STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2008
v	No. 277156 Oakland Circuit Court
ADAM BENJAMIN KIRSCH, Defendant-Appellant.	LC No. 2006-210880-FH

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assaulting, resisting, or obstructing a sheriff's deputy, MCL 750.81d(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 46 months to 15 years each, with no credit for time served. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

Defendant's convictions arise from an altercation with sheriff's deputies in the Oakland county jail. The prosecution's witnesses, consisting of sheriff's deputies who were present during the altercation, and some inmates, testified that defendant was upset because he was being housed in a crowded jail cell and wanted a bed. He began yelling, using vulgar language, and threatening other officers. Officers ordered defendant to put on his shirt and exit his cell. Witnesses testified that defendant walked up and swung at one deputy, struck another deputy, and continued swinging his arms. Other deputies entered the cell and attempted to restrain defendant while keeping other inmates back. Defendant continued to resist the deputies' commands and physically resisted his removal from his cell. The deputies eventually took control of defendant and moved him to another cell, where he continued to resist commands until he became winded and gave up.

In contrast to the prosecution's witnesses, defendant testified that he obeyed the order to exit his cell, but when he did so, a deputy grabbed him by the throat and threatened to beat him. He testified that although he tried to comply with the deputies' orders, the deputies kicked and punched him. He denied disobeying any direct orders from the deputies, or resisting or obstructing the deputies from performing their duties.

On appeal, defendant first argues that trial counsel was ineffective for not requesting a jury instruction on his right to resist excessive force by the deputies. Because defendant did not

raise this issue in a motion in the trial court, this Court's review is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was so prejudiced by counsel's representation that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). A defendant must also demonstrate that they were prejudiced by counsel's performance. *People v Dendel*, 481 Mich 114; 748 NW2d 859, 865 (2008).

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Under the common law and Michigan's earlier resisting arrest statute, MCL 750.479, it was necessary to prove as an element of the offense of resisting arrest that the defendant was subject to a lawful arrest. *People v Ventura*, 262 Mich App 370, 374; 686 NW2d 748 (2004). Therefore, the right to resist an unlawful arrest was a defense to a charge under MCL 750.479. *Ventura*, *supra*.

However, MCL 750.479 was replaced by MCL 750.81d(1), which provides:

> 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.

MCL 750.81d(7)(b)(*v*) defines a "person" to include a sheriff or deputy sheriff. MCL 750.81d(7)(a) defines "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."

In *Ventura*, *supra* at 375-377, this Court held that, unlike MCL 750.479, because MCL 750.81d does not refer to the lawfulness of an arrest or detaining act, the lawfulness of a defendant's detention is not an element under MCL 750.81d. Defendant argues, however, that even if the lawfulness of a detaining act is not an element of MCL 750.81d, a defendant may still assert as a defense to a prosecution under MCL 750.81d that he used reasonable force to resist an officer's unlawful use of excessive force. Assuming without deciding that such a defense is not foreclosed, the facts of this case did not support such a defense.

Defendant testified at trial and denied refusing to comply with the deputies' commands or physically resisting the deputies in the performance of their duties. He testified that he was grabbed by the throat and that the deputies used force against him, even as he tried to cooperate. Defendant denied being an aggressor or fighting back. Defendant's theory was that he was beaten without justification or cause.[1] Under these circumstances, defense counsel was not ineffective for failing to request an instruction on defendant's right to use reasonable force to resist an officer's unlawful use of excessive force. Such an instruction was not supported by the evidence and would have been inconsistent with defendant's theory that he did not attempt to resist the officers or fail to comply with their commands. See *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003) (counsel was not ineffective for failing to request an instruction that was not supported by the evidence and inconsistent with the defense theory).

Next, defendant argues that because there was evidence of several acts that might have supported conviction for the charged offenses, the trial court erred by failing to give a specific instruction advising the jury that it had to unanimously agree on the particular act that formed the basis for each conviction. Because defendant did not request a specific unanimity instruction at trial, or object to the instructions given, this issue is not preserved. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Accordingly, our review of this issue is limited to plain error affecting defendant's substantial rights. *Gonzalez, supra* at 643.

At trial, the jury heard evidence of various different acts that could have supported the charges. There was testimony that defendant (1) ignored an order to be quiet, (2) ignored an order from Deputy Cardona to put on his shirt and exit the cell, (3) swung at, but did not strike, Deputy Cardona, (4) struck Deputy Wargel, (5) ignored commands from Deputy Wargel to stop resisting, (6) ignored commands from Deputy Vasquez to get down on the ground, and (7) ignored commands to place his hands behind his back. Despite this evidence, defendant was charged with only two counts of resisting or obstructing a sheriff's deputy. One charge pertained to Deputy Cardona and the other to Deputy Wargel.

In *People v Bobby Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006), this Court explained:

> A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). It is undisputed that the trial court gave the jury a general unanimity instruction at defendants' trial. Under most circumstances, a general instruction on the unanimity requirement will be adequate. *Cooks*, *supra* at 524. However, the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct

[1] Although defendant admitted that he refused to comply with a deputy's order to be quiet, he explained that he disobeyed that order because he was exercising his First Amendment rights of free speech. There was no evidence presented that defendant tried to physically defend himself in response to the command to keep quiet.

> (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." *Id.*

Although there was evidence of several different acts that might have supported a conviction for the charged offenses, we conclude that the failure to give a specific unanimity instruction did not amount to a plain error affecting defendant's substantial rights.

In her closing argument, the prosecutor explained that the two charges were based on (1) defendant's failure to comply with Deputy Cardona's command for defendant to come out of his cell, and (2) defendant's failure to comply with Deputy Wargel's command for defendant to put his hands behind his back and stop resisting. Also, for each deputy, the possible alternative acts that may have supported separate charges were not materially distinct, but rather occurred within the same sequence of events. Further, the defense position was that defendant never resisted or disobeyed a command. The defense did not challenge one possible alternative act over another.

In this regard, this case is similar to *Van Dorsten*, *supra*. In that case, the defendant was charged with a single count of first-degree criminal sexual conduct, but the complainant testified that the defendant committed five separate acts of penetration. *Id.* at 541. The defendant denied committing any sexual assaults. *Id.* at 542. The defendant did not request an instruction on a requirement of unanimity with regard to a particular act. *Id.* at 544. The Supreme Court determined that regardless of whether it would have been proper to instruct the jury that its verdict must be unanimous with respect to a particular act or theory where there were several that might have supported conviction of the offense, the issue was not preserved with an appropriate objection at trial and appellate relief was not necessary to avoid manifest injustice. The Court reasoned:

> The number or specific identification of acts of sexual penetration was not in dispute in this case. The defendant's position was simply that there was no sexual assault committed. It was obvious to the participants in the trial that the verdict turned on whether the jury believed the testimony of the complainant and Terry Doyle on the one hand, or found reasonable doubt that any sexual assault occurred, as claimed by the defendant. Given that posture of the case, there was no reason for the parties to focus on the specifics of individual penetrations. In this context, the failure to give an instruction requiring unanimity on a particular act in no way impeded the defense or denied the defendant a fair trial. [*Id.* at 545.]

Likewise, the focus of this case did not involve a dispute over specific acts of resistance or failure to comply with specific commands. Rather, defendant's position was that he complied with all of the officers' commands and never resisted. As in *Van Dorsten*, the case turned on whether the jury believed the testimony of the prosecution witnesses on the one hand, or found reasonable doubt that any resistance or failure to comply occurred at all, as claimed by defendant. In this context, the failure to give a specific unanimity instruction did not affect defendant's substantial rights.

For these reasons, the failure to give a specific unanimity instruction does not require reversal.

Next, defendant argues that the trial court erred by failing to award him sentence credit for time served awaiting trial. The trial court determined that because defendant was on parole when the offenses were committed, any credit for time served was required to be applied against his prior sentence. We find no error.

Defendant was not entitled to sentence credit under MCL 769.11b. This Court has consistently held that because MCL 768.7a(2) provides that sentences of persons convicted of committing offenses while on parole "begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense," any sentence credit applies to the previous paroled offense, not a new offense. Pursuant to MCL 791.238(2), credit for time served by a parole detainee applies only to the sentence for which parole was granted. *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006); *People v Meshell*, 265 Mich App 616, 638-640; 696 NW2d 754 (2005); *People v Seiders*, 262 Mich App 702, 705-708; 686 NW2d 821 (2004).

Contrary to what defendant argues, MCL 791.238 does not violate a defendant's right to equal protection and due process even though it treats parolees differently than nonparolees with respect to sentence credit. *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). Further, because defendant is entitled to credit for time served against the remaining portion of his previous sentence, the denial of credit against his new sentence does not violate his double jeopardy protections. *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other grounds in *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989).

Defendant has not provided any support for his claim that he never received credit against his earlier sentence. Further, our review is limited to the sentences defendant received in this case. We lack jurisdiction to consider issues involving defendant's previous sentence for the paroled offense, which is not before this Court. To the extent that defendant questions the wisdom of the Department of Corrections's application of the statutes involved, his argument should be addressed to the Legislature.

Defendant argues in a pro se supplemental brief that the evidence was insufficient to support his convictions, and that the jury's verdict is against the great weight of the evidence.

An appellate court's review of the sufficiency of the evidence to sustain a conviction does not turn on whether there was any evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 514-515.

This case essentially involved a credibility contest between the prosecution and defense witnesses. Testimony from the prosecution's witnesses indicated that defendant refused to comply with Deputy Cardona's command to exit his cell, and that he also failed to comply with Deputy Wargel's command to put his hands behind his back and stop resisting. This testimony,

if believed, was clearly sufficient to support defendant's convictions for two counts of resisting or obstructing a sheriff's deputy, contrary to MCL 750.81d(1). Although contrary testimony was presented by the defense witnesses, we are required to view the evidence in a light most favorable to the prosecution and resolve credibility disputes in favor of the jury's verdict when reviewing challenges to the sufficiency of the evidence. *Wolfe*, *supra* at 514-515. Because the evidence, so viewed, was sufficient to support defendant's convictions, we reject his challenge to the sufficiency of the evidence.

Defendant also argues that the jury's verdict is against the great weight of the evidence. Such a claim is addressed to the discretion of the trial court. Here, however, defendant failed to preserve this issue by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review of this issue is limited to plain error affecting defendant's substantial rights. *Id*.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. Conflicting testimony, even when impeached to a certain extent, is generally not a basis for granting a new trial. *Id*. at 219. "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*., quoting *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998).

Here, although defendant challenged the credibility of the prosecution's witnesses, their testimony was not so far impeached that it was deprived of all probative value that it could not be believed. Accordingly, it was for the jury to weigh the conflicting testimony and determine which account was accurate. Defendant has failed to establish a plain error affecting his substantial rights.

Defendant's pro se brief also raises several other issues that are not within the scope of his statement of the question presented. "This Court need not consider issues that are not properly set forth in the statement of questions presented." *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007), vacated in part 480 Mich 1059 (2008). Nonetheless, we have considered defendant's remaining issues and find no basis for relief. We additionally find no merit in any of defendant's remaining arguments presented in his pro se brief and accordingly, we affirm the convictions and sentences of defendant.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello