STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2013
v	No. 311721 Livingston Circuit Court
ROBERT WILLIAM NYILAS, Defendant-Appellant.	LC No. 11-020165-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of interfering with electronic communications, MCL 750.540(5)(a), and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was acquitted of felonious assault, MCL 750.82, and aggravated assault, MCL 750.81a(1). Defendant was sentenced to 12 months' probation. We affirm defendant's conviction for interfering with electronic communications, but reverse defendant's conviction for resisting or obstructing a police officer.

I. BASIC FACTS

Defendant was charged with felonious assault, aggravated assault, interfering with electronic communications, and resisting and obstructing after the victim accused defendant of threatening her with a baseball bat and taking her cellular phone when she tried to call police. She told the responding officers and testified at the preliminary examination that defendant broke her wrist in a prior altercation and that when she presented defendant with the medical bill and indicated that she expected him to pay, defendant flew into a rage and threatened her with a bat. The victim escaped to a neighbor's house and the neighbor called 911. When officers arrived to investigate, defendant had gone to stay at his parents' home.

Numerous officers converged on defendant's parents' home and attempted to persuade defendant to come out. When that was unsuccessful, the officers obtained search and arrest warrants and defendant was arrested. Defendant denied threatening the victim, but admitted to one officer that he took her cell phone when she threatened to call 911. Despite the victim's previous statements to police and her testimony at the preliminary hearing, the victim completely recanted at trial.

The jury acquitted defendant of the assault charges, but found him guilty of interfering with electronic communications and resisting or obstructing a police officer. He was sentenced to 12 months' probation and now appeals as of right.

II. DEFENDANT WAS ENTITLED TO A DIRECTED VERDICT ON THE CHARGE OF RESISTING OR OBSTRUCTING A POLICE OFFICER

Defendant argues that the trial court erred in failing to grant his motion for a directed verdict with respect to the charge of resisting or obstructing a police officer. He argues that because a person is not required to open the door to answer police questions, there was no knowing failure to follow a lawful command. We agree.

Defendant's motion for a directed verdict was denied on the third day of trial. Our review is as follows:

> 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. [*People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).]

To the extent the case involves the interpretation and application of a statute, our review is de novo. *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012).

Deputy James Steinaway testified that he contacted Livingston County Deputy Sheriff Anthony Clayton and Livingston County Sheriff's Department Sergeant Chris Schmidt to assist in the investigation of the victim's allegations. Steinaway, Clayton, and Schmidt went to defendant's parents' house, where the victim said she believed defendant would be. Steinaway attempted to contact defendant at the front door while Clayton and Schmidt watched the perimeter of the residence. Steinaway stated that "[i]t was a minimum of an hour that I was knockin' on the front door, ringing the doorbell, identifying myself as the Sheriff Department requesting that somebody answer the door." Steinaway testified that he used "a loud clear voice" to identify himself "as Sheriff['s] Department." During the hour, Steinaway heard Clayton on the opposite side of the residence "identifying himself as Sheriff Department Canine Unit, and telling him to come to the door and speak with us, and give his side of the story of what happened."

Under directions from his superior, Steinaway left to obtain an arrest warrant for defendant and a search warrant for the residence. Clayton and Schmidt, as well as Deputy Fairbanks and Deputy Morris, remained at the perimeter of the residence. When Steinaway returned to the residence with the warrants, three lieutenants and a nine-person "tactical team" were present at the scene. In addition, Deputy Voorhies and Livingston County Deputy Sheriff James Barkey were present as negotiators. Sergeant Schmidt testified that the tactical team did not immediately enter the residence when Steinaway returned to the residence with the warrants because Deputies Barkey and Voorhies were still attempting to negotiate defendant outside.

Acting as a hostage negotiator for the County Crisis Resolution Team, Barkey testified that he attempted to call defendant's cell phone and the landline phone, but he did not receive a response. Barkey then activated the overhead lights and the siren on one or more patrol vehicles, and he used a PA system to start making announcements.

> I let him know my name. I says, you know, this is Deputy Barkey from the Livingston County Sheriff's Department. We need to speak with you. We're not gonna go anywhere. We're here to stay. We need to talk to you about what happened tonight. We need you to answer the phone. I stated my phone number for him to call me back. I said or you can come out and talk to us, but we're not going to go away.

Importantly, Barkey did not inform those inside the residence that officers had an arrest warrant or a search warrant. Barkey explained that he did not do so because "[w]e're looking for compliance where we want them to want to come out. That way it's safe for everybody. We don't want anybody getting hurt. And . . . the more minimizing you do of the situation the better for them." The following took place during Barkey's cross-examination:

> *Q* [by defense counsel]: [Y]ou've just testified you're making announcements saying please come out, Mr. Nyilas. We're not gonna leave. Come out and talk about that just—just as sum up basically what you were saying.
>
> *A*: To sum up, yes.
>
> *Q*: You didn't tell him I've got an arrest warrant, come outside, correct?
>
> *A*: No, I never said that.
>
> *Q*: And you didn't tell him I've got a search warrant come outside, correct?
>
> *A*: No, I never said—
>
> *Q*: Okay.
>
> *A*: —that.

Defendant testified that he knew the officers were outside. While he was in bed, defendant "kept hearin' the Sheriff' Department knockin' on the door or sayin' . . . that they wanted to talk to me." Defendant ignored the knocking and requests. Defendant admitted that he failed to exit the residence or call the police to explain his innocence, although he could have done so. He took his father's advice and figured that the situation could wait until morning.

After attempts to get defendant to come out of the home were unsuccessful, the incident commander ordered the tactical team to enter the residence. After the tactical team breached the front door and entered the residence, they brought defendant and his parents outside and defendant was placed under arrest.

Defendant was charged with violating MCL 750.81d(1), which provides that "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." For purposes of this case, the question is whether defendant "obstructed" officers. "'Obstruct'" includes 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).

Defendant moved for a directed verdict on the charge of resisting and obstructing a police officer, arguing that he never resisted a lawful command. The trial court denied the motion:

> I do find that there is enough evidence to get to a jury as to whether or not the prosecutor . . . has put enough evidence forward to have the matter go to a jury as to whether or not the Defendant did assault, batter, [wound], resist, obstruct, oppose, or endanger Deputy Barkey who was performing his duty. . . . And it's clear that enough came forward that I've heard that there was enough sirens, bullhorns, requests, door knocking, doorbell ringing, to . . . have the jury consider that issue. . . .

We conclude that the trial court abused its discretion in failing to grant defendant's motion for directed verdict. Defendant was under no legal obligation to leave the home or allow the officers to enter the home absent valid warrants to do so.[1] Once the warrants were obtained, the police may have been legally authorized to order defendant's compliance, but there is absolutely no record evidence that police officers ever "commanded" that defendant come out of the home or advised defendant that they had obtained search and arrest warrants.

In *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), the defendant informed two police officers that he would not allow them to enter his residence without a warrant, and then he attempted to close the front door. *Id*. at 42. One of the police officers put his shoulder against the door to prevent the defendant from closing the door. *Id*. at 42-43. The defendant struggled with the police officers, and he was eventually charged with assaulting, resisting, or obstructing a police officer under MCL 750.81d(1). *Id*. at 43. The issue before the Court was whether MCL 750.81d abrogated "the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas." *Id*. at 41. After an analysis of the statutory language, the Court concluded that MCL 750.81d did not abrogate "the common-law right to resist unlawful arrests or other unlawful invasions of private rights." *Id*. at 58. Thus, "the prosecution must establish that the officers' actions were lawful." *Id.* at 52.[2]

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[1] And, it should go without saying that defendant had a Fifth Amendment right to not answer any questions from the police. *US Const Amend V*.

[2] *Moreno* may be given retroactive effect in cases where a defendant preserves the issue at trial. *City of Westland v Kodlowski*, 298 Mich App 647, 672; 828 NW2d 67 (2012).

To the extent that police officers requested defendant to answer the phone or come to the door and talk with them, such requests were not "lawful" because defendant had no obligation to do so. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v Jardines*, __ US __; 133 S Ct 1409, 1415; 185 L Ed 2d 495 (2013) quoting *Silverman v United States*, 365 US 505, 511, 81 S Ct 679, 5 L Ed 2d 734 (1961). In fact,

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v United States*, 365 US 505, 511; 81 S Ct 679, 683; 5 L Ed 2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. [*Payton v New York*, 445 US 573, 589-590; 100 S Ct 1371; 63 L Ed 2d 639 (1980).]

While an police officer, like any other private citizen, may knock at the door without a warrant and request entry, *Jardines*, 133 S Ct 1409 at 1415-1416, "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v King*, ___ US ___; 131 S Ct 1849, 1862; 179 L Ed 2d 865 (2011). "*And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak*." *Id*. (emphasis added). We conclude, therefore, that the police, in requesting that defendant come to the door (before the officers obtained valid arrest and search warrants) were not making a lawful request.

Moreover, even after the officers obtained the requisite warrants, at which time their conduct became "lawful," the record does not indicate that defendant was ever "commanded" to do anything. Police purposefully failed to advise defendant that they had a warrant for his arrest. In so doing, they hoped to gained defendant's compliance and "keep everyone safe." Such testimony buttresses defendant's argument that he was never ordered to do anything. Instead, police, with use of a hostage negotiator, hoped to cajole defendant out of the house under his own free will. Defendant at no time failed to comply with a lawful command. As such, he could not have been convicted of resisting or obstructing a police officer. Because we have concluded that the facts did not support a submission of the charge to the jury, we decline to further address defendant's argument regarding the constitutionality of MCL 750.81d(1).

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR INTERFERING WITH ELECTRONIC COMMUNICATIONS

Defendant argues that there was insufficient evidence to support his conviction for interfering with electronic communications, especially in light of the victim's denial at trial that defendant seized her phone during their argument. To the extent defendant argues that the evidence was insufficient, there is no preservation requirement for appellate review. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). However, to the extent defendant argues that the trial court erroneously admitted the victim's prior written statement to police under MCL 768.27c, we note that defendant did not raise a similar objection in the trial court, as required, and the issue must be reviewed for plain error affecting defendant's substantial rights. *People v. Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999).

A claim of insufficient evidence is reviewed de novo. *Hawkins*, 245 Mich App at 457.

> [W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. [*People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).]

Defendant was charged with violating MCL 750.540(4), which provides:

> A person shall not willfully and maliciously prevent, obstruct, or delay by any means the sending, conveyance, or delivery of any authorized communication, by or through any telegraph or telephone line, cable, wire, or any electronic medium of communication . . . .

Steinaway testified that when he questioned defendant shortly after placing him under arrest, defendant admitted that he seized the victim's phone during the argument because he believed that she was attempting to call 911. Steinaway also testified that the victim told him that defendant seized her phone when she was attempting to call 911 during the argument.

At trial, the victim recanted all of her previous allegations against defendant. The prosecutor presented the victim with a statement she gave to police in which she said that defendant took her cell phone. The statement was admissible MCL 768.27c, which provides:

> Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

Defendant's argument that the victim's prior statements were only admissible for impeachment, not as substantive evidence, is without merit. See *People v Meissner*, 294 Mich App 438, 445-446; 812 NW2d 37 (2011). Moreover, his argument that the trial court erred in not instructing the jury on the difference between impeachment and substantive evidence was waived when, except for the denial of his requests to instruct the jury about the right to resist unlawful action by the police, the right to privacy within the home, and the right to refuse to answer police questions, defendant agreed to the instructions given. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that MCL 768.27c is limited to statements regarding the "infliction or threat of physical injury upon the declarant." MCL 768.27c(1)(a). However, MCL 768.27c(1)(a) does not require "that the statements at issue describe the charged domestic violence offense." *Meissner*, 294 Mich App at 447. Here, the victim's statement that defendant seized her phone when she was attempting to call 911 was a narration of defendant's threat with a baseball bat. In particular, the victim stated that defendant's threat with the baseball bat, in addition to her inability to call 911, caused her to run to a neighbor's house in fear. Thus, the challenged part of the victim's statement satisfied MCL 768.27c(1)(a).

Defendant's argument that MCL 768.27c violates the separation of powers doctrine is without merit. Our Supreme Court has the "exclusive authority under Const 1963, art 6, § 5 to promulgate rules regarding the practice and procedure of the courts." *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). However, when a statute "is based on policy considerations over and beyond the orderly dispatch of judicial business," it is a valid substantive law that supersedes the applicable rule of evidence. *Id.* at 475. This Court has specifically held that "[o]ur Legislature enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases." *Meissner*, 294 Mich App at 445.

Defendant's argument that MCL 768.27c allows the admission of hearsay statements as substantive evidence contrary to the Sixth Amendment need not be addressed because it is inapplicable to the facts of this case. Testimonial statements are generally inadmissible under the Confrontation Clause absent "unavailability and a prior opportunity for cross-examination." *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008) (internal quotation marks and citation omitted). However, because there is no dispute that the declarant (the victim) in this case was available and subject to cross-examination, it is not necessary to address the Confrontation Clause issue. See *Meissner*, 294 Mich App at 446 n 2.

Given defendant's statement to police as well as the victim's statement to police, there was sufficient evidence to support defendant's conviction for interfering with electronic communications.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE PROSECUTOR'S MOTION TO EXCUSE TWO JURORS FOR CAUSE

Defendant argues that he was denied the right to an impartial jury when the trial court erroneously dismissed two jurors. We disagree.

A trial court's decision to excuse a juror for cause is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 256 n 5; 631 NW2d 1 (2001). Also, "[t]he trial court's decision whether to remove a juror is reviewed for an abuse of discretion." *People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"The Sixth Amendment of the United States Constitution guarantees criminal defendants a trial by an impartial jury." *People v Smith*, 463 Mich 199, 213; 615 NW2d 1 (2000). However, a defendant's right to a fair and impartial jury is limited to the jury's singular role as finder of fact. See *People v Bearss*, 463 Mich 623, 629-630; 625 NW2d 10 (2001). The defendant has no right to a jury that will refuse to return an unjust verdict notwithstanding the facts proven beyond a reasonable doubt. *People v Demers*, 195 Mich App 205, 206-207; 489 NW2d 173 (1992).

A. JUROR 10

Under MCR 2.511(D)(3), a trial court may excuse for cause any person who "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be."

During voir dire, Juror 10 unambiguously indicated that a "recipient of the violence" should consent to a prosecution before a defendant is convicted. Given the facts of this case, Juror 10's position would mean that defendant could not be convicted because the victim was not cooperative with the prosecution. Thus, Juror 10 had "formed a positive opinion . . . on what the outcome should be." MCR 2.511(D)(3). Moreover, after the trial court explained the limited role of the jury, the prosecution asked Juror 10, "Do you . . . agree with that concept or would you require the complainant to want to go forward?" Juror 10 responded, "Yes, I would." Defendant argues Juror 10's response was ambiguous because it was a compound question. However, the responsive words "I would" parallel the questioning words "would you." Accordingly, it is reasonable to infer that Juror 10 was indicating that she "would . . . require the complainant to go forward" in order to find defendant guilty. Thus, because Juror 10 twice suggested that defendant should not be convicted if the victim was unwilling to cooperate, the trial court did not abuse its discretion in excusing Juror 10 for cause.

B. JUROR 19

"Removal of a juror under Michigan law is . . . at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001). Juror 19 admitted that he heard on the radio that, if convicted, defendant would face a potentially lengthy sentence. The juror indicated that he would allow the possibility of severe punishment to affect his findings with respect to the elements of the crimes. A juror should not allow the severity of punishment, which is established by the law, to affect his or her findings of

fact. See *People v Goad*, 421 Mich 20, 27; 364 NW2d 584 (1985). While Juror 19 also indicated that he would attempt to set aside his thoughts regarding punishment, there was some record evidence for the trial court's decision to dismiss Juror 19. "[E]rror does not necessarily follow when the court through abundance of caution to secure an impartial jury excuses a juror on ground not technically sufficient to support a challenge for cause, as it would in retaining one who is challenged and ought to have been rejected." *People v Clyburn*, 55 Mich App 454, 456; 222 NW2d 775 (1974) (internal quotation marks and citation omitted).

We reverse defendant's conviction for resisting and obstructing a police officer, but affirm defendant's conviction for interfering with electronic device.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher