

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011

v

JACOB CARL VAUGHN,
Defendant-Appellant.

No. 299445
St. Joseph Circuit Court
LC No. 10-016332-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of resisting or obstructing a police officer, MCL 750.81d(1), for which he was sentenced to wear a tether for five months. We affirm.

Defendant argues that the trial court improperly provided a jury instruction that appealed to the jurors' sense of civic duty by emphasizing that even if the officers' conduct was illegal, defendant should still be convicted. In addition, defendant argues that the instruction improperly appealed to the jurors' concern for police and public safety and improperly informed the jury that there were other mechanisms in place that could correct any injustice to defendant. Specifically, defendant takes issue with the trial court's decision to read to the jurors a portion of this Court's opinion in *People v Ventura*, 262 Mich App 370, 377; 686 NW2d 748 (2004).

We conclude that defendant waived any challenge to the jury instructions when his counsel affirmatively approved the instructions as read. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Because defendant waived this issue, any error has been extinguished. *Id.*

Defendant also argues that defense counsel rendered ineffective assistance by failing to object to the allegedly improper instructions. To establish ineffective assistance of counsel, a defendant must show that his trial attorney's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that the result of his trial would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761

(2004). Counsel is not ineffective for failing to make a futile or meritless objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

“At a criminal trial, the judge functions both as a neutral arbiter between the two contesting parties and as the jury’s guide to the law. This role requires that the judge instruct the jury regarding the law applicable to the case . . . and fully and fairly present the case to the jury in an understandable manner.” *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). “Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Jury instructions will be upheld if they accurately stated the law. *People v McKinley*, 168 Mich App 496, 508; 425 NW2d 460 (1988).

In *Ventura*, 262 Mich App at 377, this Court set forth the applicable law relating to the offense of resisting or obstructing a police officer. We cannot conclude that the trial court erred by reading a portion of the *Ventura* opinion to the jury in this case. The portion read to the jury accurately stated the applicable law governing the offense of resisting or obstructing an officer and fairly presented the issues for trial. *McKinley*, 168 Mich App at 508; see also *Moore*, 189 Mich App at 319. Because the jury instructions were not improper, it follows that defense counsel was not ineffective for failing to object to them. *Milstead*, 250 Mich App at 401.

Defendant also argues that he was not resisting arrest, but rather writhing in pain on the hood of the vehicle and attempting to relieve the excruciating discomfort caused by the herniated discs in his back. He argues that the trial court should have permitted him to present medical records and the testimony of his surgeon to corroborate this claim. He contends that the trial court erred by excluding this medical evidence, thereby denying him the constitutional right to present a defense.

In general, we review for an abuse of discretion the trial court’s decision to admit or exclude evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Whether a defendant’s right to present a defense was violated is a constitutional question that we generally review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, unpreserved constitutional questions are reviewed for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We fully acknowledge that a criminal defendant has the constitutional right to present a defense and call witnesses in his defense. US Const, Am VI; Const 1963, art 1, § 20; *People v Whitfield*, 425 Mich 116, 124 n 1; 388 NW2d 206 (1986). However, we conclude that defendant waived any error relating to the admission of the medical evidence when his attorney admitted on the record that the medical proofs were not admissible at trial. *Carter*, 462 Mich at 215. Moreover, defendant has not demonstrated any outcome-determinative plain error in this regard. See *Carines*, 460 Mich at 763-764. Even without the medical records and surgeon’s testimony, defendant still managed to present his defense to the jury when he testified at trial that he was not resisting the officers, but rather thrashing about due to his painful back condition. We perceive no error requiring reversal.

Defendant next argues that the trial court created an atmosphere conducive to a hasty verdict by unnecessarily injecting a time constraint into the jury's deliberations. We review this unpreserved issue for outcome-determinative plain error. *Carines*, 460 Mich at 763-764.

A trial court ““should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion.”” *People v Malone*, 180 Mich App 347, 352-353; 447 NW2d 157 (1989) (citations omitted). “Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered.” *Id.* at 352.

In *People v Vettese*, 195 Mich App 235, 245; 489 NW2d 514 (1992), the trial court instructed the jury in relevant part:

And if you have not arrived at a verdict by 5:00 p.m., you will be excused and asked to report back here tomorrow morning at 8:30 and commence your deliberations in the morning.

This Court concluded in *Vettese*:

It is clear that the trial court's instruction was not coercive and merely indicated that the jurors would have to return the next day if they did not reach a verdict by 5:00 p.m. There is nothing in the trial court's instruction to suggest that the jurors had to reach a verdict by that time.

* * *

Thus, we conclude that defendant was not denied a fair trial because of the trial court's instruction or a coercive atmosphere during the jury's deliberations. [*Id.*]

The facts of this case are strikingly similar to the facts of *Vettese*. The trial court in the present case did not coerce the jury into reaching a hasty verdict. Instead, the trial court simply provided the jury with information regarding any questions it might have during deliberations and informed the jurors what additional steps would need to take place before they could be excused for the evening. As in *Vettese*, the trial court specifically stated that if the jury did not reach a verdict by the end of the day, the jurors could return to continue deliberating the following morning. Moreover, the trial court had previously instructed the jury:

Try your best to work out your differences; however, although you should try to reach an agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you, or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.

It is well settled that jurors are presumed to follow their instructions. *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010). As in *Vettese*, we conclude that defendant was not denied

a fair trial because the trial court did not create a coercive atmosphere during jury deliberations or actually encourage the jury to reach a hasty verdict. *Vettese*, 195 Mich App at 245.

Defendant lastly argues that his trial attorney rendered ineffective assistance of counsel by failing to object to the trial court's allegedly coercive comments to the jury. This issue was not contained in defendant's statement of the questions presented and is therefore not properly presented for review. MCR 7.212(C)(5); *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). In any event, as we have already explained, the trial court's comments to the jury were not improper. Accordingly, it follows that defense counsel was not ineffective for failing to object to them. As noted previously, counsel is not ineffective for failing to make a futile objection. *Milstead*, 250 Mich App at 401.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer