STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 221834 Ingham Circuit Court
MICHAEL LEON HESTER, Defendant-Appellant.	LC No. 99-074381-FH

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting and obstructing a police officer, MCL 750.479, and trespassing, MCL 750.552. The trial court sentenced defendant as a third habitual offender to 3½ to 15 years' imprisonment for the resisting and obstructing conviction and time served for the trespassing conviction. Defendant appeals as of right, and we affirm.

I. Basic Facts and Procedural History

The instant case arose from an incident that occurred in a dormitory on Michigan State University's campus (hereinafter "MSU.") During the fall of 1998, defendant would enter onto the MSU campus and watch female athletes exercise. On December 4, 1998, MSU police served defendant with a "Notice of Trespass" (hereinafter "notice.") This notice stated that defendant had committed various illegal acts upon the campus including: entering residences without permission, harassing students, sleeping in vacant rooms, and making obscene telephone calls. The notice further banned defendant from entering onto MSU's premises for one year and that if he was found on the premises, he would be subject to arrest. The notice was filed at MSU police headquarters where officers could access it. Flyers containing defendant's photograph were posted in the dormitories instructing residents to phone police if defendant was observed on campus.

Despite this notice, defendant entered one of the dormitories and went to a floor that housed only female residents. In the hallway, defendant approached a female student and remarked that she looked "really good" in the pants that she wore because they were tight. Thereafter, defendant allegedly invited the nineteen year old female student to accompany him to his vehicle to obtain alcohol and proceeded to talk with her for approximately twenty minutes.

Another female resident observed defendant and contacted a member of MSU's staff who in turn phoned the police.

Three police officers were dispatched to the dormitory. While proceeding to the location, one officer verified that defendant was subject to a valid Notice of Trespass. Upon arrival, two officers entered the building and one remained outside. They interviewed the two female students, obtained a description and began to search the building. One of the officers observed defendant in a stairwell and commanded him to stop. A chase ensued where the officers repeatedly ordered defendant to stop. One of the officers testified at trial that he identified himself as a police officer and ordered defendant to stop approximately eight to twelve times but to no avail.

Defendant exited the building and police chased defendant on foot, splitting up in different directions in an attempt to surround defendant. Eventually, defendant came face to face with one of the officers at which time defendant put his hands into his pockets prompting the officer to draw his gun and order defendant to drop to the ground. Despite the officers' orders, defendant refused. Accordingly, the officers had to use physical force to subdue defendant, handcuff him, and take him into custody. When police transported defendant to police headquarters to process and identify him, they discovered a copy of the notice on his person.

Defendant was charged with resisting and obstructing a police officer, harassment and trespass. After the prosecution's case in chief, the trial court, on its own motion, dismissed the harassment charge and the case proceeded to the jury on the charges of resisting and obstructing and trespass. The jury convicted defendant and the trial court sentenced him in accord therewith. Defendant appeals his conviction as of right. We affirm.

II. The Resisting and Obstructing Theory

First, defendant argues that the evidence was insufficient to support a jury instruction on the prosecution's theory of resisting and obstructing arrest. We disagree.

A review of the record reveals that defendant failed to object when the trial court instructed the jury pursuant to this theory.[1] While it is true that criminal defendants need not take special steps to preserve a sufficiency of the evidence argument, *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999), to the extent that defendant failed to object to the instruction, defendant waived any error "unless relief is necessary to avoid manifest injustice." *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999).

Submitting a theory to a jury for their consideration where there is insufficient evidence to support that theory, constitutes error. *People v Olsson*, 56 Mich App 500, 504; 224 NW2d

---

[1]Although defendant subsequently raised this issue in a post-verdict motion for a new trial, typically, that is insufficient to properly preserve the issue for appellate review, "unless it is a new matter that could not have been presented before and is crucial to the interests of justice." *People v Willis*, 1 Mich App 428, 430; 136 NW2d 723 (1965).

691 (1974); see also *People v Smielewski*, 235 Mich App 196, 205-206; 596 NW2d 636 (1999). Accordingly, incumbent upon this Court is to determine whether the prosecutor's evidence on its resisting arrest theory is such that a rational trier of fact could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *Cain, supra* at 117.

To establish the crime of resisting arrest, the prosecution must show:

> (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 Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983).

In the case at bar, the prosecution offered evidence to establish that when defendant fled, uniformed officers identified themselves, chased defendant on foot, and repeatedly commanded defendant to stop. Further, evidence established that it took two officers to subdue and finally handcuff defendant as defendant insisted that "it wasn't [him]" and that they "[had] the wrong guy." Accordingly, we find sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that the individuals making the arrest were officers of the law, defendant knew that they were officers of the law, that defendant resisted a lawful arrest and intended to so resist. The trial court did not err in submitting the resisting arrest theory to the jury for their consideration. *Smielewski, supra* at 206.

III. The Right to a Unanimous Jury Verdict

Next, defendant argues that the trial court deprived him of his constitutional right to a unanimous verdict because the trial court only rendered a general unanimity instruction and did not otherwise instruct that the jurors must specify whether they were convicting defendant of resisting an arrest or convicting him of obstructing an officer's attempt to keep the peace. A review of the record reveals that defendant failed to object to the jury instructions before the matter was submitted to the jury for deliberations. Accordingly, defendant waived any error save for relief necessary to avoid manifest injustice. *Henry, supra* at 151. However, to the extent that defendant alleges a violation of a constitutional guarantee, this Court reviews such a claim for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Because our state constitution guarantees criminal defendants a unanimous jury verdict, trial courts must give proper instructions relative to the unanimity requirement. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998) (citing Const 1963, art 1, § 14.) Where the offenses charged are separate and distinct in character, provable by substantially different evidence and punishable by differing penalties, a general guilty verdict is erroneous. *People v Booker (After Remand)*, 208 Mich App 163, 169-170; 572 NW2d 42 (1994) (citation omitted.)

In the case at bar, both crimes are violations of the same statute, provable by substantially the same evidence and carry the same penalty. MCL 750.479. Defendant correctly asserts that resisting arrest and obstructing an officer in his attempt to keep the peace are two separate crimes

with differing elements. *People v Weiss*, 235 Mich App 241, 244; 597 NW2d 215 (1999) (citation omitted.) However, while it was possible for a juror to find that defendant obstructed a police officer but did not resist arrest, it would be impossible for a juror to determine that defendant resisted arrest without also finding that defendant obstructed an officer. MCL 750.479. Accordingly, we find no manifest injustice warranting reversal because at a minimum, the jury unanimously determined that defendant was guilty of obstructing a police officer. See *People v Burgess*, 67 Mich App 214, 219-221; 240 NW2d 485 (1976).

III. Constitutional Claim

Defendant further argues that his conviction for trespass was constitutionally infirm because the conviction was premised upon an unlawful trespass notice, thereby depriving him of his constitutional right to be on MSU's campus without due process. Defendant raised this issue for the first time in his motion for new trial. Typically, appellate review is limited to issues decided by the trial court. *Candelaria v B C General Contractors, Inc.*, 236 Mich App 67, 83; 600 NW2d 348 (1999). However, this Court may review an unpreserved issue if failure to consider it would result in manifest injustice, if considering the issue is necessary to properly determine the case, or if the issue raises a question of law where all necessary facts have been presented. *Richards v Pierce*, 162 Mich App 308, 316; 412 NW2d 725 (1987).

Here, all of the necessary facts required for a proper determination on this issue were not presented, argued or decided in the trial court. Consequently, this Court lacks the factual foundation upon which to make a proper determination. Further, we do not find that considering this issue is required for this Court to properly determine the case or that failure to address it would result in manifest injustice. *Id*. Accordingly, we decline to review this issue on the record herein presented.

IV. Ineffective Assistance of Counsel

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel admitted defendant's guilt on the trespass charge in his opening and closing arguments. We disagree.

Claims for the ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for the deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (citations omitted.)

In the case at bar, defense counsel conceded that defendant was trespassing. A review of counsel's closing argument reveals that defense counsel employed this tactic to explain the reason why defendant fled when he observed the police. Although defense counsel conceded guilt on the lesser offense, counsel elected to maintain defendant's innocence on the greater charge of resisting and obstructing. The decision to admit guilt to a lesser offense while

maintaining innocence on other charges is a matter of trial strategy. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

On review of the entire record, defendant did not overcome the presumption of effective assistance of counsel, or otherwise establish by a "reasonable probability" that but for the alleged deficiencies, defendant would have been acquitted. *Hoag*, *supra* at 6. The record does not demonstrate any error requiring reversal or otherwise require a remand for an evidentiary hearing on defendant's claim for ineffective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald