

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TANEKA DASHAWN JONES,

Defendant-Appellant.

UNPUBLISHED

January 22, 1999

No. 206484

Ingham Circuit Court

LC No. 96-071287 FH

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction of resisting and obstructing a police officer, MCL 750.479; MSA 28.747,¹ for which she was sentenced to two years' probation, with three months to be served in the Ingham County jail. We affirm.

I

This case stems from defendant's response to being stopped for a minor traffic violation. After receiving a traffic ticket and driving away, defendant attracted the officer's attention again and was pulled over a second time. This led to an altercation during which defendant was told that she was under arrest, but several back-up officers were needed to actually apprehend her. Defendant maintained that she had been beaten by the officers, but several officers testified that defendant had resisted arrest. She was convicted of resisting and obstructing arrest, and this appeal followed. Although she was also charged with assaulting a police officer while the officer was engaged in making a lawful arrest, MCL 750.479a; MSA 28.747(1), the jury deadlocked on that charge, and the prosecutor subsequently filed a motion of nolle prosequi.

II

Defendant's first claim of error is that the court failed to instruct the jury that the illegality of an arrest is a complete defense to the charge of resisting and obstructing arrest. Because both parties

approved of the jury instructions, this issue has not been preserved for appeal. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). This Court may disregard the issue preservation requirement only if failure to do so would result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Jury instructions are reviewed as a whole. *People v Tims*, 449 Mich 83, 109-110; 534 NW2d 675 (1995). The jury in this case was instructed that legality of the arrest was an element of resisting and obstructing arrest, MCL 750.479; MSA 28.747, and that the prosecutor was required to prove each element beyond a reasonable doubt. Absent evidence to the contrary, there is a presumption that the jury followed the court's instructions. *People v Banks*, 438 Mich 408, 418; 475 NW2d 769 (1991); *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). In the present case, there was sufficient evidence from which the jury could find that the officer who took defendant into custody reasonably believed that defendant had committed a crime and that, therefore, the arrest fell within the definition of a legal arrest. Defendant has failed to show manifest injustice.

III

Defendant's second claim of error is that she was denied effective assistance of counsel because her trial counsel did not use one of the police reports to impeach one of the testifying officers. Absent a *Ginther*² hearing, this Court may only consider the appeal to the extent that the claimed mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). No *Ginther* hearing was held; the referenced police report was not admitted into evidence, nor was it referenced during direct or cross-examination of the police officer that allegedly wrote it, and it is not part of the lower court record. Therefore, it may not be considered by this Court. Because no error is apparent on the record, this claim must fail. Moreover, we are satisfied that impeachment would not have affected the outcome of the trial.

IV

Defendant next claims that she was denied effective assistance of counsel when her trial counsel failed to move for a judgment of acquittal after the jury verdict, pursuant to MCR 6.419. Since no evidentiary hearing was held on this issue, it is reviewed for error apparent on the record. *Johnson*, *supra* at 129-130.

A motion for directed verdict of acquittal may be granted where the evidence, viewed in the light most favorable to the prosecution, is not "sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt." MCR 6.419; *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). The prosecution in the instant case was required to prove six elements; however, defendant only challenges one of those elements – the legality of her arrest. Because there was ample evidence on the record from which a reasonable trier of fact could have concluded that defendant's arrest was legal, a motion for directed verdict of acquittal would have been without merit. We reject

defendant's contention that the jury's question and its failure to come to verdict on the other count constituted a failure to find a requisite intent. Defense counsel was not required to file a meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Therefore, defendant was not deprived of effective assistance of counsel.

V

Defendant finally claims that the trial court erred in assigning a score of ten points for OV 6, placing multiple victims in danger of injury, particularly where defendant was exercising her right to use reasonable force as is necessary to resist an unlawful arrest. This Court lacks jurisdiction over claims of misapplication of the sentencing guidelines unless "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Calculation of the sentencing guidelines variables may be based on the record before the court, including the presentence investigation report and testimony from trial. *People v Warner*, 190 Mich App 26, 28; 475 NW2d 397 (1991). The court may also base its calculation on criminal activity for which defendant was acquitted. *People v Jarvi*, 216 Mich App 161, 165; 548 NW2d 676 (1996). The number of points scored within a given category is within the discretion of the sentencing judge, provided there is evidence on the record to adequately support the score. *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988).

In the present case, there was testimony that defendant kicked and scratched one of the officers and placed the other officers in danger of injury. The court also noted that while defendant was not convicted of assaulting a police officer, the prosecution proved by a preponderance of the evidence that the original arresting officer was placed in danger. Although none of the other officers were injured, OV 6 merely requires a finding that multiple victims were *placed in danger* of injury, and there was ample evidence to support such a finding. Defendant has failed to satisfy the standards set forth in *Mitchell*, *supra* at 176-177. Therefore, the lower court's application of the sentencing guidelines should not be disturbed.

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

¹ Both the information and the judgment of sentence reference this as "MCL 750.479-B." However, resisting and obstructing a police officer is codified at MCL 750.479; MSA 28.747. MCL 750.479b prohibits the taking of firearms or weapons from a peace officer. Defendant was clearly charged with resisting and obstructing, and no suggestion was made at trial that firearms were involved in the incident. There has been no challenge to this error.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).