STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2005
v	No. 255719 Calhoun Circuit Court
GLENN FRANK FOLDEN, Defendant-Appellant.	LC No. 04-000291-FH

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree fleeing and eluding, MCL 750.479a(3), two counts of assault of police officer/resisting and obstructing, MCL 750.81d(1), and leaving the scene of an accident where vehicle damage had resulted, MCL 257.618. He was sentenced to time served for the latter conviction, 21 to 60 months for the fleeing and eluding conviction and 15 to 24 months for each resisting and obstructing conviction. We affirm.

Defendant first contends that the trial court's instructions to the jury regarding one of the counts charging resisting and obstructing violated his right to a unanimous verdict. The issue is not preserved because defendant did not object to the jury instructions below. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). This Court reviews unpreserved jury instruction issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find that the court's instructions for fleeing and eluding Officer Jeske and Sergeant Clark, coupled with the general unanimity instruction, was not plain error that violated defendant's right to a unanimous jury. US Const, Am VI; Const 1963, art 1, § 14; MCR 6.410(B).

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The trial court generally instructed the jury that its verdict must be unanimous. The court gave specific instructions for count III, resisting and obstructing arrest:

> [T]he defendant is charged with the crime of resisting or obstructing a police officer who was maintaining the peace . . . . the prosecution must prove beyond a reasonable doubt the following elements: First, that the Defendant resisted an officer of the law . . . . in Count III that's alleged to be either Todd Jeske or William Clark or both.

Defendant argues that, based on the instruction, it is unclear on which charge the jury convicted: resisting and obstructing Jeske, resisting and obstructing Clark, or both. It is also unclear, defendant contends, on which charge the jury may have acquitted: the first, the second, or neither.

The prosecution argues that jury unanimity is not required with respect to alternative theories and cites *People v Gadomski*, 232 Mich App 24; 592 NW2d 75 (1998). In that case this Court upheld a conviction for criminal sexual conduct in which the jury was required to find that the defendant's act of sexual penetration was accompanied by one of three alternative aggravating circumstances. *Id.* at 29. This Court stated, "[I]t is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *Id.* at 31. "Where there is a single sexual penetration, the various aggravating circumstances [listed in the statute] constitute alternative means of proving a single CSC I offense and would not support convictions of separate and distinct CSC I offenses." *Id.*

We believe this case is controlled by *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994). In that case, defendant was charged with one count of first-degree criminal sexual conduct, which was premised upon three separate acts against the victim occurring over a three-day period. Defendant requested a jury instruction requiring that the jurors unanimously agree as to which specific act of penetration occurred. *Id.* at 508. The trial court declined, but did give a general unanimity instruction. *Id.* at 508-509. This Court reversed defendant's conviction, holding that defendant was entitled to the unanimity instruction requested. *Id.* at 511. The Supreme Court reversed, holding that "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the *actus reus* of a single criminal offense." *Id.* at 512 (emphasis in original). The Court noted:

> The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Id.* at 512-513 (emphasis in original; footnote omitted).]

This is precisely the situation here. The prosecutor submitted evidence that during the single encounter between police and defendant, defendant resisted and obstructed his arrest. The encounter involved two police officers, but like the situation in *Cooks*, a jury finding that defendant resisted and obstructed either officer was sufficient. Indeed, because there was no jury confusion on the record, and Officer Jeske did not even testify, we believe the jury verdict was in harmony with the unanimity requirement and a separate instruction was not necessary.[1]

[1] *People v Quinn*, 219 Mich App 571; 557 NW2d 151 (1996) is distinguishable and supports our conclusion in this case. In *Quinn* we held that the prosecutor failed to produce sufficient evidence to convict defendant on one of two theories submitted under a receiving and concealing stolen property count. The two theories - involving separate events some nine years apart – could have supported separate counts but not a single count involving alternative means because

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We turn now to defendant's challenges to his convictions for fleeing and eluding and resisting and obstructing Officer Stanley. He contends that insufficient evidence supported that conviction. We disagree. This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The standard for reviewing a claim of insufficient evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Defendant argues that there was insufficient evidence to support the existence of a property damage accident from which he could have fled. This argument is unpersuasive because the jury was free to believe the testimony of Melissa Jennings, the woman who testified that defendant hit her car in line at a gas station. She stated that after the accident she noticed a new scratch about four inches long on her bumper. She claimed that defendant told her "it's nothing but a scratch" and acknowledged the damage. She also averred that defendant was aware that the gas station called the police and that he left the station after he gained that awareness. Defendant testified otherwise, denying that there was any damage. He also averred that he left the station to return to work and made no statement about whether he knew the station called the police. It was for the jury to decide whom to believe. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Further, defendant's argument about the lack of other evidence does not address whether the evidence actually before the jury was sufficient.

Defendant next argues that insufficient evidence supported the first count of evading Stanley and his conviction for resisting and obstructing Stanley. These arguments are without merit, as Defendant is again confusing a credibility conflict with a claim of insufficient evidence.

Defendant next argues that he was improperly convicted of fleeing and eluding Stanley as well as resisting and obstructing him because the charges were based on a single course of conduct. We disagree. Defendant did not preserve this issue below, so we review it for plain error affecting substantial rights. *Carines*, *supra*.

According to the statute proscribing fleeing and eluding:

> (1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

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the transactions were so independent. *Id.* at 576. Here, defendant's acts against both officers occurred at the same time.

* * *

> (3) Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both, if 1 or more of the following circumstances apply:
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> * * *
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> (b) A portion of the violation occurred in an area where the speed limit is 35 miles an hour or less, whether that speed limit is posted or imposed as a matter of law. [MCL 750.479a.]

The evidence supported a conclusion that defendant violated this statute by failing to pull over when Stanley closely followed him with lights flashing. Stanley's flashing lights and his close following of defendant constitute a visual signal for defendant to stop. As subsection 1 requires, Stanley was in uniform in a fully marked car. He testified that the posted speed limit was thirty miles per hour and that defendant accelerated up to forty-six miles per hour. The speed limit meets the requirement of subsection 3(b). Defendant's acceleration meets the requirement of subsection (1) that the defendant willfully fail to obey an order to stop. The statute clearly applies to the conduct Stanley described.

Defendant was also convicted of resisting and obstructing Stanley. MCL 750.81d codifies this crime as follows:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

The exceptions listed in subsection (1) pertain to injuries that result from the prohibited conduct and do not apply to this case. The testimony of Stanley supports defendant's separate conviction under this statute. When defendant stopped and got out of his vehicle, Stanley ordered him to stop. Stanley testified that defendant responded that he would not stop, and ran away. Defendant admitted that at this point he knew Stanley was pulling him over. He was therefore aware that Stanley was performing official police business, as the statute requires. Furthermore, defendant opposed Stanley's order to stop by responding that he would not and fleeing on foot, meeting the other key element of violating the statute.

These two convictions do not rest on a single course of conduct. Defendant first decided not to stop his car and to try to elude Stanley. MCL 750.497a specifically addresses the conduct of those who use motor vehicles to flee police. Defendant then decided after he stopped to run away on foot. While doing that, he disregarded a verbal order to stop. In this manner he opposed Stanley's attempt to apprehend him, which MCL 750.81d proscribes in no uncertain terms. It also contains an express provision stating that violation of the statute does not preclude conviction of any other violation of law. MCL 750.81d(5). Defendant was properly charged under both statutes.

Defendant argues in the alternative that punishment for both convictions violates his constitutional protection against double jeopardy. The argument lacks merit. A double jeopardy claim presents a question of law, which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). As noted above, the two statutes proscribe different conduct and contain separate elements. The first applies only to those who use motor vehicles to flee police. The second is more general and applies to defendant's refusal to obey a verbal order to stop. Multiple convictions of distinct crimes do not violate double jeopardy. See e.g., *People v Ford*, 262 Mich App 443, 458-459; 687 NW2d 119 (2004) (holding that convictions for armed robbery and robbery of a safe do not violate double jeopardy). The fact that the two crimes belong to different sentencing categories and result in different lengths of sentences also demonstrates that the Legislature intended separate punishments in this case. *Id.* at 456-457. Defendant's constitutional protection against double jeopardy was not violated.

Defendant next contends that judicial factfinding supporting his sentencing score for offense variable thirteen is unconstitutional following the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Defendant did not challenge his offense variable score below and we therefore review his claim of error for plain error affecting substantial rights. *Carines, supra*.

In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court stated that *Blakely* does not affect Michigan's sentencing guidelines because our sentences are indeterminate, not determinate as they were in *Blakely*. And this Court has rejected an argument that *Claypool's* pronouncement on the inapplicability of *Blakely* to Michigan's sentencing system is not binding authority. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004) lv grt in part 472 Mich 881. Therefore, we reject defendant's constitutional challenge under *Blakely* to his sentence.

Finally, defendant argues that his presentence report is incomplete and should be amended. A presentence report is presumed accurate unless the defendant effectively challenges it. *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997); *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant has failed to effectively challenge his presentence report. Defendant asks that the presentence report be amended to show that he earned a building trades certificate in 1975 and completed a business math college course, both through the Michigan Department of Corrections. However, defendant has presented nothing to document that. A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual statements with specific references to the record. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Nor may defendant merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). His request to amend his presentence report lacks merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette