

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 9, 2018

v

GEORGE WILLIE EVANS, JR.,  
  
Defendant-Appellant.

No. 335685  
Saginaw Circuit Court  
LC No. 14-040594-FH

---

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Defendant, George Willie Evans, Jr., was convicted after a jury trial for resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced Evans as a second-offense habitual offender, MCL 769.10, to two years of probation, with the first six months to be served in jail or on an electronic tether. Evans appeals as of right and raises an ineffective assistance of counsel claim related to the lawfulness of the police's conduct. We affirm.

**I. FACTS**

In July 2014, Officer Brent Green responded to a 911 call from defendant's neighbor about a domestic violence incident. The neighbor told 911 that Evans and a woman were arguing, Evans had been drinking, and Evans and the woman were shoving each other. The neighbor also identified two children at the scene. When Officer Green arrived, he saw a man and two young girls in the driveway, but he did not see the woman reported to have been involved in the domestic violence incident. Evans walked quickly towards Officer Green, and Officer Green asked Evans what was happening. Evans responded with expletives, asked Officer Green why he was there, and said that no one called the police and that he did not hit the woman. Officer Green replied that someone had called 911 and again asked what was happening.

Officer Green described Evans as "very agitated." When Evans began yelling at the police officer, Officer Green asked Evans to turn around and put his hands behind his back for both defendant's safety and the officer's safety. Evans responded with a blank stare and said that would not happen. Officer Green turned on his Taser and again asked Evans to turn around and put his hands behind his back. Evans in turn took a step back, "cocked his arm" like he was going to swing at Officer Green, and began to walk towards the officer. Officer Green then tased Evans. While the Taser probes were still activated, Evans pulled one of the probes out of his

chest and held it by his side. When Evans took another step toward Officer Green, Green activated the Taser a second time. Evans dropped the probe in his hand, took the other probe out of his abdomen, took a step toward the officer, turned around, and walked into the house. Evans continued walking into the house when Officer Green asked Evans to stop.

After other police officers arrived as backup, Officer Green and the other officers went inside the house to look for the woman who was reportedly assaulted. They found Evans in a bedroom hovering over a woman “crouched down in a corner . . . .” Defendant’s hands were not visible, so Officer Green ordered Evans to show his hands. Evans refused and began walking toward the bedroom’s entrance. Officer Green sprayed Evans with pepper spray. One of the officers then handcuffed Evans and took him outside to the patrol vehicle. Evans struggled with the officers when they searched him.

The prosecution charged Evans with one count of domestic violence and one count of resisting and obstructing a police officer. At the end of the preliminary examination, the prosecution moved to dismiss the domestic violence charge. The trial court bound Evans over for trial on the charge of resisting and obstructing a police officer. A jury found Evans guilty of the charge.

## II. ANALYSIS

Evans argues that he received ineffective assistance of counsel during trial. To preserve the issue of ineffective assistance of counsel on appeal, a defendant must move for a new trial or request a *Ginther*<sup>1</sup> hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Evans did not preserve the issue, so this Court’s review is limited to mistakes apparent on the record. See *id.* at 659.

Evans argues that his trial counsel was ineffective because counsel failed to move for dismissal on the basis of the “right to resist” unlawful police activity, failed to argue for acquittal on this basis, and failed to request a “right to resist” jury instruction. To establish ineffective assistance of counsel, “a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

We first conclude that a motion to dismiss the charge would have proven futile. Trial courts may dismiss criminal charges on the defendant’s motion if the evidence is insufficient. *People v Williamson*, 138 Mich App 397, 399; 360 NW2d 199 (1984). However, “defense counsel is not ineffective for failing to pursue a futile motion.” *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

The elements of the offense of resisting and obstructing a police officer under MCL 750.81d(1) are “(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

endangered a police officer, and (2) the defendant knew or had reason to know that the person . . . was a police officer performing his or her duties.” *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010). In *People v Moreno*, 491 Mich 38, 51-52; 814 NW2d 624 (2012), our Supreme Court held that MCL 750.81d(1) did not abrogate the common-law right to resist unlawful conduct by a police officer. Therefore, “the prosecution must establish that the officers’ actions were lawful.” *Id.* at 52. If the officers’ conduct was unlawful, the charge should be quashed. *Id.* at 58.

In this case, there is no evidence that the officers’ conduct was unlawful. When Evans told Officer Green to leave, Officer Green found himself in an escalating encounter with a man who was potentially involved in a domestic violence incident, Officer Green still had not located the alleged victim of that incident and did not know what condition she was in, and Officer Green did not know if there were any persistent threats that could have posed a risk to the woman’s safety. Moving to dismiss would have been futile because the officers’ actions were permissible and because defendant’s agitated state, physical interactions with police, and refusals to comply with their commands supported the charge of resisting and obstructing a police officer. Accordingly, defense counsel was not deficient for failing to file a motion to dismiss the charge for lack of sufficient evidence.

Next, we reject defendant’s claim that defense counsel failed to argue that Evans had the right to resist the officers’ unlawful conduct. Defense counsel has “broad discretion” to decide legal strategy. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994) (quotation marks and citation omitted). Counsel is not ineffective simply because the chosen strategy fails. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

In this case, defense counsel did make the argument. In the closing argument, counsel highlighted “the subject of lawfulness of police conduct” and whether a reasonable person in defendant’s circumstances would have believed that he was free to leave. Counsel remarked that the judge will instruct the jury that a police officer seizes or arrests a person when a reasonable person would have believed that he or she was not free to leave and asked the jury to consider whether a reasonable person in defendant’s circumstances would have believed he was free to leave. Counsel further stated that the judge will instruct the jury that the prosecution must prove that the officers’ conduct was lawful and described when a police officer may constitutionally detain someone on the basis of reasonable suspicion. These statements adequately apprised the jury that Evans believed the police illegally seized him and he had a right to resist arrest. It is not our function to second-guess the word choices of counsel’s oral arguments.

Finally, we disagree with Evans that defense counsel was ineffective for failing to request a jury instruction about the right to resist unlawful police conduct. The trial court did instruct jurors that Evans had the “right to resist” unlawful police conduct and described the extent of a police officer’s authority to question someone. Accordingly, Evans has not shown that counsel’s performance was deficient or affected the outcome of proceedings.

We affirm.

/s/ Peter D. O'Connell  
/s/ Joel P. Hoekstra  
/s/ Brock A. Swartzle