STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 208499 Calhoun Circuit Court
HENRY JACOB CALDWELL, JR., Defendant-Appellant.	LC No. 97-002198-FH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting and obstructing an officer in the discharge of his duty, MCL 750.479; MSA 28.747. Defendant was sentenced to three years' probation, with the first nine months served in the county jail. He appeals as of right and we affirm.

Defendant argues that the prosecution failed to present sufficient evidence to sustain his conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

The elements of resisting arrest are:

> (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) at the time of the arrest, the defendant must have intended to have resisted such officer; (5) at the time of the arrest, the defendant must have known that the person he was resisting was an officer; and (6) at the time of the arrest, the defendant must have known that the officer was making an arrest. [*People v Little*, 434 Mich 752, 755 n 5; 456 NW2d 237 (1990), quoting *People v Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983).]

Here, defendant only challenges the sufficiency of the evidence supporting the second element, whether his arrest was lawful.

Defendant's conviction arose from an incident involving his girlfriend, Annetta Tucker. On June 16, 1997, Tucker invited several friends to the apartment she shared with defendant. Defendant did not join the party, but instead attempted to sleep. According to Tucker, when the party got loud, defendant became "belligerent" and ordered everyone to be quiet. Defendant became particularly angry with one male guest. Tucker called the police two times during the evening, explaining she "just wanted [defendant] to calm down." Uniformed police officers Larry Weeks and Chris Young were dispatched to the apartment in a fully marked police car. When they arrived, defendant was agitated and was yelling at several people inside the apartment. While the officers were present, defendant and Tucker got into an argument and Tucker told defendant she wanted him to leave. Defendant refused to leave, stating that he lived at the apartment too. Officers Weeks and Young testified that they believed both defendant and Tucker had been drinking. The officers gave Tucker information regarding how she might have defendant evicted from the apartment then left.

Within minutes of leaving, officers Weeks and Young discovered defendant was released on bond pending domestic violence and trespassing charges. The pretrial release order issued in connection with that bond required that defendant have only "peaceable contact" with Tucker.[1] Officers Weeks and Young immediately returned to the apartment to arrest defendant for violating the order. According to the officers, defendant fled when he saw they had returned. Officer Weeks testified that he shouted, "stop, police, you're under arrest." After a short foot chase, defendant was apprehended, handcuffed and arrested. The officers claimed defendant used threats and profanity and physically resisted their attempts to lead him back to their car. According to several police officers that observed the arrest, defendant intentionally struggled and tripped Officer Weeks, causing him to fall to the pavement with defendant falling on top of him. Officer Weeks suffered a separated shoulder. Several defense witnesses testified that defendant did not resist the officers and suggested Officer Weeks tripped on a speed bump.

Defendant contends on appeal that, because there was no evidence that he violated the terms of the peaceable contact order and there was no disturbance at the time the police returned to the apartment, the police did not have probable cause to arrest him and his arrest was unlawful. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). A peace officer may effectuate a warrantless arrest when he "has reasonable cause to believe [a defendant] is violating or has violated a condition" of a release order. MCL 764.15e(1); MSA 28.874(5)(1)

Here, there was sufficient evidence that defendant's conduct toward Tucker violated a condition of his pretrial release order. Defendant suggests that the order requiring peaceable contact prohibited only violent or forceful contact with Tucker. We refuse to construe the conduct prohibited by the order so narrowly.[2] We conclude that testimony regarding defendant's belligerent conduct which caused Tucker to seek help in calming defendant along with testimony regarding defendant's conduct of arguing

with Tucker to the point that she requested that he leave the apartment was sufficient to allow the jury to reasonably infer that defendant's conduct constituted contact in violation of the peaceable contact order. The elements of an offense may be proved by circumstantial evidence and reasonable inferences arising from the evidence. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Consequently, there was sufficient evidence that Officers Weeks and Young had reasonable cause to arrest defendant for violation of the order and that the arrest was lawful. MCL 764.15e(1); MSA 28.874(5)(1). The fact that the officers left the apartment for a short period before returning to effectuate defendant's arrest does not alter that conclusion. MCL 764.15e(1); MSA 28.874(5)(1) permits arrest when there is reasonable cause to believe a defendant "has violated" a condition of his pretrial release. Testimony regarding the officers' observations of defendant's conduct toward Tucker and their subsequent discovery of the peaceable contact order was sufficient evidence that Officers Weeks and Young had reasonable cause to conclude defendant had violated the pretrial release order. Given the testimony that defendant intentionally physically resisted the officers' efforts to complete his arrest, there was also sufficient evidence of each of the remaining elements of the crime. See *Little, supra*.[3]

Defendant also argues that the trial court erred in allowing the jury to decide whether defendant's arrest was lawful, rather than deciding the issue as a matter of law. We disagree. A lawful arrest is an element of the crime of resisting arrest. *Little, supra*. Thus, while the lawfulness of an arrest is generally a question of law for the trial court to decide, defendant's trial for resisting arrest made the issue of lawfulness a question of fact for the jury. *People v Dalton*, 155 Mich App 591, 598; 400 NW2d 689 (1986).

Last, defendant argues that he was denied the effective assistance of counsel at trial. We disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was objectively unreasonable, and (2) that defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to establish prejudice, the defendant must show there is a reasonable probability that, but for the alleged error by counsel, the result of the proceeding would have been different. *People Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 687; *Rockey, supra*. We limit our review to mistakes apparent from the record, given defendant did not move for a new trial or *Ginther*[4] hearing. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant contends that defense counsel's failure to move for a directed verdict following the prosecution's presentation of proofs constituted ineffective assistance. Given that the prosecution presented sufficient evidence of each of the elements of the charged offense, defendant's counsel's performance in this regard was not objectively unreasonable and did not cause defendant prejudice. *Mitchell, supra*; *Rockey, supra*. Defendant also challenges defense counsel's failure to object to Officer Weeks' testimony that Tucker told him defendant was creating a disturbance inside the apartment on the basis that testimony was inadmissible hearsay. Because there was significant other testimony regarding defendant's conduct from which the jury could infer that defendant violated the

peaceable contact order, there is no reasonable probability that, but for defense counsel's failure to lodge an objection to the complained-of testimony, the result of the proceedings would have been different. *Stanaway, supra* at 687-688. We further conclude that defense counsel's failure to object to Officer Young's testimony that he knew the location of defendant's and Tucker's apartment because he had been to the apartment on prior occasions did not constitute ineffective assistance. Defendant's arrest was based on his alleged violation of the peaceable contact order. The jury was made aware that the order was issued in connection with prior charges of domestic violence and trespassing. Implicit in the existence of those charges and the issuance of the order is the knowledge that defendant had prior contact with the police. Given that knowledge, defendant has failed to demonstrate that Officer Young's complained-of testimony caused him prejudice. *Id*. Finally, defendant has not demonstrated how his trial counsel's failure to object to the introduction of a single recording of Tucker's two phone calls to the police dispatcher constituted ineffective assistance. Even assuming that the single recording caused the jury to conclude Tucker made only one call to the police, defendant has failed to indicate how such a conclusion resulted in prejudice. Moreover, the police dispatcher clearly testified that Tucker made two calls on the night in question, approximately ten to thirty minutes apart. Accordingly, we conclude defendant has failed to overcome the heavy presumption against a determination of ineffective assistance. *Stanaway, supra* at 687; *Rockey, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[1] Although a copy of the pretrial release order has not been introduced at any time during these proceedings, it is undisputed on appeal that an order limiting defendant to "peaceable contact" with Tucker had been issued.

[2] As noted prior, a copy of the pretrial release order was not introduced below or on appeal. Thus, beyond its requirement that defendant have only "peaceable contact" with Tucker, its exact terms are not known. A standard form order regarding pretrial release or custody provides, in part, "It is Ordered: . . . *shall* have peaceable contact only; no physical or verbal abuse; no threatening, harassing, intimidating or stalking of [protected person]."

[3] Insofar as defendant claims his physical resistance was justified by the unlawful nature of his arrest, we conclude that defendant's arrest was lawful and, further, note that this Court has recognized the waning support for the common law rule allowing resistance under circumstances where a defendant perceives his arrest is unlawful. *People v Wess*, 235 Mich App 241, 245; 597 NW2d 215 (1999).

[4] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).