STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2006
v	No. 266395 Dickinson Circuit Court
MARK ANTHONY PILETTE, Defendant-Appellant.	LC No. 05-003427-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assaulting, battering, obstructing, or endangering a public official performing his or her duties (obstructing a public official), MCL 750.479(2), and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to one year in jail with credit for time served and three years of probation. We affirm defendant's convictions, but remand this case to the trial court for correction of a clerical error on defendant's judgment of sentence.

Defendant's conviction for obstructing a public official stems from verbal threats to kill the judge presiding over defendant's ongoing child support obligations. Defendant communicated the threats to kill the judge to both a friend of the court investigator and the police officer assigned to investigate the first threat. Based on these threats, defendant was charged with obstructing a public official contrary to MCL 750.479(1)(a).[1]

MCL 750.479(1)(a) provides that a person shall not knowingly and willfully "assault, batter, wound, obstruct, or endanger a . . . judge . . . acting in the performance of his or her duties." Further, the term "obstruct" is defined to include "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.479(8)(a). Before the trial court, defendant argued that MCL 750.479 was a specific intent crime and, therefore, that the prosecution had to prove not only that defendant made the threats,

[1] Defendant was originally charged with two counts of common law obstruction of justice based on these threats. See MCL 750.505. However, the information was later amended to include only one count of obstructing a public official contrary to MCL 750.479(1)(a).

but that he intended the threats to be taken seriously. The trial court disagreed and concluded that MCL 750.479 was a general intent crime.

In *People v Gleisner*, 115 Mich App 196, 198-200; 320 NW2d 340 (1982), the Court held that a prior version of MCL 750.479 was a general intent crime.[2] In reaching this conclusion, the Court determined that the use of the term "willfully" meant that the prosecution had to prove that the defendant intended to perform the proscribed act and that the term "knowingly" required proof that the defendant directed the proscribed act at an officer, knowing him or her to be an officer. *Id.* at 198-199. Consistent with this understanding of MCL 750.479, the trial court gave the following instruction:

> The defendant is charged with the crime of obstructing a public official who was acting in the performance of her duties. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant obstructed a public official, namely a judge. Obstruct includes the use or threatened use of physical interference or force.
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> Second, that the defendant knew that the person obstructed was a judge who was performing her duties.
>
> Third, that the defendant's actions were intended by the defendant. That is, not accidental.

In his first argument on appeal, defendant argues that, as interpreted by the trial court, MCL 750.479 is unconstitutionally overbroad. Specifically, defendant contends that, to the extent that MCL 750.479 regulates speech, it must be read to contain a specific intent or it is unconstitutional under the First Amendment to the United States Constitution.[3] Because the trial court improperly instructed the jury that it could convict defendant without finding that he had the requisite intent, defendant continues, this Court must reverse his convictions. We conclude that the statute is not unconstitutionally overbroad and that any error in the jury instruction does not warrant reversal.

This Court reviews de novo, as questions of law, challenges to the constitutionality of a statute, *People v Martin*, 271 Mich App 280, 328; 721 NW2d 815 (2006), and claims of instructional error, *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Further, we note that this issue has not been properly preserved for appellate review. Before the trial court, defendant argued that, according to its plain language, MCL 750.479 requires a showing of specific intent. Defendant did not, however, raise a First Amendment challenge to either the sufficiency of the trial court's instructions or the constitutionality of MCL 750.479. A challenge on one ground is generally insufficient to preserve an appeal on a different ground. *People v*

[2] The statute was amended to reflect its current form by 2002 PA 270.

[3] US Const, Am I. The First Amendment is applicable to the states through the Fourteenth Amendment. *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003).

Kimble, 470 Mich 305, 309; 684 NW2d 669 (2004). Therefore, we shall review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).[4]

The First Amendment generally prevents government from proscribing speech based on disapproval of the ideas expressed. *RAV v City of St. Paul*, 505 US 377, 382; 112 S Ct 2538; 120 L Ed 2d 305 (1992). However, the First Amendment does not provide absolute protection for all forms of expression.[5] *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003). The United States Supreme Court has recognized that certain categories of speech are of such slight social value that any benefit that may be derived from them is outweighed by society's interest in order and morality. *RAV*, *supra* at 383. One such category is composed of "true threats." *Black*, *supra* at 359, citing *Watts v United States*, 394 US 705, 708; 89 S Ct 1399; 22 L Ed 2d 664 (1968) (per curiam). Hence, if MCL 750.479 only proscribes "true threats," its provisions would be entirely consistent with the First Amendment.

The "true threats" exception had its origins in Watts, *supra*. The defendant in *Watts* was convicted of "'knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . .'" *Watts*, *supra* at 705, quoting 18 USC 871(a). He was convicted based on his statement at a rally against the Vietnam War that, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. In examining the statute, the Supreme Court first noted that it was constitutional on its face. "Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707. In overturning the defendant's conviction, the Court held that the term threat must be construed in the light of First Amendment principles that encouraged uninhibited debate on public issues. In this light, defendant's statement was not a true threat, but rather was a "kind of political hyperbole." *Id.* at 708. Because the Court determined that the defendant's statement was not a threat, it did not

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[4] We disagree with plaintiff's contention that defendant waived this issue when he expressed satisfaction with the jury instructions. Defendant's statement of satisfaction only applied to the jury instructions and was qualified by the court's acknowledgment of defendant's earlier comments and objections, which included defendant's claim that MCL 750.479 was a specific intent crime. Although this prior objection was insufficient to preserve defendant's claim of error with regard to the jury instructions, it was sufficient to avoid waiver of the issue in its entirety. Further, under no circumstances can this expression of satisfaction reasonably be interpreted as a waiver of a constitutional challenge to the validity of the statute.

[5] We disagree with plaintiff's contention that MCL 750.479 proscribes conduct rather than "pure speech." Although the statute clearly encompasses physical conduct, it also applies to speech whose communicative impact causes a specific harm (i.e. obstructing a public official through threats to use physical interference or force). Consequently, to the extent that the statute applies to pure speech, the statute is a content-based regulation of speech. See *United States v Cassel*, 408 F3d 622, 626 (CA 9, 2005); cf. *People v Taravella*, 133 Mich App 515, 520-521; 350 NW2d 780 (1984) (noting that, unlike the present statute, Michigan's misuse of communications service statute was "not directed at the restriction of the communication of thoughts or ideas," but rather at conduct).

address the *mens rea* requirement necessary to proscribe a threat consistent with the First Amendment. However, the Court expressed grave doubts about those cases that permitted a defendant to be convicted where he or she "voluntarily uttered the charged words with 'an *apparent* determination to carry them into execution.'" *Id.* at 707, quoting *Ragansky v United States*, 253 F 643, 645 (CA 7, 1918) (emphasis supplied by the *Watts* Court).

Although the Court in *Watts* expressed grave doubts about the construction given to the statute by the court in *Ragansky*, by 1975 a majority of the circuit courts had adopted similar standards for "true threats." See *Rogers v United States*, 422 US 35, 43; 95 S Ct 2091; 45 L Ed 2d 1 (1975) (Marshall, J., concurring) (describing the standard as the "objective" construction). In *Rogers*, the Court granted certiorari to address the apparent conflict among the circuit courts concerning the elements of the offense originally addressed in *Watts*. *Id.* at 36. However, the majority concluded that it was unnecessary to reach the merits of the issue and reversed on other grounds. *Id.* Although Justice Marshall did not disagree with the majority's analysis and conclusion, he wrote separately because he believed that the defendant's conviction should have been reversed on the ground that the instructions were inconsistent with the First Amendment. *Id.* at 43, 47-48.

Justice Marshall noted that, under the district court's instructions to the jury, the jury "was not required to find that the petitioner actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat. Instead, the jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act." *Id.* at 43-44. This was, in essence, "a negligence standard," which charged the defendant "with responsibility for the effect of his statements on his listeners." *Id.* at 47. This construction of the statute's elements, Justice Marshall concluded, was inconsistent with the requirements of the First Amendment.

> If [18 USC 871(a)] has any deterrent effect, that effect is likely to work only as to statements intended to convey a threat. Statements deemed threatening in nature only upon "objective" consideration will be deterred only if persons criticizing the President are careful to give wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the "uninhibited, robust, and wide-open" debate that the First Amendment is intended to protect. [*Id.* at 47-48, quoting *New York Times Co v Sullivan*, 376 US 254, 270; 84 S Ct 710; 11 L Ed 2d 686 (1964).]

For that reason, Justice Marshall would have held that a threat is punishable consistent with the First Amendment only when the speaker "intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Id.* at 48.

The United States Supreme Court returned to the issue of threats and the First Amendment in *Black, supra.* In *Black*, the Court addressed the constitutionality of a Virginia statute that made it unlawful to burn a cross with the intent to intimidate any person or group of persons. *Id.* at 348. In passing on the constitutionality of the statute, the Court noted that "true threats" may be banned consistent with the First Amendment. *Id.* at 359.

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v United States*, *supra* at 708 ("political hyperbole" is not a true threat); *R.A.V. v City of St. Paul*, 505 US at 388. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. [*Id.* at 359-360.]

The Court then concluded that a "ban on cross burning carried out with the intent to intimidate is . . . proscribable under the First Amendment." *Id.* at 363. Nevertheless, a plurality of the Court determined that the statute was facially invalid because it indicated that the burning of a cross was prima facie evidence of an intent to intimidate a person or group of persons. See *id.* at 365.

Since the decision in *Black*, only a few courts have addressed whether the definition of "true threats" provided in *Black* introduced an intent element into the First Amendment analysis of true threats. In *United States v Cassel*, 408 F3d 622 (CA 9, 2005), the court addressed the facial validity of a statute that punished "'[w]hoever, by intimidation . . . hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of' federal land at public sale." *Id.* at 626, quoting 18 USC 1860. The court in *Cassel* first surveyed the case law involving the threat exception to the First Amendment, which it noted was not entirely clear or consistent. *Id.* at 628-630. It then turned to the decision in *Black*.

The court in *Cassel* examined the definition of "true threats" and "intimidation" stated by the Court in *Black* and noted that the Supreme Court had laid great weight on the intent requirement.

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim. [*Id.* at 631 (citations omitted).]

The court concluded that, based on the decision in *Black*, it was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633. Because the jury had been improperly instructed regarding intent and the record was insufficient to support a conclusion that the error was harmless beyond a reasonable doubt, the court in *Cassel* reversed the defendant's conviction. *Id.* at 635-636, 638.

Other courts have continued to apply an objective standard for true threats even after the decision in *Black*, but without specifically addressing the issue. See *Porter v Ascension Parish School Bd*, 393 F3d 608, 616 (CA 5, 2004) ("Speech is a 'true threat' and therefore unprotected

if an objectively reasonable person would interpret the speech as 'a serious expression of an intent to cause a present or future harm.'") (citations omitted); *Washington v Johnston*, 156 Wash 2d 355, 361; 127 P 3d 707 (2006) (noting that Washington follows an objective standard for determining what constitutes a true threat); *Citizens Publishing Co v Miller*, 210 Ariz 513, 520; 115 P 3d 107 (2005) (stating that "true threats" are "those statements made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of [a person].'" (citation omitted); *Connecticut v Deloreto*, 265 Conn 145, 156; 827 A2d 671 (2003); see also *Cassel*, *supra* at 633 n 10 (noting that "no other circuit has squarely addressed the question whether *Black* requires the government to prove the defendant's intent."). Only one court other than the court in *Cassel* has directly addressed whether the decision in *Black* imposed an intent element on true threats. In *New York ex rel Spitzer v Cain*, 418 F Supp 2d 457 (SD NY, 2006), the court rejected the defendant's argument that the decision in *Black*, *supra* imposed an intent element on the First Amendment analysis of true threats.

> Defense counsel misreads *Black*. The Court explained there that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The relevant intent is the intent to communicate a threat, not as defense counsel maintains, the intent to threaten. [*Id.* at 479 (citations omitted).]

Nevertheless, despite its conclusion that *Black* did not impose an intent requirement, the court in *Spitzer* concluded that the statements at issue in that case would be threats under any standard, whether objective or subjective and whether imposed by the First Amendment or the statute at issue. *Id.* at 479-480.

We conclude that the Court in *Black* did not interject an intent element into "true threat" analysis. The Supreme Court defined "true threats" as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, *supra* at 359. Under this definition, the relevant intent is the general intent to communicate a "serious expression of an intent to commit an act of unlawful violence," i.e., to communicate a "true threat." Whether the speaker communicated the "true threat" with the specific intent to cause the person to whom the threat was communicated to feel threatened is irrelevant to determining whether the communication was a "true threat."[6] Instead, we hold that the objective standard for determining whether a communication is a "true threat" is the proper standard to apply.

[6] Further, the *Black* Court's definition of intimidation does not alter our conclusion. In *Black*, the Court noted that intimidation in the constitutionally proscribable sense was "*a type of true threat*, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, *supra* at 360 (emphasis added). By defining intimidation to be a "type of true threat," the Court in *Black* clearly distinguished it from the more general class of "true threats," which may be proscribed consistent with the First (continued…)

As noted, the majority of jurisdictions currently apply an objective standard for determining whether a threat is a "true threat" that may be proscribed consistent with the First Amendment. However, authorities are split as to whether the focus of the objective standard should be on the reasonable speaker or the reasonable listener. See *United States v Fulmer*, 108 F3d 1486, 1490-1491 (CA 1, 1997). Under the speaker-oriented standard, a statement is a "true threat" if "'a reasonable speaker would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to harm or assault.'" *United States v Schiefen*, 139 F3d 638, 639 (CA 8, 1998), quoting *United States v Orozco-Santillan*, 902 F2d 1262, 1265 (CA 9, 1990). Under the listener-oriented standard, a threat is a "true threat" and "therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'" *Porter*, *supra* at 616 (citation omitted). Because we believe that the speaker-oriented standard for "true threats" best comports with the requirements of the First Amendment, we adopt that standard as the appropriate standard for determining whether a threat is proscribable as a "true threat." See *Fulmer*, *supra* at 1491 (adopting the speaker-oriented standard because that standard "not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the 'reasonable-recipient standard,' namely that the jury will consider the unique sensitivity of the recipient.").

We now turn to defendant's claim that MCL 750.479 is facially unconstitutional. An otherwise valid governmental regulation may be unconstitutional if it "sweeps so broadly as to impinge upon activity protected by the First Amendment." *Dandridge v Williams*, 397 US 471, 484; 90 S Ct 1153; 25 L Ed 2d 491 (1970); *People v Boomer*, 250 Mich App 534, 539; 655 NW2d 255 (2002). By its plain terms, the present statute criminalizes the "threatened use of physical interference or force," see MCL 750.479(8)(a), against a judge acting in the performance of his or her duties. MCL 750.479(1)(a). When these terms are given their plain and ordinary meaning, this statute clearly prohibits more than true threats. In additional to proscribable "true threats," the statute applies to speech or expressive conduct that is protected under the First Amendment such as threats made in jest, hyperbole, and crude statements of political advocacy. See *Watts*, *supra* at 708. Therefore, the statute is unconstitutionally overbroad. However, where a statute may reasonably be construed to limit its overbreadth, this Court is under a duty to give the statute that construction rather than invalidate it. *INS v St. Cyr*, 533 US 289, 299-300 & n 12; 121 S Ct 2271; 150 L Ed 2d 347 (2001) (noting that courts are duty bound to construe statutes to avoid constitutional problems). Hence, we construe the reference to threats in MCL 750.479(8)(a) to prohibit only "true threats." Given this limiting construction, the statute in question is not facially invalid.

Defendant also contends that the statute was unconstitutional as applied in his case because the jury was not properly instructed on the intent element of the crime. We emphatically disagree with defendant's contention that the prosecution had to prove that defendant actually intended to harm the judge or intended to affect the outcome of his child support case. Under our holding, the offense of obstructing a public official is a general intent crime even to the extent that it applies to speech. Therefore, defendant was not entitled to a specific intent

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(…continued)

Amendment.

instruction. The only intent that the prosecution had to prove was the general intent to communicate a "true threat." *Watts*, *supra* at 708. Under this standard, the prosecution had to prove that defendant willfully made the threat, i.e. that he intended to make the statement, see *Gleisner*, at 198-199, and that the threat was a "true threat" under the objective standard. The prosecution did not need to prove that defendant actually intended to carry out the threat. *Black*, *supra* at 359-360. Nevertheless, we agree with defendant's general contention that the jury was not properly instructed in accord with the requirements of the First Amendment. First, we note that it is normally a question of fact for the jury whether a particular statement constitutes a "true threat." *United States v Daughenbaugh*, 49 F3d 171, 173 (CA 5, 1995). Although the trial court properly instructed the jury concerning the general intent necessary to convict defendant, it did not instruct the jury that it also had to find beyond a reasonable doubt that defendant communicated a "true threat." See *Washington*, *supra* at 364 (noting that the instructions were erroneous because they did not define "true threat.").

As already noted, defendant did not properly preserve this issue for appeal. Hence, this claim of constitutional error will not warrant reversal unless three conditions are met: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, *supra* at 763. In order to meet the third requirement, the defendant must demonstrate that the plain error affected the outcome of the lower court proceedings. *Id.* In the present case, the trial court plainly erred when it failed to instruct the jury concerning the intent necessary to convict defendant based on his speech rather than conduct. However, we conclude that defendant has failed to meet his burden of persuasion that the error affected the outcome of the trial.

Testimony at trial established that shortly after defendant received a court order revising his child support obligations, defendant called the Friend of the Court office and spoke to a child support investigator with whom he had previously had contact. The investigator testified that defendant was very upset and that when she stated that there was nothing she could do about the order, defendant stated that he would shoot the judge who issued the order in "front of God and everybody." The investigator testified that she was "very scared" and "fearful for the Judge." She further testified that she had talked to defendant in the past when he was angry, but this time was much different.

In addition, testimony established that several days after the call to the friend of the court office a police officer went to defendant's home to question him about the threat. The officer testified that defendant became very angry when the officer explained the reason for his visit and told him that "it wasn't a threat . . . it was a promise that he was going to kill her." The officer further testified that defendant stated that he understood why fathers kill their children and that he wanted to put diesel fuel in a truck and blow up the courthouse. The officer stated that defendant explained that he knew where the judge lived and had seen her leave work and said several times that he intended to kill her. The officer further testified that these statements along with defendant's demeanor led him to believe that defendant's threats were credible. As a result, various steps were taken to secure the safety of the judge until defendant could be apprehended. Finally, the officer testified that after defendant was arrested, defendant chuckled and said, "You think this is really going to help? I'll just kill her when I get out."

In response to this evidence, defendant testified that he was just venting and that the witnesses had simply misconstrued his statements as threats. He further testified that his

statements regarding blowing up the courthouse and fathers who kill their children were merely references to current events. He also testified that he had no intent to actually obstruct the judge's work.

These facts are compelling evidence that defendant willfully threatened a judge knowing that she was a judge acting in the performance of her duties and that a reasonable speaker, under the totality of the circumstances, see *Watts*, *supra* at 708 (noting the importance of context), would have foreseen that the statement would be interpreted by the friend of the court investigator and police officer as a serious expression of an intent to harm or assault the judge, *Schiefen*, *supra* at 639. Based on totality of this evidence, we cannot conclude that, had the jury been properly instructed on this element, the outcome would have been different. Therefore, the error does not warrant reversal. Finally, even if we were to conclude that there was plain outcome determinative error, we would decline to reverse defendant's conviction because the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763.

Defendant next argues that he was denied his right to a unanimous verdict on the charge of resisting or obstructing a police officer under MCL 750.81d(1). Specifically, defendant argues that the individual jurors could have found that he resisted or obstructed the arresting officer on different grounds and, therefore, the trial court should have instructed the jury that it had to unanimously agree as to which acts were proven beyond a reasonable doubt. This error, defendant further argues, warrants reversal. We disagree.

Defendant correctly notes that, under some circumstances, a trial court may be required to give a specific unanimity instruction. See *Martin*, *supra* at 338-339. However, after the trial court instructed the jury, which instructions included a general unanimity instruction, the trial court asked defendant's trial counsel if he had any further comments and objections. Defendant's trial counsel responded by expressing satisfaction with the instructions. This expression of satisfaction waived any claim of error for failing to give a specific unanimity instruction. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Consequently, there is no error to review. *Id.* Even if this error had not been waived, we would conclude that there was no plain error warranting reversal. *Carines*, *supra* at 763.

Finally, defendant asks this court to remand his case to correct a clerical error on his judgment of sentence. Defendant was originally charged with two counts of common law obstruction of justice under MCL 750.505. However, those charges were eventually dismissed, and the information was amended to include one count of obstructing a public official under MCL 750.479. Despite these changes, defendant's judgment of sentence erroneously reflects that defendant was convicted of common law obstruction of justice rather than obstructing a public official. Therefore, we agree with defendant's contention that this clerical error should be corrected and remand this case for that purpose. See MCR 7.208(C).

Affirmed, but remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski

I concur in result only.

/s/ William B. Murphy