STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2002
v	No. 232946 Saginaw Circuit Court
DERRICK LASHON BRADDOCK, Defendant-Appellant.	LC No. 00-018916-FH

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of felonious assault, MCL 750.82, and one count of resisting and obstructing a police officer, MCL 750.479. Defendant was sentenced to concurrent terms of four years' probation with 270 days in jail on each count. We affirm.

Defendant argues that insufficient evidence was adduced at trial to support his resisting and obstructing conviction. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

Defendant argues that verbal passive resistance does not constitute knowing and willful resistance or obstruction. In support of this argument, defendant cites *People v Philabaun*, 234 Mich App 471; 595 NW2d 502 (1999), which was overturned in *People v Philabaun*, 461 Mich 255; 602 NW2d 371 (1999). In overturning the holding of this Court, our Supreme Court adopted the following language from Judge Murphy's dissent in *People v Dav*is, 209 Mich App 580, 586; 531 NW2d 787 (1995):

> "In sum, the question whether a defendant has engaged in conduct that violates the resisting or obstructing statute should be decided case by case. Although the classic example of resisting or obstructing involves a defendant who physically interferes with the officer, actual physical interference is not necessary because case law instructs that an expressed threat of physical interference, absent actual physical interference, is sufficient to support a charge under the statute." [*Philabaun, supra* at 263.]

Further, the evidence established that defendant had thrown rocks at police officers while they were effectuating a lawful arrest. We believe this evidence is clearly sufficient to support defendant's conviction of this charge.

Defendant also argues that his counsel was ineffective in two ways: (1) for failing to request jury instructions on attempted felonious assault and attempted resisting and obstructing a police officer, and (2) for failing to move for a directed verdict of acquittal on the resisting and obstructing charge.[1] We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We conclude that defendant has failed to overcome the presumption that trial counsel's failure to request the disputed instructions was sound trial strategy. Defendant's defense strategy was to argue that he had been erroneously identified by the police, and that he had an alibi for the time the offense was committed. Defense counsel's decision to pursue this line of defense and not request the disputed instructions falls within the purview of trial strategy that we will not second-guess on appeal. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

As for defendant's second claim of ineffective assistance, this issue is not properly before us because it was not included in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). MCR 7.212(C)(5). In any event, we find no evidence of ineffective assistance. As we previously concluded, viewed in a light most favorable to the prosecution, the evidence adduced at trial was sufficient to support defendant's conviction for resisting and obstructing a police officer.

Defendant also challenges the identification procedures employed by the police at the scene, arguing that they were unduly suggestive, resulting in a verdict against the great weight of the evidence. Again, we disagree. Because defendant did not preserve his claim that the verdict is against the great weight of the evidence by making a motion for new trial, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), we review for a miscarriage of justice, *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Defendant also did not preserve his claim of unduly suggestive identification procedures because he failed to move to suppress the

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[1] Defendant's cursory argument does not identify the alleged error beyond the general claim that a motion for a directed verdict should have been brought. However, because this argument is appended to the end of defendant's claim that insufficient evidence was presented to support his resisting and obstructing conviction, we assume that the alleged error involves only this charge.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

identification evidence or request a *Wade* hearing.[3] *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). We review this element of defendant's argument for plain errors affecting substantial rights. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

With regard to the identification evidence, on-the-scene identification procedures similar to those employed in defendant's identification were appropriate because prompt confrontations between the victim and the suspect promote fairness and reliability. *Winters, supra* at 727. On-the-scene identification procedures, though suggestive, are reasonable because the victim's memory is fresh and accurate and the identification results in the quick release of innocent suspects. *People v Purofoy*, 116 Mich App 471, 480; 323 NW2d 446 (1982). Accordingly, because we find no plain error in the out of court identification, we conclude that defendant has failed to establish that a miscarriage of justice occurred.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).