

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL RAY JONES,

Defendant-Appellant.

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UNPUBLISHED

May 8, 2008

No. 278300

Gladwin Circuit Court

LC No. 06-002475-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of resisting and obstructing a police officer, MCL 750.81d. We affirm.

**I. FACTS**

Defendant's conviction arose as a result of events that took place following a routine traffic stop. The traffic stop was initiated by a uniformed officer in a fully marked police vehicle. The officer had observed that defendant's vehicle was traveling well below the speed limit, was weaving within its lane, and was without taillights. During the initial exchange with the officer, defendant had an unlighted cigarette in his mouth. Defendant was ordered not to light his cigarette by the officer, who anticipated that a preliminary breath test (PBT) might be necessary as part of his investigation into defendant's erratic driving. Defendant disregarded the order and lit the cigarette. The officer then ordered defendant to remain in his vehicle while the officer called for assistance.

Upon returning to defendant's vehicle, the officer observed defendant rummaging around in items on the passenger seat. The officer ordered defendant to keep his hands where they could be seen, but defendant disregarded this order as well. The officer was concerned that defendant might be looking for a weapon, so he forcibly removed defendant from the vehicle by opening the door, pulling defendant out, and placing him against the vehicle. The officer ordered defendant to spread his arms and legs for a weapons search; defendant refused, so the officer attempted to kick defendant's legs apart and defendant then tried to kick back at the officer.

Defendant had escalated the encounter to physical resistance, so the officer informed defendant that he was under arrest, maced defendant in the face, and, when defendant continued

to struggle, took him to the ground. Shortly thereafter, two citizens happened by and helped the officer secure defendant in handcuffs.

Defendant testified that he was told to get out of the truck and asked to submit to a breathalyzer, and that he agreed to take the test. Defendant contended that when he voluntarily got out of the truck, the officer hit him on the back with his baton, and maced him after he fell to the ground. Defendant stated that other police officers beat him on the side of the road. He denied ever laying hands on the officer or kicking at him.

The jury convicted defendant as charged. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of 12 months in jail.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his conviction. We disagree.

### A. Standard of Review

This Court reviews challenges to sufficiency of the evidence de novo. *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007). We must examine 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 reasonable doubt. *Id.* It is the function of the factfinder to determine the weight of the evidence and credibility of witness; the reviewing court should not interfere with that function. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748; amended 441 Mich 1201 (1992).

### B. Analysis

The essential elements of resisting and obstructing a police officer are: (1) that defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered the officer, and (2) that defendant knew or had reason to know the officer was performing his duties. MCL 750.81d(2). “Obstruct” is defined as “use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.” MCL 750.81d(7)(a). A defendant knows or has reason to know that he is resisting and obstructing a police officer in the performance of his duties when said defendant ignores or resists the persistent commands of a police officer in full uniform. See *People v Nichols*, 262 Mich App 408, 413; 686 NW2d 502 (2004).

The prosecution offered the testimony of the arresting officer, which established that when the officer initiated the traffic stop, he was in full uniform and driving a marked police vehicle. The officer related that defendant ignored a number of his commands, and then offered physical resistance. Defendant admitted that he recognized that the officer was a police officer when he was stopped. We find that the prosecution offered sufficient evidence for a rational trier of fact to conclude that the essential elements of the crime were proven beyond reasonable doubt. Even though defendant submitted contradictory evidence, it was for the trier of fact to determine the credibility of the proofs presented. *Wolfe, supra* at 514.

### III. JURY INSTRUCTIONS

Defendant also contends that his conviction must be reversed because the general unanimity jury instruction was insufficient to clearly relate that the jury was required to unanimously agree on which act was proven beyond a reasonable doubt. Again, we disagree.

#### A. Standard of Review

Defendant failed to object to the jury instructions. Therefore, this issue is unpreserved. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Unpreserved jury instruction issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

#### B. Analysis

A criminal defendant has a right to a unanimous verdict for conviction. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In most cases, a general unanimity instruction will protect that right. However, a specific unanimity instruction must be given by the trial court where “1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant’s guilt.” *Cooks, supra* at 524. Defendant claims that both possibilities apply in this case because a series of distinct acts could have proven the resisting and obstructing charge, and because the jury was confused.

A specific unanimity instruction is not required if the acts are so similar in nature and time that they constitute one continuous transaction. *Id.* at 524, 528. While the prosecution introduced evidence that defendant disobeyed more than one order, attempted to kick the officer, and physically resisted being handcuffed, all these acts were related to the initial traffic stop, occurred within a short period of time, and involved one officer. Therefore, the evidence regarding defendant’s behavior in relation to the officer showed one continuous transaction of escalating resistance.

Defendant next contends that a specific unanimity instruction was necessary because the record demonstrated that there was jury confusion as to which act committed by defendant could form the basis of the conviction. Defendant has mischaracterized whatever juror confusion may have existed. The jury requested clarification at two separate times during deliberations. In particular, the jury sought to verify that the word “or” in the instructions meant that it had to agree on at least one act enumerated in MCL 750.81d, but not all. After addressing each question, the trial court inquired if the parties were satisfied; defendant did not object or request further clarification or instruction. Since the trial court cleared up any confusion in addressing the jury’s questions, and since there is no indication that the jury was confused at the time the verdict was reached, the general unanimity instruction was sufficient.

### IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, we reject defendant's assertion that he was denied the effective assistance of counsel because a specific unanimity instruction was not requested.

#### A. Standard of Review

Defendant failed to file a motion for a new trial or request a *Ginther*<sup>1</sup> hearing; therefore, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

#### B. Analysis

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

A specific unanimity instruction was not necessary in this case; therefore, a failure to request such an instruction could not have affected the outcome of the proceedings, and defendant was not denied effective assistance of counsel. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Donald S. Owens

/s/ Bill Schuette

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).