STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 329156 Tuscola Circuit Court
MICHAEL WILLIAM LANGENBURG, Defendant-Appellant.	LC No. 14-013035-FH

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of resisting/obstructing a police officer, MCL 750.81d(1), operating an unregistered snowmobile, MCL 324.82103, and reckless operation of a snowmobile, MCL 324.82126b. The trial court subsequently vacated the reckless operation of a snowmobile conviction. Defendant was sentenced to two days in jail plus $458 in fines and costs for the resisting/obstructing conviction and was ordered to pay $100 in fines and costs for the unregistered snowmobile conviction. Defendant appeals as of right. For the reasons expressed below, we affirm.

The instant case arises out of events that occurred when a group of people, including defendant, were riding snowmobiles during a heavy snow in January 2014. At that time, a Department of Natural Resources (DNR) conservation officer arrested defendant after attempting to get him to stop because the snowmobile he was riding did not have a required trail sticker. Defendant first argues that there is insufficient evidence to support his resisting/obstructing conviction because he did not physically interfere with or obstruct the officer during his arrest. We disagree.

"We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192; 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citations omitted). "We 'will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses.' " *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (citation omitted).

MCL 750.81d(1) provides:

> Except as provided in subsections (2), (3), and (4), *an individual who* assaults, batters, wounds, *resists, obstructs, opposes*, or endangers *a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony* punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both. [Emphasis added.]

As used in the statute, the word "obstruct" is statutorily defined to include "the use or threatened use of physical interference or force *or a knowing failure to comply with a lawful command*." MCL 750.81d(7)(a) (emphasis added). A conservation officer with the DNR is a "person" for purposes of the resisting/obstructing statute. MCL 750.81d(7)(b)(*iii*). To find a defendant guilty under MCL 750.81d(1), the prosecutor must prove that "the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a [conservation] officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a [conservation] officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010).

Contrary to defendant's argument, there is sufficient evidence to support his resisting/obstructing conviction. The DNR officer testified that he attempted to stop defendant five times while following defendant's snowmobile. The DNR officer was wearing a DNR uniform and was operating a snowmobile bearing DNR markings and stating "conservation officer." The DNR officer had also activated the flashing blue lights on his snowmobile. Once defendant finally came to a stop, the DNR officer ordered defendant four or five times to dismount from his snowmobile before he complied. The officer also testified that he ordered defendant five times to get down on the ground before defendant walked around his snowmobile and knelt down. Defendant acknowledged that once he came to a stop and saw the officer's sled and his uniform, he knew he was a conservation officer. Thus, there was sufficient evidence for the jury to conclude that defendant knew or had reason to know that the commands were coming from a conservation officer. There was also evidence that defendant knowingly failed to comply with the officer's lawful command to get off the sled, kneel down, and place his hands behind his back to be handcuffed.

Most importantly, the officer testified that defendant moved his arms around and struggled with him when the officer attempted to place him in handcuffs. Although defendant ultimately allowed the officer to handcuff him, moving his arms around and struggling when the officer first attempted to handcuff him is sufficient evidence from which a jury could reasonably find that defendant resisted the officer or physically refused to comply with a lawful command. Although defendant and another witness both testified that defendant did not resist being handcuffed, the officer presented a different version of events. To the extent that the testimony of defendant and another witness conflicted with the officer's, we defer to the jury on matters of credibility. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Defendant cites *People v Morris*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 323762), in support of his position. In *Morris*, this Court recognized that "obstructing an officer through a 'knowing failure to comply with a lawful command' requires some physical refusal to comply with a command, as opposed to a mere verbal statement of disagreement." *Id*. at ___;

slip op at 5 n 6. While the physical refusal to comply with a command required by this Court's decision in *Morris* appears to have been minimal in this case, this Court did not quantify the level of physical refusal necessary to constitute obstruction, instead noting that there must be "some physical refusal" that could occur in "the briefest of moments." *Id*. at ___; slip op at 5 n 6, 8. In this case, there was evidence that defendant physically refused to comply with the DNR officer's commands, as opposed to merely expressing disagreement with them. The officer's testimony was therefore sufficient to establish resistance and obstruction for purposes of MCL 750.81d.

Defendant next argues that he was denied a fair trial because of the resisting/obstructing instruction given to the jury. We disagree.

We first conclude that defendant has waived the issue because trial counsel approved the jury instruction on the record, and there is thus no error to review. Waiver is defined as " 'the intentional relinquishment or abandonment of a known right.' " *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (citation omitted). " 'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.' " *Id*. (citation omitted). Thus, when a defense counsel expressly approves of the jury instructions, the defense attorney's actions constitute a waiver of the issue. *Id*. at 503-505. Here, the issue is waived because defense counsel indicated that he had no objection to the jury instruction at issue. See *id*.

Even if we were to conclude that the issue was not waived but was instead merely forfeited, we would conclude that the trial court did not err by giving the jury instruction. We review unpreserved errors for plain error affecting the defendant's substantial rights. *Kowalski*, 489 Mich at 505. "A defendant has the right to have a properly instructed jury consider the evidence against him or her, and it is the trial court's role 'to clearly present the case to the jury and to instruct it on the applicable law.' " *People v Henderson*, 306 Mich App 1, 4; 854 NW2d 234 (2014) (citation omitted). The jury instructions must include the elements of the charged offenses, as well as any material issues, defenses, or theories, as long as they are supported by the evidence. *Id*. "Even if imperfect, a jury instruction is not grounds for setting aside a conviction 'if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights.' " *Id*., quoting *Kowalski*, 489 Mich at 501-502.

Defendant specifically challenges the trial court's removal of the terms "assaulting," "battering," "wounding," and "endangering" from the jury instruction. M Crim JI 13.1 provides, in part, as follows:

> (1) The defendant is charged with the crime of [assaulting / battering / wounding / resisting / obstructing / opposing / endangering] a [state authorized person] who was performing [his / her] duties. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant [assaulted / battered / wounded / resisted / obstructed / opposed / endangered] a [state authorized person]. ["Obstruct" includes the use or threatened use of physical interference or force or a knowing

failure to comply with a lawful command.] [The defendant must have actually resisted by what (he / she) said or did, but physical violence is not necessary.]

(3) Second, that the defendant knew or had reason to know that the person the defendant [assaulted / battered / wounded / resisted / obstructed / opposed / endangered] was a [state authorized person] performing [his / her] duties at the time.

There was no instructional error in this case. M Crim JI 13.1 contains brackets surrounding the phrase "assaulted / battered / wounded / resisted / obstructed / opposed / endangered," indicating that the trial court does not need to recite each term and, instead, should instruct the jury regarding the terms that apply in each particular case. The trial court was therefore correct in modifying the instruction to delete the specified words because no evidence was presented that defendant assaulted, battered, wounded, or endangered the conservation officer. The jury was properly instructed that the term "obstruct" "includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command" and that defendant "must have actually resisted by what he said or did, but physical violence is not necessary." MCL 750.81d(7)(a). The instruction fairly presented the issues to be tried and adequately protected defendant's rights at the time he was convicted. See *Henderson*, 306 Mich App at 4. Therefore, the trial court did not err in instructing the jury.

Furthermore, even assuming that the trial court did err, defendant fails to establish prejudice by showing that any error affected the trial court proceedings. As stated, there was no evidence presented at trial that defendant assaulted, battered, wounded, or endangered the DNR conservation officer. Instead, the focus of the trial was on whether defendant resisted, obstructed, or opposed the DNR officer. The omission of the additional language in the jury instruction reduced the likelihood of juror confusion and, in fact, likely aided the defense by reducing the choices under which defendant's conduct could be categorized. Accordingly, we conclude that defendant fails to establish plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (outlining the plain error standard).

Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel did not object to the modified jury instruction. We disagree.

"[A] defendant must move in the trial court for a new trial or an evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Although defendant moved for a new trial in the trial court on the basis of ineffective assistance of counsel, he did not raise the same argument he raises on appeal regarding the failure to object to the jury instruction. Accordingly, the issue is unpreserved. Because defendant failed to preserve the issue, our review of the defendant's claim is limited to mistakes that are apparent on the record. See *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

" 'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel.' " *People v Cooper*, 309 Mich App 74, 79; 867 NW2d 452 (2015) (citation omitted).

We review any findings of fact for clear error, and we review de novo the ultimate constitutional determination. *Id*. at 80.

> [I]n order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [*People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citations omitted).]

"Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201. As discussed, the modified instruction fairly presented the issues to be tried and adequately protected defendant's rights at the time he was convicted. Accordingly, any objection would have been futile, and defense counsel did not render ineffective assistance by failing to raise the futile objection. See *id*.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Michael J. Riordan