

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL EDWARD LEACH, JR.,

Defendant-Appellant.

UNPUBLISHED
October 13, 2000

No. 219438
Washtenaw Circuit Court
LC No. 98-010684-FH

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of domestic assault, MCL 750.81(4); MSA 28.276(4), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced to concurrent terms of thirty to one-hundred and eighty months' imprisonment and appeals as of right. We affirm.

Defendant went to the home of the victim, pushed his way into the victim's home, and assaulted the victim. The victim's roommate left the apartment, but could hear the victim screaming and called police. When police arrived on the scene, defendant assumed a fighting stance, used threatening language, and took a swing at Deputy Everett Robbins.

Defendant first argues that there was insufficient evidence to support the resisting and obstructing conviction because there was no evidence that any officer was placed in fear of an assault. We disagree. Review of MCL 750.479; MSA 28.747 reveals that there is no requirement that an assault occur that places an officer in fear. Rather, the statute prohibits the obstruction, resistance or opposition to an officer. *Id.* The purpose of the statute is to protect officers from physical harm while engaged in ordinary police functions. *People v Little*, 434 Mich 752, 759; 456 NW2d 237 (1990). Accordingly, defendant's challenge to the sufficiency of the evidence is without merit because fear of an assault is not an element of the offense.

Defendant next argues that he was denied the effective assistance of counsel based on trial counsel's failure to call the victim of the domestic violence charge¹ and failed to investigate eyewitnesses to the resisting and obstructing incident. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To reverse a conviction on the basis of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and so prejudiced defendant that he was denied the right to a fair trial. *Id.* at 662. Defendant meets this burden by demonstrating that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *Id.* In the present case, defendant testified that he merely sought to retrieve his keys from the victim and believed that he had a lawful right to resist under the circumstances. Defendant's theory was presented to the trier of fact, and he has failed to meet the burden of establishing that the outcome would have been different if eyewitnesses were called to testify.

Lastly, defendant argues that he did not receive *actual* notice of the filing of the habitual offender notice until the day of sentencing or after and trial counsel was ineffective for failing to notify defendant of the habitual charge. We disagree. In the absence of an evidentiary hearing or new trial based on ineffective assistance of counsel, our review is limited to errors apparent on the record. *Id.* at 661. There is no evidence in the record to substantiate the self-serving assertion that defendant was unaware of the filing of the habitual offender notice.² Defendant's contention, that trial counsel's response to the grievance filed by defendant constitutes a tacit admission that he failed to notify defendant of the habitual charge, is without merit.

However, we do note that at the time of sentencing, the trial court failed to delineate whether he was sentencing the defendant as an habitual offender. Furthermore, a judgment of sentence dated March 16, 1999, provided that defendant was sentenced to thirty to one-hundred and eighty months' imprisonment for each conviction, to be served concurrently. There is no indication in the lower court record that defendant moved for resentencing or clarification of his sentence. However, on June 21, 1999, an amended judgment of sentence provided that defendant's sentence for domestic assault, MCL 750.81(4); MSA 28.276(4), was sentenced pursuant to the habitual fourth offender, MCL 769.12; MSA 28.1084. MCR 6.429(A) provides that the trial court may correct an invalid sentence, but may not modify a valid sentence. Because

¹ We note that the victim did take the stand to testify. However, a bench conference was held prior to any testimony. The trial court briefly questioned the victim regarding a warrant for an obstruction of justice charge. The victim was then excused. While not expressly stated on the record, it appears that ramifications of the testimony or advice of counsel precluded questioning of this witness.

² Defendant merely asserts in an affidavit that trial counsel withheld information regarding the habitual notice from him. However, in order to prove domestic assault, MCL 750.81(4); MSA 28.276(4), two or more prior convictions for domestic assault must have occurred. Those convictions were admitted at the trial attended by defendant. Furthermore, the parties engaged in plea negotiations, and an offer was tendered to defendant that was rejected. Appellate counsel failed to corroborate the ineffective assistance allegations by tendering an affidavit from the prosecutor regarding the specifics of the plea discussions and whether it incorporated the habitual offender notice.

of the lack of information in the lower court record regarding the circumstances that led to the amended judgment of sentence, we remand to the trial court for clarification. We do not retain jurisdiction.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage