STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2010
v	No. 292746 Van Buren Circuit Court
TOBY ALLAN FARLEY, Defendant-Appellant.	LC No. 07-15452-FH

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was found guilty of disarming a police officer of a non-firearm weapon, MCL 750.479b(1), resisting and obstructing a police officer, MCL 750.81d(1), and of being a fourth felony offender contrary to MCL 769.12. In *People v Farley*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2009 (Docket No. 278667), this Court reversed the convictions and remanded for a new trial. Defendant's new trial was held on April 1, 2009.

The jury in the new trial again convicted defendant of disarming a police officer of a non-firearm weapon, MCL 750.479b(1) and resisting or obstructing a police officer, MCL 750.81d(1).[1] Defendant was sentenced to concurrent prison terms of 4 to 15 years on the disarming conviction and 46 months to 15 years on the resisting and obstructing conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for the ministerial task of amending the judgment of sentence and presentence report to reflect defendant's conviction under MCL 750.81d(1) rather than MCL 750.81d(2).[2]

[1] Whether defendant was tried and convicted under MCL 750.81d(1) or d(2) is the crux of this appeal. As set forth more fully below, the record is clear that defendant was tried, found guilty, and sentenced for violating MCL 750.81d(1).

[2] We note that our review is hampered by the failure of the Van Buren County Prosecutor to file a brief. While in the future we may view such nonparticipation as a confession of error, in the instant case we choose to address the merits of the issues raised by defendant.

I. RESISTING AND OBSTRUCTING

Defendant argues on appeal that his constitutional right to be protected from double jeopardy was violated when he was tried and convicted at his second trial of resisting and obstructing an officer causing injury requiring medical care or treatment, MCL 750.81d(2), when the jury from the first trial found him innocent of that charge and only found him guilty of the lesser included offense of resisting and obstructing without causing injury, MCL 750.81d(1). We agree with defendant that if, in fact, he had been tried and found convicted under MCL 750.81d(2), there would have been a double jeopardy violation. *People v Garcia*, 448 Mich 442, 448-449; 531 NW2d 683 (1995); see also *People v Georgia*, 298 US 323, 329; 90 S Ct 1757; 26 L Ed 2d 300 (1970). However, our review of the record evidences that defendant was not, in fact, tried and convicted of MCL 750.81d(2), but of MCL 750.81d(1), the same charge he was found guilty of at his first trial.[3]

Defendant was initially charged with resisting and obstructing and officer causing injury, MCL 750.81d(2). The jury in defendant's first trial rejected that charge, but found defendant "guilty of the lesser offense of resisting without injury causing treatment or care," MCL 750.84d(1). After this Court remanded the case for a new trial, a new information was filed, but this information again listed defendant's charge as MCL 750.81d(2), resisting and obstructing causing injury.

Despite this error on the information, the trial itself was held for violating MCL 750.81d(1), resisting and obstructing without injury. The trial court's instructions to the jury on Court II before opening statements were:

> Count II, this requires first that the Defendant assaulted, battered, or wounded or obstructed or endangered the person who was performing his lawful duties, the peace officer, and second, that the Defendant knew the person he assaulted, battered[,] wounded, obstructed, or endangered was a police officer performing his duties, and third, that the Defendant's actions were intended by the Defendant, that is, they were not accidental.
>
> Those are the three things on Count II that the People must show beyond a reasonable doubt.

These are the correct instructions for MCL 750.81d(1), not MCL 750.81d(2).[4] Indeed, there is no mention of a requirement to cause an injury.[5] Similarly, after closing arguments, the trial court instructed the jury on Count II as follows:

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[3] We admit that the record is somewhat confusing in this matter. However, a thorough review indicates that defendant received a fair trial on the appropriate resisting and obstructing charge and that his sentencing was based on the correct charge.

[4] In fact, these are actually the instructions for violations of MCL 750.479, as the instructions for MCL 750.81d do not include a scienter requirement. See note 1 to both CJI2d 13.1 and 13.2. However, this error worked in defendant's favor, as the jury was required to find additional

(continued…)

> Count II, ask yourselves if the People have shown the following beyond a reasonable doubt:
>
> One: Did defendant on November 27th, 2006, in the Township [of] Bangor, Van Buren County, Michigan assault, batter, wound, resist, obstruct, oppose, or endanger Trooper Gonyeau, who was performing his duties?
>
> If so, did Defendant know that the Trooper whom he assaulted, battered, wounded, resisted, obstructed, or endangered was then a Trooper performing his duties?
>
> And if so, were the actions of the Defendant intended, that is, not accidental.

Again, there is no reference to an injury requirement and they include an unnecessary scienter requirement. These are clearly instructions for MCL 750.81d(1), not d(2).

However, the jury verdict form indicated that Count II was "RESISTING CAUSING INJURY REQUIRING MEDICAL TREATMENT OR CARE." It appears from the record that the court revised the jury verdict form from the first trial, as it was identical to the first form except that it removed the possibility of finding defendant guilty of the "lesser included." This is consistent with the idea that the trial was based on the lesser-included charge of resisting and obstructing without injury and that there was simply a failure to change the title of Count II to omit the requirement regarding causing injury.

The jury checked that defendant was "Guilty as charged" on the verdict form for Court II. However, when reading their verdict, they stated simply, "Count II: Resisting, we the jury find the Defendant guilty as charged." Thus, there was no reference to the injury requirement when the jury rendered their verdict. Finally, looking at the May 26, 2009 sentencing information report (SIR), the scored conviction was "750.81D1." Thus, defendant's sentence was based on the proper offense.

The record makes clear that defendant's second trial was properly based upon a violation of MCL 750.81d(1) rather than d(2), even though the information and jury verdict form improperly referenced that charge. Accordingly, there is no double jeopardy claim.[6] This does

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elements that were not, in fact, required. Furthermore, the instruction as given excluded resisting and opposing from the actions taken, while the correct instruction, CJI2d 13.1, would have included those. Because these differences in instructions provided a basis for defendant's acquittal, rather than for conviction, they did not constitute reversible error. See *People v Garrett*, 82 Mich App 178, 181; 266 NW2d 458 (1978).

[5] A fact pointed out by defendant in his claim that the jury was improperly instructed as to resisting and obstructing causing injury.

[6] Consequently, defendant's claim regarding instructional error on this charge must fail, as do his claims for ineffective assistance of counsel for failing to object to double jeopardy and the instructions.

not end out analysis, however. We must now determine whether the inclusion of the wrong charge on the information and the incorrect reference to that charge on the jury verdict form were errors requiring reversal and remand for a new trial on the resisting and obstruction charge under MCL 750.81d(1). We conclude that they are not.

Because defendant did not object to the information, the instructions, or the jury verdict form, we review these unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a shoring of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id.* at 763 (citations omitted).]

Looking first at the information, we find there is no error. A defendant is deemed to be on notice of that he will have to defend against a lesser-included offense of the offense listed on the information. See *People v Fletcher*, 260 Mich App 531, 558 n 11; 679 NW2d 127 (2004). Although defendant could not actually be tried of MCL 750.81d(2) based on double jeopardy, because resisting and obstructing without injury is a lesser included of resisting and obstructing causing injury, defendant had sufficient notice of the charge under MCL 750.81d(1), for which he could properly be tried. Thus, there was no prejudice to defendant in the information having the wrong reference.

As for the improper reference on the jury verdict form, the law on instructional error is equally applicable to alleged errors relative to the jury verdict form. This is because the verdict form is, in essence, a jury instruction. *Bieszck v Avis Rent-A-Car Sys, Inc*, 224 Mich App 295, 302; 568 NW2d 401 (1997) rec'd on other ground 459 Mich 9 (1998). Instructional error involving misdiscription of only one element of a crime is subject to harmless error analysis. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000). Structural error is not subject to harmless error analysis. However, the error in the jury verdict form in this case, because it involves misdescription of only one element of the charge, is not structural error and does not require reversal. *Id.* at 51-52.

We conclude that the error on the jury verdict form does not meet the third plain error requirement. While the reference to Count II as "RESISTING CAUSING INJURY REQUIRING MEDICAL TREATMENT OR CARE" is both error and obvious or plain, there is no prejudice to defendant in its inclusion. Indeed, by including the injury element on the verdict form for which the jury received no instruction during trial, it was more likely that defendant would be found not guilty. "Where, as here, the instruction provided a basis for defendant's acquittal, rather than for conviction, the injection of an issue not supported by the evidence does not constitute reversible error." *People v Garrett*, 82 Mich App 178, 181; 266 NW2d 458 (1978). Furthermore, the resisting and obstructing causing injury offense stated on the jury verdict form included all of the elements of resisting and obstruction without injury. Thus, the jury necessarily found defendant guilty of MCL 750.81d(1) when it marked on the verdict form that it found defendant guilty of, what was essentially, MCL 750.81d(2).

Under the circumstances, we find no prejudice to defendant. With the exception of the erroneous reference on the jury verdict form and the fact that defendant received instructions that added an unnecessary scienter requirement to MCL 750.81d(1), defendant's trial was in all respects procedurally correct for a charge under MCL 750.81d(1). Indeed, as previously noted, defendant was sentenced for a conviction under MCL 750.81d(1). We see no reason to expend additional judicial resources on another remand where the substance and procedure of defendant's trial would be identical to what he has already received.[7] There is simply nothing in the record before us to even remotely suggest that the outcome of the trial would have been different but for the erroneous labeling of Count II on the jury verdict form.

Having found no prejudice, defendant has failed to meet the requirements to avoid forfeiture. *Carines*, 460 Mich at 763. Accordingly, defendant is not entitled to a new trial based on the jury's instructional error. However, because defendant's judgment of sentence and commitment to the department of corrections incorrectly lists defendant's conviction as MCL 750.81d(2) instead of MCL 750.81d(1), we remand for the ministerial task of correcting that form, as well as any references that may be contained in the presentence report.[8]

II. DISARMING AN OFFICER

Defendant first argues that there was insufficient evidence to support his conviction of disarming an officer of a non-firearm weapon. We disagree.

We review a challenge to the sufficiency of the evidence by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). We must resolve all credibility disputes in favor of the jury's verdict. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant's entire argument is that Trooper Gonyeau's testimony was not worthy of belief. Specifically, defendant argues that Trooper Gonyeau's testimony was contradicted by physical evidence because the officer claimed he never shot at defendant from behind and yet defendant was shot in the buttock or just below the buttock area. This argument ignores that Detective Sergeant Diane Oppenheim testified that it was possible for someone to be shot in that location while facing the person who shot you "if the person was twisting and turning" and that it would "depend[] on the motion of your body." Defendant also argues that it was "implausible" that defendant would struggle for Trooper Gonyeau's service revolver after being shot and kicked by the officer. However, that argument goes to the weight of the evidence—something that is determined by the jury.

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[7] Indeed, a new trial might be considered even less favorable to defendant, as on remand the trial court would be aware that the scienter requirement is not necessary to the charged offense.

[8] We note that the SIR correctly references MCL 750.81d(1), so that the PSIR is likely correct. However, because we were not provided with a complete copy of the PSIR, we cannot determine whether it contains any references to MCL 750.81d(2). To the extent that there are such references, defendant is entitled to have them corrected. See MCL 771.14(6).

"[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (citation omitted). Where the question is one of credibility, the jury's verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was "deprived of all probative value or that the jury could not believe it." *Id.* at 643. Here, there was no testimony or evidence that was directly contradictory to Trooper Gonyeau's testimony. Thus, the record does not evidence the level of impeachment required to deprive his testimony of all probative value.

Defendant next asserts that there is some significance to the fact that Trooper Gonyeau testified that defendant "bit his hand causing him to drop the taser" but that the officer had also testified that he was wearing gloves. We are uncertain of the relevance of this, as Trooper Gonyeau testified that he felt intense pressure and pain as a result of the bite even though he was wearing gloves. We believe that defendant is implying that he could not have been deemed to have "taken" the taser from Trooper Gonyeau by biting him if the taser simply fell as a result of the bite. We disagree. Whether a weapon is pulled directly from one's hand, or whether a person manages to pull all of a person's fingers off of a weapon, or bites a hand in order to make the weapon fall, each of these methods constitutes a taking of the weapon. Further, simply because the loss of the weapon may be an automatic response does not mean the taking of the weapon no longer lacked consent. The fact that the loss is involuntary automatically renders the loss as without consent. Thus, if a person drops a weapon because another individual shoots them in the hand, that is still an involuntary taking of the weapon.

Even assuming that we believed that the simple automatic or reflexive dropping of a weapon could not constitute a taking, the record does not support defendant's argument that Trooper Gonyeau testified that he lost control over the taser and dropped it. When defense counsel asked whether the loss of the weapon was because the officer lost control, the officer replied, "I wasn't able to retain the weapon." Trooper Gonyeau never testified or agreed that he lost control of the taser. He denied that his pulling his arm and hand away from defendant was an automatic response to the biting, stating that he was attempting to pull his hand back not simply because he was in pain, but "because [defendant] had my weapon" and he wasted "[t]o get my taser back from [defendant]." He testified that he "absolutely" tried to maintain his grip on the taser and the taser "did not fall."

Thus, when taking the evidence in the light most favorable to the prosecution, there was more than sufficient evidence to conclude that defendant took the officer's taser without the officer's consent. *Petrella*, 424 Mich at 268-270. Accordingly, we find no error. Further, because we conclude that there was sufficient evidence upon which the jury could convict defendant of disarming an officer, defendant's claim of ineffective counsel for failure to move for a directed verdict must fail. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant next argues that the trial court improperly instructed the jury on Count I. Defendant argues that the trial court failed to instruct the jury that defendant took the taser without the consent of the trooper. As previously noted, defendant failed to object to the instructions. Accordingly, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763, 774.

We review jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *Id.* Even if jury instructions "are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

It is true that when the trial court instructed the jury after closing arguments, the trial court's instructions did not include the requirement that the disarming occur without consent:

> As to Count I, ask yourselves if the People have shown the following beyond a reasonable doubt:
>
> One, did the Defendant on November 27th, 2006 in the Township of Bangor, Van Buren County, Michigan, take a weapon other than a firearm, that is a taser, from Trooper Gonyeau?
>
> If so, two, at the time was Trooper Gonyeau authorized by the Michigan State police to carry the taser in the line of duty?
>
> If so, was Trooper Gonyeau at the time performing his duties as a Trooper?
>
> If so, did Defendant know or have reason to believe that the Trooper from whom he took the taser was a Michigan State trooper?
>
> If you are satisfied beyond a reasonable doubt of all four of those elements, and [sic] you would find the Defendant guilty as charged. If you have reasonable doubt as to any[ ]one, you would find him not guilty.

However, the trial court's initial instructions to the jury were proper:

> What do the People have to show to prove these crimes? Well there are four elements, four things on Count I, [that] they must show. First, they must show that the Defendant knew or had reason to believe that the person from whom the weapon was taken was a peace officer.
>
> Second, that at the time of the offense the peace officer was performing his duties as a peace officer.
>
> Third, that the Defendant took the weapon without consent of the peace officer.
>
> And fourth, that at the time of the offense the peace officer was authorized by his employer, the State of Michigan to carry the weapon in the line of duty.
>
> Those are the four things that the People must show beyond a reasonable doubt. If they don't show any[ ]one of these [then] it is not guilty.

Further, the evidence at trial made clear that this was not a disputed issue. Defendant never argued that he had the officer's consent to take the taser. Rather, defendant disputed the first element—that the taser was taken. Defendant's theory was that he was improperly charged because "the taser fell out of Trooper Gonyeau's hands, and that is what we are here arguing about." He argued that it was a reflex response on the officer's part.[9]

The only testimony related to this charge came from Trooper Gonyeau. He testified that after the last taser cycle on defendant:

> he broke [h]is head forward, he jerked it down – jerked it off to the side and as I'm pressing it against his neck when he moved it and my hand goes down pretty much right here in front of him, and at the same time that happens and he is already started his hands up to where I'm at with the taser and grabs on to the taser and the back [of] my hand and pulls it down in front of him much like you pill a seat belt across and begins biting in on the back of my right thumb here between the wrist and the first knuckle and the hand that's holding the taser underneath him.

At that point, Trooper Conyeau "immediately tried to [use] every bit of strength I had to rip my arm – rip my hand and taser out from his control." Although his arm and hand came out, the taser did not and he "wasn't able to keep my thumb collapsed on it when pointed out." At that point, defendant thrust forward at Trooper Gonyeau with the taser, attempting to deploy it on the officer. He testified that he tried to maintain his grip on the taser after defendant bit him and that he was pulling his arm out from in front of defendant "[t]o get my taser back from [defendant]." When directly asked whether he willingly let go of his taser, he responded, "Absolutely not."

During cross-examination, defendant's counsel attempted to get Trooper Conyeau to say that the taser simply fell out his hand and that it was an automatic reaction. The officer did not agree that his pulling back on his hand was an automatic response to having been bitten and was explicit that "At no time did my taser fall. My taser did not fall."

Under the circumstances, we find no prejudice. First, although the second set of jury instructions erroneously omitted the consent requirement, the jury was properly instructed prior to receiving the evidence that the disarming had to occur without consent to find defendant guilty. Second, there was more than sufficient evidence in the record to support that the disarming occurred without consent. Third, defendant never disputed the consent requirement.

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[9] We note that in defendant's sufficiency of the evidence claim, he argues that "the verdict came down to whether the Trooper had the taser taken without his consent: whether he dropped it or voluntarily lost control over it." There is no evidence in the record that Trooper Gonyeau "voluntarily" lost control over it. Defendant argued two things—that Trooper Gonyeau dropped the taser in response to having been bit, and that Trooper Gonyeau's pulling back of his hand was a reflex from the pain of having been bit. As previously noted, both of these constitute an involuntary taking, as there is nothing in either of these actions to constitute a voluntary movement. Accordingly, defendant actually provided no evidence to rebut either the taking or the consent element.

Instead, his defense revolved around the argument that the taser simply fell; that defendant never disarmed the officer at all. There is nothing in the record to suggest that in the absence of this error, a different outcome at trial would have occurred. Accordingly, we find no reversible error. *Carines*, 460 Mich at 763.

Defendant's final argument on appeal is that he received ineffective assistance of counsel because his counsel failed to object to the erroneous instruction on Count I. We disagree.

To establish his claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312-314. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Assuming, without deciding, that defendant's counsel's failure to object to the instructions on Count I was prejudicial, defendant has failed to show that the result of the proceeding would have been different. As noted above, defendant never argued that there was consent. Indeed, the only evidence before the jury was that defendant grabbed the officer's hand and bit it, and that when the officer attempted to pull his hand and the taser away from defendant, he could not keep his grip on the taser and defendant took it from him. Further, the jury was properly instructed at the beginning of trial. Accordingly, there is nothing in the record that suggests that but for counsel's error, the jury would not have convicted defendant of disarming Trooper Gonyeau. *Id.* Absent such a showing, defendant has failed to show ineffective assistance of counsel. *Id.*

III. CONCLUSION

We affirm defendant's convictions for disarming an officer, MCL 750.479b(1), and for resisting and obstructing, MCL 750.81d(1), and his sentences for the same, but remand for the limited ministerial purpose of correcting the judgment of sentence and PSIR to reflect defendant's conviction under MCL 750.81d(1) rather than MCL 750.81d(2). We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro