STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2018
v	No. 337004 Newaygo Circuit Court
ISAIAH STEWARD ROBINSON, Defendant-Appellant.	LC No. 16-011327-FH

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

PER CURIAM.

Defendant, Isaiah Steward Robinson, appeals as of right his convictions for resisting and obstructing a police officer, MCL 750.81d(1), malicious destruction of police property, MCL 750.377b, and indecent exposure, MCL 750.335a. We affirm.

I. BACKGROUND

In the late evening hours of April 13, 2016, Robinson's neighbor called 911 to report that Robinson threatened to shoot him. The responding police officer interviewed the neighbor and Robinson. After talking with both of them, the police officer arrested Robinson for assault. After the arrest, Robinson complained that he was experiencing medical difficulties, so the police officer took Robinson to the hospital. At the same time, the arresting officer asked another police officer to get a statement from the complainant. At the hospital, Robinson was resistant and combative, lunging at nearby police officers and making it difficult for the medical staff to examine and treat him. After the doctor cleared Robinson, the police officer drove Robinson to the county jail. During that drive, Robinson kicked the door of the car and attempted to move his hands, which were handcuffed behind his back, to the front of his body, which required the police officer to stop the car and call for assistance. Robinson also urinated in the patrol car in an attempt to urinate on the police officer driving the car.

II. DISCUSSION

A. PROBABLE CAUSE TO SUPPORT ARREST

Robinson contends that the trial court erroneously denied his motion to dismiss the criminal charges against him because the arresting police officer lacked probable cause to arrest him for assault. "We review a trial court's decision on a motion to dismiss charges against a

defendant for an abuse of discretion." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). This Court reviews de novo underlying questions of law. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002).

A police officer may arrest a person without a warrant if the police officer has reasonable cause to believe that the person committed "a misdemeanor punishable by imprisonment for more than 92 days . . . ." MCL 764.15(1)(d). Simple assault is a 93-day misdemeanor.[1] MCL 750.81(1). In this case, the arresting police officer was legally permitted to arrest Robinson without a warrant if he had probable cause to believe that Robinson committed an assault.

"Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). This inquiry looks at the "facts available to the officer at the moment of arrest . . . ." *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). "The standard is an objective one, applied without regard to the intent or motive of the police officer." *People v Chapo*, 283 Mich App 360, 367; 770 NW2d 68 (2009). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998).

We conclude that the trial court did not abuse its discretion by ruling that the arresting police officer had probable cause to arrest Robinson for assault. An assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. A battery is an intentional, unconsented and harmful or offensive touching of the person of another . . . ." *People v Meissner*, 294 Mich App 438, 454; 812 NW2d 37 (2011) (citations and quotation marks omitted). The complainant first called 911 because Robinson threatened to shoot him, and he described this threat to the arresting police officer in detail. The complainant also told the arresting police officer that Robinson reached for the door handle of his truck and that he believed Robinson was about to pull him out of the truck. The complainant said that the door was unlocked and that Robinson was bigger and stronger; he "knew that if [Robinson] pulled [him] out of the truck, that would be it." The arresting police officer testified that Robinson was twice the complainant's size and half his age, the complainant appeared to be "legitimately scared," and he was shaking. The police officer also asked Robinson about what happened, but Robinson's response was inconsistent. These circumstances gave the police officer probable cause to believe that Robinson assaulted the complainant. Therefore, the trial court did not abuse its discretion by denying Robinson's motion to dismiss.

B. JURY INSTRUCTIONS

[1] At the time of the arrest, the police officer asserted felonious assault as the basis for the arrest. He later testified that he should have specified misdemeanor assault as the reason for the arrest.

Robinson argues that the trial court erroneously failed to instruct the jury that the lawfulness of the arrest was an element of the charge of resisting and obstructing a police officer. Robinson did not request this jury instruction. Therefore, he has not preserved this issue for appeal, see *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000), and we review it for plain error affecting substantial rights, see *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999). Reversal is warranted only if the error "resulted in the conviction of an actually innocent defendant or . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." Id. at 763 (citation and quotation marks omitted; alteration in original).

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Quinn*, 305 Mich App 484, 493; 853 NW2d 383 (2014) (citation and quotation marks omitted). "Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (citation omitted). This Court considers the jury instructions "as a whole to determine whether the issues to be tried were adequately presented to the jury." *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014).

The crime of resisting and obstructing a police officer is set forth in MCL 750.81d(1):

> [A]n 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 . . . .

In addition, the prosecution must show that the police officer's actions were lawful. *Quinn*, 305 Mich App at 491. In this case, it is undisputed that the trial court failed to instruct the jury that the officer's actions must have been lawful. "While the lawfulness of an arrest is generally a question of law to be decided by the trial court, if the lawfulness of the arrest is an element of a criminal offense, it becomes a question of fact for the jury." *Id*. at 494. Nonetheless, reviewing the evidence in the light most favorable to the prosecution, Robinson identified no evidence that could persuade a rational trier of fact that the arresting officer lacked probable cause to arrest Robinson. Additionally, the trial court instructed the jury about the definition of obstruction, which included "the knowing failure to comply with a lawful command," both before opening statements and after closing arguments. Therefore, the jury was adequately instructed, and Robinson has not shown plain error.

C. MOTION FOR A DIRECTED VERDICT

Robinson argues that the trial court erroneously denied his motion for a directed verdict regarding the charge of resisting and obstructing a police officer. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Quinn*, 305 Mich App at 491 (citation and quotation marks omitted).

Robinson challenges only whether the officer's actions were lawful. Because the trial court correctly ruled that the arresting police officer had probable cause to arrest Robinson for misdemeanor assault, the police officer's actions were lawful. Therefore, the trial court did not err by denying Robinson's motion for a directed verdict with regard to the charge of resisting and obstructing a police officer.

D. FAILURE TO PRODUCE MATERIALS IN RESPONSE TO A DISCOVERY REQUEST

Robinson argues that the prosecution failed to produce a supplemental witness statement taken from the complainant after Robinson's arrest. Robinson did not preserve this issue for appeal. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, we review it for plain error affecting substantial rights. See *Carines*, 460 Mich at 765-766.

Robinson argues that the prosecution's failure to disclose the supplemental witness statement violated *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In *Brady*, 373 US at 87, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," but the same is not true with respect to whether the police preserve potentially exculpatory evidence. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). The United States Supreme Court refused to impose on the police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id*. at 58. Therefore, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id*.

In this case, it appears that the police inadvertently lost the witness statement; it was not withheld. Accordingly, Robinson's claim falls under *Youngblood* rather than *Brady*. Therefore, Robinson must show that the complainant's supplemental witness statement was potentially exculpatory and that the police acted in bad faith in losing it. Robinson has not done so.

Robinson fails to articulate what potentially exculpatory or impeachment value the complainant's supplemental witness statement would have had, and Robinson does not argue that the police acted in bad faith. In addition, Robinson has not demonstrated prejudice. Even if the supplemental witness statement had some value, such as impeachment of the complainant's credibility with regard to the initial confrontation between the complainant and Robinson, that impeachment would have had no impact on Robinson's trial. Robinson was not charged with any crime related to his confrontation with the complainant, so the credibility of the complainant is immaterial. Further, the credibility of the complainant, as determined by a subsequently obtained witness statement, would not impact the analysis of whether the arresting police officer had probable cause to arrest Robinson on the basis of what he learned from his first and only

interview of the complainant, conducted before Robinson's arrest. Accordingly, Robinson has not demonstrated plain error affecting his substantial rights.[2]

E. MOTION FOR A NEW TRIAL

Finally, Robinson argues that the trial court erroneously denied his motion for a new trial. A new trial is not warranted unless "the error was prejudicial." *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion and its findings of fact for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Waterstone*, 296 Mich App at 131-132. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

Robinson first argues that the trial court erred by not permitting the jury to hear and see "large portions" of the 911 recordings and the police officer's body-cam video. Robinsons does not identify what portions of the audio and video the jury was not allowed to hear and see. Therefore, Robinson has abandoned this issue on appeal. See *People v Iannucci*, 314 Mich App 542, 545; 887 NW2d 817 (2016). In addition, Robinson does not describe what was missing from the portions of the recordings played for the jury that would have altered the outcome of the trial. Therefore, he has not demonstrated prejudicial error.

Robinson also challenges whether probable cause existed to support his arrest. Because the evidence was sufficient to establish probable cause to support Robinson's arrest, Robinson has not shown that a new trial is warranted.

We affirm.

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

[2] We also reject Robinson's unpreserved argument that the trial court should have instructed the jury about the missing evidence because the prosecution had a reasonable excuse for not producing the statement.