STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2006
v	No. 259087 Oakland Circuit Court
CONSTANCE SCHENK, Defendant-Appellant.	LC No. 2003-191368-FH

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a second jury trial, defendant was convicted of obstructing a police officer, MCL 750.81d, during the course of a traffic stop and was sentenced to probation for one year, with two days to be served in jail, with credit for two days served. She appeals as of right. We reverse and remand for a new trial.

Defendant was charged with obstructing Officer Jason Porta in the performance of his duties. Defendant was the passenger in a vehicle that was stopped for speeding on July 2, 2003. The driver was subsequently arrested on an outstanding warrant and for driving while intoxicated. Defendant allegedly approached another officer who was conducting an inventory search of the vehicle, disobeyed Officer Porta's command to stop, and tried to push Officer Porta out of the way. According to the officers, defendant was arrested and physically resisted. Defendant denied doing anything to cause her arrest and contended that the injuries she sustained that night were due to police brutality, not her resistance to her arrest. Defendant's first trial ended in a hung jury. She was convicted at the second trial.

I. Admissibility of Evidence

Defendant argues that the trial court abused its discretion by admitting a videotape of defendant's conduct during the booking process at the police station following her arrest. Defendant moved to exclude this evidence before her first trial and the trial court ruled that the videotape was admissible. At defendant's second trial, however, the trial court was not asked to consider the admissibility of the videotape. Rather, when the prosecutor moved to admit the videotape, defense counsel specifically stated, "No objection to the tape." Defendant had the opportunity to object again to the admission of the videotape. Instead, defense counsel affirmatively acquiesced to the videotape's admission, resulting in a waiver of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

II. Jury Instructions

Defendant raises two issues in which she argues that the trial court's jury instructions regarding the charged offense were erroneous. Because defense counsel twice expressed his satisfaction with the court's jury instructions, review of these issues is also waived. *Id.*; *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

III. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to support her conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. Additionally, it was the jury's role to determine the credibility of the witnesses and the weight that their testimony should be accorded. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

A person is guilty of obstructing a police officer if he "obstructs . . . a person who the individual knows or has reason to know is performing his or her duties . . . ." MCL 750.81d. "'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). Viewed in the light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction.

The evidence showed that defendant became extremely irate when Officer Michael Emmi began to search her truck and yelled that he "couldn't f***ing search her car" and "had no right to search her car" as she walked toward Officer Porta at the rear of the truck. A reasonable inference could be made that defendant was attempting to go over to Officer Emmi and that she might interfere with his search. In an effort to stop her, Officer Porta stepped into her path, put his hand up indicating for her to stop, and told her not to approach Officer Emmi. Defendant ignored Officer Porta's command and her action of pushing toward Officer Porta, which resulted in her fingers grazing him because he leaned out of the way, could reasonably be construed as an attempt to remove Officer Porta from her path. There is no dispute that defendant knew Officer Porta was a police officer. From this evidence, the jury could find that the essential elements of the crime were proven beyond a reasonable doubt because defendant knowingly failed to obey a lawful command and physically interfered with Officer Porta's duty to ensure Officer Emmi's safety.

IV. Great Weight of the Evidence

Defendant also argues that the trial court erred in denying her motion for a new trial on the ground that the verdict was against the great weight of the evidence. On appeal, the trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Such

a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 640, 642; 576 NW2d 129 (1998).

Two of the three officers present at the scene testified that it appeared that defendant was trying to go over to Officer Emmi and that Officer Porta tried to stop her. One officer testified that defendant was simultaneously vigorously objecting to the search of her car. The only evidence to the contrary was defendant's testimony and the testimony of Officer Emmi, who admitted he did not see the entire incident. Conflicting testimony and questions of witness credibility are not sufficient grounds for granting a new trial. *Id.* at 643. The evidence did not preponderate so heavily against the verdict that it would be an injustice for it to stand. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

V. Ineffective Assistance of Counsel

Defendant presents several claims of ineffective assistance of counsel. Because a *Ginther*[1] hearing was not held, this Court's review is limited to mistakes that are apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). 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).

A. Bad Acts Evidence

Defendant argues that the evidence of her alleged resistance to her arrest was irrelevant to the issue whether she obstructed a police officer and was inadmissible under MRE 404(b).

MRE 404(b) precludes the admission of evidence of other bad acts for the purpose of proving a defendant's character. However, the "res gestae exception" provides that "[e]vidence of other criminal acts is admissible when so closely connected with the crime of which defendant is accused as to constitute an explanation of the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), citing *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (internal citations omitted). The res gestae exception has also been defined as "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *People v*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Robinson, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

Here, the prosecution contended that defendant had been belligerent and uncooperative, the degrees of which escalated after Officer Porta placed defendant under arrest. Defendant asserted that she did nothing to precipitate her arrest or injuries and was generally cooperative. Defendant also argued that her injuries were the result of an out-of-control officer who physically assaulted her and were not caused by her actions surrounding her arrest. The jury was charged with deciding whose version of events to believe.

We hold that the police officers' testimony regarding defendant's resistance was relevant to explain the prosecution's theory that defendant sustained her injuries while resisting efforts to secure her and to contradict defendant's defense that she was an innocent victim of police brutality and did nothing during her entire time at the scene to warrant her arrest. Also, the challenged evidence was admissible to allow the jury to evaluate the witnesses' credibility. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *Sholl, supra* at 741. Therefore, we conclude that the evidence regarding defendant's resistance to arrest was admissible as part of the res gestae of the offense. Accordingly, defense counsel was not ineffective for failing to object to this evidence. *Mack, supra* at 130.

Defendant also argues that the evidence regarding her resisting arrest was inadmissible because the prosecutor failed to give the required notice under MRE 404(b)(2) of her intent to introduce the evidence. But because the evidence was admissible as res gestae evidence without regard to MRE 404(b), the prosecutor was not required to provide notice. See *Delgado, supra* at 84.

B. Jury Instructions

Defendant next argues that defense counsel was ineffective for failing to request a limiting instruction regarding her resistance to arrest because the jury could have considered her actions in resisting arrest as evidence of obstruction, thus convicting her of a crime for which she was not charged. Defendant contends that *People v Kelley*, 78 Mich App 769; 260 NW2d 923 (1977), is on point. We agree.

In *Kelley*, the defendant wanted to tow his friend's car home to avoid the towing fee. His friend had been arrested for drunk driving. *Id*. at 772. The defendant was told he could not, but persisted and was eventually arrested for disorderly conduct. He physically resisted the arrest. *Id*. at 772-773. The defendant was charged with violating the prior version of MCL 750.479[2] and was tried on the theory that his actions resisted or obstructed the police officer in his accident investigation. *Id*. at 771, 774. An issue on appeal was whether the trial court erred

[2] MCL 750.81d was enacted by 2002 PA 266, and MCL 750.479 was amended at the same time to exclude the crime of resisting arrest, 2002 PA 270. Therefore, the list of proscribed conduct in MCL 750.81d also includes resisting. Otherwise, the language of the statutes is nearly identical.

reversibly in failing to instruct the jury that the defendant's physical resistance to his arrest could not be the basis of his conviction. *Id*. at 776-777. The Court concluded that "there was a substantial likelihood that defendant may have been convicted for his resistance to the arrest, even though the arrest may have been illegal." *Id*. at 779. [3]

The *Kelley* Court specifically noted that the defendant was not charged with resisting arrest and, therefore, could not be convicted of that offense regardless of whether the arrest was legal. *Kelley, supra* at 776. In deciding that the defendant was entitled to a new trial, the Court stated that the proofs at trial "went into great detail as to the defendant's acts of physical resistance to the arrest itself" and the jury was not informed that "a conviction could not be premised on defendant's physical resistance to his arrest" because it was inconsistent with the theory of the case consistently adhered to by the plaintiff. *Id*. The Court stated that the prejudice to the defendant was the possibility that the jury could have concluded that his resistance to his arrest was sufficient grounds for conviction and thus, convicted the defendant of a crime for which he was not charged because it was not instructed to disregard the defendant's actions in response to his arrest. *Id*. at 776-777.

The Court noted that even if the jury had not received this instruction, much of the prejudice could have been obviated had the jury been instructed that if the defendant had committed no crime before his arrest, then his arrest would have been illegal and his resistance justified. The reasoning being that if the jury convicted the defendant, even if mistakenly based on his resisting arrest, it necessarily believed that he was guilty of the charged offense. *Id*. at 777. The Court further stated that the possibility of prejudice was increased because the uncharged offense of resisting arrest was a violation of the same statute and occurred at the same time and place as the charged offense. "The possibility that the jury may have been confused, and convicted defendant of the uncharged offense, is substantially greater than in the usual case . . . ." *Id*. at 778.

Here, we conclude that defendant was faced with the same possibility of jury confusion.[4] Defendant was not charged with resisting arrest. Although the prosecutor consistently presented that his theory of the case was that the offense occurred when defendant attempted to get around Officer Porta before defendant was arrested, he also repeatedly supported his theory with references to defendant's behavior during and after her arrest. And the jury was instructed that it had to find that defendant obstructed Officer Porta in the performance of his "lawful duties," which would include an arrest. Moreover, resisting arrest is also an offense under MCL 750.81d.

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[3] Plaintiff asserts that *Kelley* is distinguishable because of the illegal arrest factor. At the time *Kelley* was decided, a person could not be guilty of resisting an unlawful arrest. This is no longer the case. *People v Ventura*, 262 Mich App 370, 374, 377; 686 NW2d 748 (2004). But this difference is irrelevant in this case. The Court's decision hinged on the fact that without a limiting instruction regarding the defendant's resistance to arrest, it was possible that the jury found that the defendant committed no crime before his arrest, but nevertheless convicted him based on his arrest behavior, presuming that the arrest was legal.

[4] We find it significant that defendant's first trial ended in a hung jury, which could well indicate jury confusion.

We therefore conclude that there was a substantial likelihood that the jury may have convicted defendant for the uncharged offense of resisting arrest. Had defense counsel requested a limiting instruction regarding defendant's behavior in resisting arrest, he would have been entitled to one. We can envision no sound trial strategy that would include foregoing such an instruction and believe that defense counsel's performance was deficient for failing to request one.

Furthermore, the prejudice to defendant by defense counsel's failure to request a limiting instruction is great. Defendant's resisting behavior was chronicled in great detail and occurred within minutes of the alleged actions for which she was charged. The jury instructions provided no guidance on what behaviors to consider in deciding if defendant was guilty of the charged offense. Had a limiting instruction been given and the jury told that defendant's actions from the time of her arrest and afterward could not form the basis for her conviction, the result of the proceeding could very well have been different. The evidence supporting defendant's conviction was not overwhelming, and defendant's first trial ended with a hung jury. We therefore conclude that defendant has sustained her burden of showing that she is entitled to a new trial based on ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to object to the jury instruction regarding the charged offense because the trial court did not define "obstruct." Because we are remanding for a new trial, this argument is moot. We note, however, that the trial court's jury instruction was based on the former version of CJI2d 13.2. Both CJI2d 13.1 and CJI2d 13.2 were amended in October 2004 to reflect the enactment of MCL 750.81d and the amendment of MCL 750.479. The use notes following these instructions state that CJI2d 13.1 is to be used when a defendant is charged under MCL 750.81d. This instruction explicitly defines "obstruct" in accordance with the statutory definition.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff