STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 326173 Kent Circuit Court
MARIAN MOUSSA, Defendant-Appellant.	LC No. 13-009724-FC

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Defendant appeals her convictions of assaulting, resisting, or obstructing a police officer, MCL 750.81d, and possession of marijuana, MCL 333.7403(2)(d). For the reasons provided below, we affirm.

I. SEARCH AND SEIZURE

On appeal, we interpret defendant's first argument as challenges to the propriety of a pat-down search in a parking lot and a search at jail, after she was arrested. Neither of these claims is preserved. See *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). We review these unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). "A search of a person incident to an arrest requires no additional justification." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "'[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.'" *People v Chapman*, 425 Mich 245, 250-251; 387 NW2d 835 (1986), quoting *United States v Robinson*, 414 US 218, 235; 94 S Ct 467; 38 L Ed 2d 427 (1973). An arrest is lawful if the police possessed "information demonstrating probable cause to believe that an offense has occurred and that the defendant has committed it." *People v Nguyen*, 305 Mich App 740, 751; 854 NW2d 223 (2014). "Probable cause requires only a probability or substantial chance of criminal activity," and can be based on circumstantial evidence and inferences arising therefrom. *Id*. at 752. In addition, relevant to this appeal, evidence obtained pursuant to an

illegal search or seizure may not be used at trial. *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004).

Furthermore, in certain circumstances, "a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005), citing *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Such a detention "does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot." *Jenkins*, 472 Mich at 32. "A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior." *Id*. (quotation marks and citations omitted). "An officer who makes a valid investigatory stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Champion*, 452 Mich at 99. The scope of the pat-down search is limited "to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Id*.

Here, defendant was subject to two different searches. The first one occurred at a church parking lot, where she initially met police officers. And the second one occurred at the jail after she was arrested for kidnapping.

A. SEARCH IN PARKING LOT

The first search occurred where Officer Andrew Bingel conducted a pat-down search of defendant for weapons after speaking with her, and we conclude that the pat-down was legal as part of an investigative *Terry* stop. The officer had a reasonable suspicion that defendant may be involved with a crime, i.e., the kidnapping of MC, when it became apparent to him that defendant claimed to be a relative of MC, yet never attempted to contact MC's parents at any time after taking MC from the bus. Further, the officer was put on notice that defendant could be armed or dangerous when she made the extraordinary claim that she was concerned that the backpack MC brought from school on the bus may have contained a "bomb" that could have "blown up the whole [apartment] complex." Hence, Officer Bingel's pat-down search of defendant under these circumstances was entirely justified and legal.

Defendant also claims that the search was unreasonable because it included unzipping her coat. In a pat-down search as part of an investigative stop, the scope of the search must be reasonably designed to discover weapons that could be used to assault an officer. *Id.* Officer Bingel testified that normal procedure for patting someone down is that the person puts their hands on their head while the officer searches their pockets, around their waist, and inside their coat to see if they are concealing any weapons. Officer Bingel also testified that defendant was wearing a coat, was clothed underneath the coat, and that the search did not include searching inside her pants or her shirt. From this testimony it is clear that the search was reasonable and lawful, as it showed that the search was aimed to ensure that defendant did not possess any weapons. Officer Bingel testified that although defendant claimed to refuse to unzip her coat because she was not wearing anything underneath it, he could see that she wore a shirt and pants underneath her coat. Defendant also makes the unsupported claims that there was no legitimate

reason for Officer Bingel to search under her coat without summoning a female officer to do so, and because there is no authority to support her claim, it is rejected.

Moreover, we note that the legality of this search ultimately is irrelevant to the suppression of any evidence because no evidence was discovered during this search. In other words, the pat-down in the parking lot did not uncover any evidence, let alone any that led to defendant's eventual arrest. Defendant was arrested for kidnapping MC because she had lied about being MC's relative, she did not have permission to take MC off the bus, and she never attempted to contact MC's parents afterward.

B. SEARCH IN JAIL

We also hold that the search that took place at the jail after defendant was ultimately arrested was legal. After MC's father arrived at the church parking lot, he informed the police that defendant was not a relative and did not have permission to take MC off of the bus. Based on this information, the police had probable cause to believe that defendant kidnapped MC by fraudulently taking her with the intent to detain or conceal her from her parents and those in lawful charge of her, which is a felony under MCL 750.350. On the basis of this probable cause, defendant was lawfully arrested. *Nguyen*, 305 Mich App at 751-752. After defendant was arrested, she could be lawfully searched incident to that arrest. *Chapman*, 425 Mich 250-251. She was taken to jail and searched, and marijuana was found in her possession, which provided the basis for her conviction of possession of marijuana. The search was lawful and, thus, defendant was not entitled to suppression of the marijuana. *Goldston*, 470 Mich at 528.

Defendant nevertheless claims that defense counsel at trial was ineffective for failing to object to the admission of marijuana into evidence on the ground that it was the fruit of an illegal search. We disagree because, as described above, any challenge to any of the searches would have failed, as the searches were proper, and counsel cannot be found ineffective for failing to raise meritless issues. *People v Ericksen*, 208 Mich App 192, 201; 793 NW2d 120 (2010).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to prove that she was guilty of resisting and obstructing a police officer. An appeal based on the sufficiency of the evidence is reviewed de novo. *People v Henderson*, 306 Mich App 1, 8; 854 NW2d 234 (2014). When considering the sufficiency of the evidence, the Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Id*. at 9.

To convict a defendant of resisting or obstructing a police officer under MCL 750.81d(1), the prosecution must show that (1) "the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer;" (2) "the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties;" and (3) "the officers'

actions were lawful." *People v Quinn*, 305 Mich App 484, 491; 853 NW2d 383 (2014); see also MCL 750.81d(1). The term "obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a command. MCL 750.81d(7)(a).[1]

Here, there was sufficient evidence for a reasonable jury to find that the first element—that defendant resisted or obstructed a police officer—was proven beyond a reasonable doubt. Officer Bingel testified that defendant refused to unzip her coat when told to do so and pulled away from him when he tried to unzip the coat, himself. The jury also heard testimony that there was a physical struggle between defendant and Officer Bingel, that defendant twisted and tried to pull away while being handcuffed, and that she became belligerent and physically resisted Officer Bingel and another officer. Viewing this evidence in the light most favorable to the prosecution, this evidence was sufficient for the jury to find defendant resisted or obstructed the police officers.

There was also sufficient evidence for the jury to find that the second element—that defendant knew or had reason to know that the officers were police officers performing their duties—was proven beyond a reasonable doubt. Testimony at trial established that defendant arrived at the church parking lot expecting to meet with police officers and that the officers who arrived were both in marked police patrol cars. On this basis, the jury could conclude that defendant knew she was interacting with police officers who were performing their duties.

Regarding the third element, we have already determined in Part I-A of this opinion that the pat-down search in the parking lot was legal. Thus, the officer's actions and commands related to the search were lawful. In reaching our conclusion, we note that despite defendant's arguments to the contrary, defendant's subjective belief regarding the lawfulness of the officers' actions has no bearing on the sufficiency of the evidence supporting her conviction. *Quinn*, 305 Mich App at 491.

Because there was sufficient evidence to enable a rational trier of fact to find beyond a reasonable doubt that each of the three elements of resisting and obstructing were met, we affirm defendant's conviction of resisting or obstructing a police officer.

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey

[1] The statutory language indicates that the term "obstruct" includes "knowing failure to comply with a *lawful* command." MCL 750.81d(7)(a) (emphasis added). However, the lawfulness of the officer's actions is to be separately analyzed as part as the third element of the crime. See *Quinn*, 305 Mich App at 491.