STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER GEORGE ZEROD,

Defendant-Appellant.

UNPUBLISHED
December 28, 1999

No. 211212
Bay Circuit Court
LC No. 97-001323 FH

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of resisting and obstructing a police officer, MCL 750.479; MSA 28.747. The charge arose from defendant's involvement in an altercation with a police officer who had been dispatched to defendant's home to investigate a loud music complaint. The trial court sentenced defendant to three years' probation, with fifteen days in jail. Defendant appeals as of right. We affirm.

I

Defendant first contends that his trial counsel provided ineffective assistance in the following particular manners: (1) by failing to adequately voir dire the jurors or excuse the entire jury for cause after some prospective jurors had indicated they were inclined to believe that police officers always told the truth; (2) by neglecting to ask defendant whether he had done any charity work so that the jury could have favorably compared defendant to a police officer witness; (3) by failing to present evidence of defendant's back condition to demonstrate that defendant could not have assaulted the officer; (4) by failing to introduce diagrams or photographs of the porch area of defendant's home to illustrate to the jurors the movements of each witness; (5) by not questioning the police officer regarding a comment he made at the preliminary examination that might have reduced his credibility; (6) by not conducting additional questioning of defendant to remove any impression that defendant might belong to a militia group and did not respect the police; (7) by not questioning the police officer about his verbal confrontation with defendant's son; (8) by failing to determine whether the police officer had in fact been attacked by a dog while on defendant's front porch; (9) by not questioning the police officer concerning the time it took him to write his police report; (10) by failing to review the officer's personnel file to

determine whether anyone had filed complaints against him; (11) by not inquiring of the officer whether his uniform was damaged during defendant's arrest; (12) by failing during closing argument to highlight discrepancies in the testimony of the two police officers or to point out the lack of any evidence supporting the officer's claim that he was bitten by a dog; and (13) by failing to present the legal defense that defendant's attempt to call the sheriff did not constitute obstruction.

Because defendant neither moved for a *Ginther*[1] hearing nor a new trial, our review is limited to mistakes apparent on the existing record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that his right to effective assistance of counsel was so undermined that it justifies reversal of his conviction, defendant must show that defense counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the presumption that his defense counsel provided effective assistance, *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995), and also bears the burden of overcoming the strong presumption that his counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant's claim regarding his counsel's performance during the voir dire is meritless. The decision to challenge a juror is a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). The record is unclear whether the potential jurors, none of whom had raised their hands to indicate their belief that some or all police officers lie, affirmatively raised their hands in response to defense counsel's inquiry whether they believed all police officers always tell the truth. The record indicates, however, that defense counsel elicited from the jurors their beliefs that police officers were human and sometimes made mistakes, and that defense counsel otherwise questioned the jurors concerning potential biases. Furthermore, defense counsel exercised several challenges, both peremptorily and for cause, eventually indicating his satisfaction with the jury as ultimately selected. Under these circumstances, we conclude that defendant has not demonstrated substandard performance or prejudice. *Pickens, supra*.

Defendant's claims regarding defense counsel's performance at trial likewise lack merit. Each of the actions defendant now claims defense counsel should have performed relates to the questioning of witnesses or the presentation of evidence, all of which are matters of trial strategy that this Court does not second guess. *Pickens*, *supra* at 330; *People v Rockey*, ___ Mich App ___; ___ NW2d ___ (Docket No. 203462, issued 8/10/99), slip op at 2; *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Furthermore, defendant failed to present evidence supporting many of his allegations. For example, defendant failed to establish that he did any charity work, that his alleged back operations made it unlikely that he could assault a police officer, that at the preliminary examination Officer Robert Greenleaf made an unrecorded comment concerning a "No Trespassing" sign, that defendant's dog did not bite Greenleaf, or that any complaints existed within Greenleaf's personnel file. With respect to defendant's complaint that defense counsel insufficiently distanced defendant from involvement in any militia group, defendant now suggests no method by which defense counsel should have done so.[2] It is defendant's responsibility to provide a record that supports his claims on appeal.

People v Ford, 417 Mich 66, 112; 331 NW2d 878 (1982). Absent such a record, we conclude that defendant has not overcome the presumption that defense counsel provided effective assistance.

With respect to defense counsel's alleged failure to introduce maps or photographs of defendant's porch, defendant offers no insight regarding how this alleged failure affected his right to a fair trial or the outcome of the trial. See *Stanaway*, *supra* at 687-688. Moreover, defense counsel's decision whether to present to the jury diagrams, maps or photographs represents a decision consigned to his trial strategy that we will not second guess. *Pickens*, *supra* at 330.

Defendant's remaining assertions that defense counsel provided ineffective assistance during trial involve defense counsel's questioning of Officer Greenleaf. Trial counsel's manner of examining witnesses is a basic decision of trial strategy. *People v Robideau*, 94 Mich App 663, 669; 289 NW2d 846 (1980), aff'd 419 Mich 458; 355 NW2d 592 (1984). Again, defendant has not demonstrated that these alleged errors adversely affected his right to a fair trial, or that had defense counsel conducted the questioning in the manner now suggested by defendant, a different outcome would likely have resulted. *Stanaway*, *supra*.

Defendant also fails to demonstrate that defense counsel's closing argument constituted ineffective assistance. The content of counsel's closing argument was a matter of trial strategy and thus will not be second guessed. *Pickens*, *supra*. The various witness' testimony agreed that the backup officer arrived after Greenleaf and defendant were already wrestling inside the house and that the backup officer was not present during the initial confrontation. Accordingly, the alleged discrepancy in the backup officer's response time is irrelevant to the jury's determination whether defendant obstructed or resisted Greenleaf. Moreover, the record does not support defendant's assertion that some discrepancy existed in the police officers' testimony that "supports the Defendant's testimony of what happened on the porch." Defense counsel's decision not to highlight that no witness other than Greenleaf mentioned that defendant's dog allegedly attacked him represented a matter of trial strategy, *Pickens*, *supra*, and, once more, defendant has failed to demonstrate that he was prejudiced because a different result likely would have occurred had defense counsel presented such an argument. *Stanaway*, *supra*. Finally, defendant failed to explain how defense counsel's failure to argue "that the Defendant did not obstruct the officer by saying he was calling the sheriff" deprived defendant of a fair trial or likely affected the outcome of the case. *Stanaway*, *supra*; *Pickens*, *supra*.

II

Defendant also contends that the trial court erred in refusing to instruct the jury that defendant had no legal obligation to identify himself to Greenleaf. Within the context of this issue, defendant suggests that the prosecutor presented no evidence that defendant was responsible for playing loud music beyond 10 p.m. Defendant further maintains that no Bay City ordinance required that he provide his name to Greenleaf, and that "[n]o authority exists under Michigan law for an officer to require a citizen to give his name or ID." Defendant reasons that "[i]f Officer Greenleaf was not on the property to make a lawful arrest, and he had no authority to obtain the Defendant's ID, then the officer was not carrying out lawful duties which is an element of the charge of obstructing, resisting or assaulting a police officer."

In reviewing a claim of instructional error, this court reviews the jury instructions in their entirety to determine if there is error requiring reversal. Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. Conversely, an instruction that is without evidentiary support should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

We first note that abundant trial testimony from most of the trial witnesses agreed that at approximately 10:30 p.m. on the date of defendant's arrest loud music emanated from defendant's home and could be heard well outside the home. Thus, defendant, as the home owner, was responsible for violating the Bay City noise ordinance, which prohibits the following:

> [t]he using, operating or *permitting to be played*, used or operated, any radio receiving set . . . phonograph or other machine or device for the producing or reproducing of sound . . . . between the hours of 10:00 p.m. and 7:00 a.m. in such a manner as to be plainly audible at a distance of 50 feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section. [Emphasis added.]

Defendant's violation of the noise ordinance, which occurred in Greenleaf's presence, authorized Greeneleaf to arrest defendant. MCL 764.15(1)(a); MSA 28.874(1)(a).

Greenleaf, charged with the responsibility of enforcing the law, thus acted properly by going onto defendant's property to investigate the noise complaint. Greenleaf, whose testimony the jury apparently credited, explained that while he initially did not plan on citing or arresting defendant for violation of the noise ordinance, he intended to obtain defendant's identification so that, in the event any subsequent violations occurred, Greenleaf would be able to establish that he had given defendant a prior warning. Greenleaf testified that he arrested defendant because defendant had assaulted him, pushing Greenleaf backward as he attempted to climb defendant's front porch staircase, not because defendant refused to identify himself. Defendant's right to refuse to identify himself, even assuming that right exists in the circumstances of this case, does not constitute a defense to the charge of resisting and obstructing a police officer by physically assaulting him.[3] Because the trial court accurately instructed the jury concerning the elements of resisting or obstructing a police officer and did not omit instructions regarding any material defense, we find no error. *Wess*, *supra* at 243-244; *People v Philabaun*, 234 Mich App 471, 480; 595 NW2d 502 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[2] As defendant acknowledges, defense counsel asked him, "Are you a member of any militia?" After defendant responded, "Absolutely not," defense counsel further queried, "More specifically the Michigan Militia?" Defendant again responded negatively.

[3] The jurors unanimously found defendant guilty on two independent bases: that defendant had interfered with an officer carrying out his lawful duties and that defendant had resisted arrest.