of fact. *Id*. To establish the crime of resisting arrest, (1) the defendant must have resisted arrest; (2) the arrest must be lawful; (3) the person making the arrest must have been at the time an officer of the law; (4) the defendant must have intended to resist the officer; (5) the defendant must have known that the person he was resisting was an officer, and (6) the defendant must have known that the officer was making an arrest. *People v Julkowski*, 124 Mich App 379; 335 NW2d 47 (1983).

Viewed in a light most favorable to the prosecution, there was sufficient evidence to enable a rationale trier of fact to find the necessary elements beyond a reasonable doubt. There was testimony that the officer stopped a car in which defendant was a passenger after he observed it weaving in traffic. As the officer was calling in to dispatch, defendant approached the officer and began screaming at him. On two separate occasions, the officer told defendant to return to his vehicle or he would be arrested for obstructing. Each time defendant refused. At that point, the officer advised defendant that he was under arrest for obstructing an investigation. When the officer attempted to arrest defendant, he back-stepped away from the officer, slapped the officer's hand several times, and thereafter an altercation ensued in which defendant choked the officer. Accepting this testimony as true, the trial court did not err in denying defendant's motion for a directed verdict on the charge of resisting arrest.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie