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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED RANDALL KREIDER, JR.,

Defendant-Appellant.

UNPUBLISHED
May 20, 2021

No. 352096
Genesee Circuit Court
LC No. 17-041350-FH

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

PER CURIAM.

Defendant's first jury trial ended in a mistrial over his objection. At defendant's first trial, he was charged with one count of resisting or obstructing a police officer causing injury, MCL 750.81d(2), and the jury was instructed on the lesser included offense of resisting or obstructing a police officer, MCL 750.81d(1). He was subsequently retried, charged with one count of resisting or obstructing a police officer causing injury requiring medical attention or care (R&O causing injury), MCL 750.81d(2), and two counts of resisting or obstructing a police officer (R&O), MCL 750.81d(1).[1] The jury convicted defendant of the two counts of R&O, but was unable to reach a verdict concerning the R&O causing injury charge. The trial court declared a mistrial as to that charge, later dismissing it without prejudice at the prosecution's request. The trial court sentenced defendant to two years' probation for the R&O convictions. He now appeals as of right, raising a double-jeopardy challenge regarding the R&O causing injury charge. In particular, defendant argues that the alleged double-jeopardy error entitles him to retrial on the two R&O charges. Because defendant has failed to carry his burden of demonstrating his entitlement to such relief under the test set forth in *Morris v Mathews*, 475 US 237, 244-248; 106 S Ct 1032; 89 L Ed 2d 187 (1986), we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] On motion of the prosecution, a third count of R&O was dismissed during the second trial, and thus that count was never submitted to the jury.

This case arises out of defendant's physical resistance of several officers one evening in January 2017 while he was in police custody at a Flint jail. At defendant's first jury trial, he was charged with R&O causing injury to Deputy Mark Zilinski and the lesser included offense of R&O. On the afternoon of the second day of the jury's deliberations, it sent the trial court the following note:

> We, the jury, have carefully reviewed the testimony and had lengthy discussions. We have had no movement on our vote—in our vote. There are very strong views in both guilty and not guilty of the lesser charge of assaulting, resisting, obstructing a police officer. We immediately threw out the first charge of assaulting, resisting, obstructing a police officer causing injury. We are hopelessly deadlocked.

After providing a deadlocked jury instruction, the trial court asked the jury to continue deliberating.

Late the following day, the jury sent the trial court another note, which was signed by all 12 jurors, and indicated that the jury remained hopelessly "deadlocked." After reviewing the note, the trial court indicated that it was inclined to declare a mistrial. Relying on, among other things, *Blueford v Arkansas*, 566 US 599; 132 S Ct 2044; 182 L Ed 2d 937 (2012), the defense objected, arguing that the trial court should poll the jurors and, if it found them to have reached a unanimous verdict of acquittal concerning the R&O causing injury charge, the court should accept that verdict rather than declaring a mistrial based on the lesser included offense of R&O. Contrastingly, citing *People v Hickey*, 103 Mich App 350, 353; 303 NW2d 19 (1981), the prosecution argued that the trial court should declare a mistrial if the jury was deadlocked on either of the charges submitted to it. After questioning the jury's foreperson, the trial court overruled defendant's objection and declared a mistrial.

The prosecution subsequently filed a motion to amend the information to add several new charges. As relevant here, the prosecution sought to add two new counts of R&O, with those new charges regarding defendant's resistance against Deputies Griffen Lloyd and Timothy Stanley, respectively. Defendant filed a motion to quash, arguing that retrial on the charge of R&O causing injury would violate his right against double jeopardy. The trial court granted the prosecution's motion to amend the information and denied defendant's motion to quash.

Hence, this matter proceeded to a second jury trial, which spanned three days. Three counts were submitted to the jury: R&O causing injury to Zilinski, R&O involving Lloyd, and R&O involving Stanley. At defendant's second jury trial, several of the involved officers testified concerning the events in question, including Officer Thomas Bade, Sergeant Patrick Fuller, and Deputy Amanda Cheney, as well as Zilinski, Stanley, and Lloyd. In concert, such officers indicated that defendant—who was visibly intoxicated, extremely agitated, profane, and angry—repeatedly refused to follow the officers' commands, physically resisted them when they attempted to move him within the jail or place him in handcuffs, threatened to harm himself or overpower the police, and generally behaved "pretty much like a maniac." At one point, after defendant refused to stop banging on the bars of his cell or sit down, Zilinski sprayed defendant with pepper spray.

Thereafter, Zilinski, Stanley, and Lloyd attempted to move defendant to "J Block"—an area of the jail housing unruly, combative, or upset prisoners—where defendant would receive soap, water, and a change of clothing to help decontaminate him from the pepper spray. Defendant tussled with the police several times on the journey to "J Block," at one point refusing to walk and falling to ground in such a way that he dragged Zilinski and Lloyd to the ground with him. At another point, defendant pushed Zilinski toward the wall, which caused the deputy to strike his hand on a metal "crank box[]" that protruded from the wall there. As a result, although Zilinski was wearing gloves, he received a painful laceration on his hand, which bled. After the officers finally wrestled defendant into his cell on "J Block," he attempted to kick Lloyd more than once.

A short time later, defendant, who had previously threatened to smash his own head against the wall to injure himself, carried through with that threat, intentionally striking the back of his head against the wall so forcefully that he suffered a large gash in his scalp. An ambulance was summoned, and as Lloyd and Stanley attempted to apply bandages to defendant's wound, he continued to resist them, threatening to "overpower" them.

During jury deliberations, the jury sent a note indicating that it was deadlocked with regard to the R&O causing injury charge but had reached a unanimous verdict regarding the two other counts. Over the objection of both parties,[2] and after questioning the jury's foreperson, the trial court declared a mistrial as to that charge, later granting the prosecution an order of *nolle prosequi* with regard to it. However, the court accepted the jury's unanimous guilty verdicts with regard to both R&O charges.

II. ANALYSIS

On appeal, defendant raises a challenge under the Double Jeopardy Clause of the United States Constitution—which is "applicable to the States through the Fourteenth Amendment," *Monge v California*, 524 US 721, 727; 118 S Ct 2246, 2250; 141 L Ed 2d 615 (1998)—and provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V.[3] "A double jeopardy challenge presents a question of

[2] Notably, defense counsel interposed his objection by stating, "Client objects," and when he was asked whether he was aware of "any legal basis" supporting the objection, he replied: "I don't know the answer." The prosecution, on the other hand, simply asked that the jury be given additional time to deliberate in hopes that a verdict might be reached as to all charges.

[3] Const 1963, art 1, § 15 similarly guarantees that "[n]o person shall be subject for the same offense to be twice put in jeopardy," and these "state and federal constitutional guarantees are substantially identical and should be similarly construed." *People v Ackah-Essien*, 311 Mich App 13, 31; 874 NW2d 172 (2015). However, by failing to include any argument in his brief on appeal concerning Const 1963, art 1, § 15—or even a mention of it—defendant has abandoned any claim of error under that provision. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his

constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

Broadly speaking, the Double Jeopardy Clause regards two distinct categories of governmental action; it "protects against successive *prosecutions* for the same offense after acquittal or conviction and against multiple criminal *punishments* for the same offense." *Monge*, 524 US at 727-728. As a general rule, when the prohibition against successive prosecutions is violated, "harmless error" concepts are inapplicable because having to twice stand trial for a jeopardy-barred charge cannot "in any sense" be considered "harmless." *Morris*, 475 US at 244-245; see also *id*. at 247 ("After all, one of the purposes of the Double Jeopardy Clause is to prevent multiple prosecutions and to protect an individual from suffering the embarrassment, anxiety, and expense of another trial for the same offense[.]"); *Price v Georgia*, 398 US 323, 331; 90 S Ct 1757; 26 L Ed 2d 300 (1970) ("To be charged and to be subjected to a second trial . . . is an ordeal not to be viewed lightly."). However, the question becomes more complicated when a defendant is tried on multiple charges, one of which is jeopardy-barred, is ultimately convicted of one or more *unbarred* charges, and seeks to use the double-jeopardy violation concerning the barred charge as a means of challenging the conviction(s) for the unbarred offense(s). See *id*. at 246 (noting "that a conviction for an unbarred offense is" not "inherently tainted if tried with a jeopardy-barred charge"); see also *Jones v Thomas*, 491 US 376, 387; 109 S Ct 2522, 2529; 105 L Ed 2d 322 (1989) ("neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls").

Such are the circumstances at bar. Relying again on *Blueford*, 566 US at 599, defendant argues that one of the charges at his second trial—R&O causing injury to Zilinski—was barred by double jeopardy.[4] He concedes that he was not actually *convicted* of R&O causing injury. Even so, defendant contends that he is now "entitled to relief" in "the form of retrial for the offenses of which he *was* convicted, because the inclusion of the [R&O causing injury] charge made conviction of those other two offenses more likely by increasing the likelihood of jury compromise." We disagree.

In support of his requested relief, defendant relies exclusively on *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975) ("[W]here a jury is permitted consideration of a charge unwarranted by the proofs there is always prejudice because a defendant's chances of acquittal on any valid charge is substantially decreased by the possibility of a compromise verdict."), overruled by *People v Graves*, 458 Mich 476, 483; 581 NW2d 229 (1998) (reasoning that *Vail*'s rule of "automatic reversal" was inconsistent "with the post-*Vail* developments in [our Supreme] Court's

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position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.") (quotation marks and citation omitted).

[4] Defendant has failed to brief the issues of whether the trial court erred by declaring a mistrial at the conclusion of his first trial, by declaring a mistrial at the second trial with regard to the R&O causing injury charge while accepting a verdict as to the R&O charges, or by granting the prosecution an order of *nolle prosequi* concerning the R&O causing injury charge. Consequently, we deem defendant to have abandoned any such claims of error. See *Kevorkian*, 248 Mich App at 389, as quoted at footnote 3, *supra*.

harmless-error jurisprudence"). Aside from the fact that *Vail* "no longer carries any precedential weight" because it has been overruled, see *In re Hudson*, 262 Mich App 612, 614 n 1; 687 NW2d 156 (2004), defendant fails to recognize that *Vail* is legally distinguishable from the instant case. In this case, defendant argues that the R&O causing injury charge was barred by double jeopardy, not that the charge was "unwarranted by the proofs[.]" Cf. *Vail*, 393 Mich at 464. Thus, defendant's reliance on *Vail* is misplaced.

Instead, we are bound by the United States Supreme Court's decisions construing federal law, "including the Constitution." *People v Lewis*, 501 Mich 1, 7; 903 NW2d 816 (2017). Our resolution of the instant federal double-jeopardy issue is thus guided by *Morris*, 475 US at 244-248, which examined several of that Court's earlier double-jeopardy decisions. Those included *Price*, 398 US at 329-331 ("we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence"), and *Benton v Maryland*, 395 US 784, 796-798; 89 S Ct 2056; 23 L Ed 2d 707 (1969) ("It is not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation."). The *Morris* Court concluded that "[n]either *Benton* nor *Price* suggests that a conviction for an unbarred offense is inherently tainted if tried with a jeopardy-barred charge. Instead, . . . a new trial is required only when the defendant shows a reliable inference of prejudice." *Morris*, 475 US at 246. "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." See *id.* at 247. Specifically, the defendant has the burden "to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense." *Id.* "[A] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome," *id.*, citing *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and the "reasonable probability" standard can be satisfied by less than a preponderance of the evidence, *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012).

Assuming, without deciding, that defendant is correct that his retrial on the R&O causing injury charge *was* barred by double jeopardy, he is simply not entitled to the relief that he requests here.[5] Defendant erroneously relies on the overruled rule of automatic reversal from *Vail.* He therefore fails to even *argue* that there is a reasonable probability that, but for the fact that he was tried for R&O causing injury with regard to Zilinski, he would not have been convicted of the counts of R&O involving Lloyd and Stanley. We are not persuaded, given the extensive testimony, that such a possibility exists. "It is well established that jurors are presumed to follow their instructions," and in the absence of both erroneous instructions and "sufficiently persuasive indicia of jury compromise," a reviewing court will not find that a conviction founded on a properly

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[5] Under "the widely accepted and venerable rule of constitutional avoidance," *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014), it is a "well-established principle that we will not reach constitutional issues that are not necessary to resolve a case," *People v Cain*, 498 Mich 108, 119 n 4; 869 NW2d 829 (2015) (quotation marks and citation omitted). We need not decide whether double jeopardy *actually* barred retrial on the R&O causing injury charge here to decide whether defendant is entitled to retrial on the R&O charges for which he was convicted, and ergo we decline to consider the former issue.

submitted charge "was a product of juror compromise." *Graves*, 458 Mich at 486-488. To convict defendant of R&O under MCL 750.81d(1), the prosecution had the burden of proving beyond a reasonable doubt that (1) "the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer," (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 police officer performing his or her duties," and (3) "the officers' actions were lawful[.]" *People v Quinn*, 305 Mich App 484, 491-492; 853 NW2d 383 (2014) (quotation marks and citations omitted). There is nothing here to suggest that the officers' actions were unlawful, and given that defendant's physical resistance occurred against officers in jail after he had been placed under arrest, it is beyond dispute that he either knew or had reason to know that those he was resisting were police officers actively performing their duties. Moreover, there was ample evidence at the second trial that defendant—at minimum—resisted, obstructed, and opposed several of the officers, including Lloyd and Stanley, and did so multiple times during the incident in question.

In light of the overwhelming evidence that defendant was guilty of at least two counts of R&O, he has failed to demonstrate a reasonable probability that he would have been acquitted of either of those two counts but for the submission to the jury of the R&O causing injury charge. Therefore, even accepting his premise that his retrial for R&O causing injury was barred by double jeopardy, he is unentitled to a new trial concerning the R&O convictions. See *Morris*, 475 US at 244-248.

Affirmed.

/s/ David H. Sawyer
/s/ Cynthia Diane Stephens
/s/ Michelle M. Rick