STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ALLEN APRILL,

Defendant-Appellant.

UNPUBLISHED
September 13, 2007

No. 275562
Grand Traverse Circuit Court
LC No. 06-010159-FH

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assaulting, resisting and obstructing a police officer. MCL 750.81d(1). Defendant was found not guilty of assault (domestic). MCL 750.81(2). He was sentenced as a second-offense habitual offender, MCL 769.10, to a prison term of 18 to 36 months. We affirm.

Defendant first contends that the trial court erred in not granting his pre-trial motion for severance of the domestic violence and resisting and obstructing charges. According to defendant, severance was mandatory in this case because law enforcement entered defendant's residence several hours after the alleged domestic violence incident and arrested him pursuant to an unrelated misdemeanor warrant. Because these incidences were unrelated, defendant asserts, joinder was improper and severance was mandatory. We disagree.

Generally, an issue is properly preserved if it is raised before, addressed and decided by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In this case, defendant properly preserved the issue whether severance was mandatory under MCR 6.120(C) by raising it in a pre-trial motion. However, to the extent that defendant argues on appeal that the lower court erred in failing to grant severance under MCR 6.120(B), which provides for permissive severance when unfair prejudice would result, that argument is unpreserved because it was not raised before the trial court. We review de novo whether defendant was entitled to mandatory severance on the basis that the charges against him were unrelated. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003).

Generally, two charged offenses may be tried together if they are related. MCR 6.120(B)(1). However, "[o]n the defendant's motion, the court must sever for separate trials offenses that are not related . . . ." MCR 6.120(C). MCR 6.120 provides that offenses are related, and thus joinder is appropriate, if they are based on "(a) the same conduct or transaction,

or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1). Further, "joinder is allowed for offenses which are part of a single scheme, even if considerable time passes between them." *People v Tobey*, 401 Mich 141, 152 n 15; 257 NW2d 537 (1977).

In this case, the evidence adduced at trial indicated that defendant left the scene of the alleged domestic assault and walked home. Approximately four hours later, after determining that defendant was a suspect in the assault, law enforcement arrived at his residence. When defendant did not respond to their repeated requests that he make contact with them, the officers entered defendant's residence on an unrelated warrant and searched for him. During a search of the downstairs portion of the residence, officers heard sounds coming from upstairs, and exited the residence in order to put on protective tactical gear for their safety. The officers then re-entered the residence and discovered defendant in an unlit portion of the attic "in . . . a fetal position on the floor on his side." Thereafter, defendant began what one officer characterized as defensive resistance.

We conclude that the evidence adduced at trial is sufficient to support a finding that defendant left the scene of the alleged domestic violence incident in order to avoid a confrontation with police and possible arrest on that charge. Although defendant had an outstanding misdemeanor warrant on an unrelated matter, pursuant to which he was ultimately arrested, there is no evidence in the record that indicates that defendant was aware of the warrant, and thus was attempting to resist and obstruct arrest on the outstanding warrant. Therefore, defendant's alleged subsequent action in resisting and obstructing the police arguably was, at least, an act connected to the prior act of domestic assault, MCR 6.120(B)(1)(b), and at most constituted a part of a single plan or scheme centered on the act of domestic violence, MCR 6.120(B)(1)(c). Therefore, the acts were related and severance was not mandatory.

As for defendant's unpreserved argument, defendant fails to show that the charges should have been severed "to promote fairness . . . and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). Defendant argues that it is highly likely that joinder of the charges resulted in his conviction of resisting and obstructing arrest. This argument is purely speculative. Indeed, the fact that defendant was found not guilty of domestic assault belies this speculation. Moreover, there is no evidence of a compromise verdict[1] in that there is no evidence that any juror did not approve the whole verdict. In fact, following the announcement of the verdict, the jurors affirmed that the verdict was theirs when asked by the court to do so. Finally, the jurors were instructed that the domestic assault and resisting and obstructing charges were separate crimes that they must consider separately during deliberations. "It is well established that jurors are presumed to follow their instructions." *People v Graves*,

[1] A compromise verdict is " '[a] verdict which is reached only through the surrender of conscientious convictions as to a material issue by some members of the jury in return for a relinquishment by other members of their like settled opinion on another issue, the result not commanding the approval of the whole panel . . . .' " *Niemi v Ford Motor Co*, 127 Mich App 811, 813-814; 339 NW2d 651 (1983), quoting 76 Am Jur 2d, Trial, § 1139, p 111.

458 Mich 476, 486; 581 NW2d 229 (1998). Thus, the trial court did not commit plain error by failing to sua sponte sever under MCR 6.120(B).

Defendant next argues that there was insufficient evidence at trial to convict him under MCL 750.81d(1). We disagree. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).[2]

MCL 750.81d(7)(a) defines the term "obstruct" to mean "the use or threatened use of physical interference or force *or* a knowing failure to comply with a lawful command." (Emphasis added.) In this case, the jury heard testimony from a police officer that defendant "resisted [arrest] to the point where he didn't comply with putting his hands where I was telling him to put them. . . . He wasn't doing what I was asking him to do." Another officer testified that on numerous occasions he tried but failed to make verbal contact with defendant before the police entered the house:

> I began yelling, Traverse City Police Department, you know, Mr. Aprill come out, we would like to talk to you, Traverse City Police, come out, . . . this is Traverse City Police, come on out, different variations. At one point I . . . got my cell phone, called central dispatch and requested them to attempt to contact the suspect also via telephone . . . . They advised me they got no luck answering. I tried his cell phone and his home phone number on my cell phone four or five times. And, while trying to call him, I was continually yelling, Traverse City Police Department, come out we want to talk to you, calling him by name.

This officer further testified that after defendant was placed into custody, he told the officer he recognized his voice as the one who was calling to him from outside the home.

Additionally, a third officer testified that defendant

> struggle[d] . . . the whole time we're telling him put your hands behind your back, put your hands behind your back, he wouldn't, we actually had to, I was able to finally get his arm from underneath him as he continued to push and pull away from me and put it behind his back, he continued to struggle with us as I was able to put handcuffs on him.

Viewing this evidence in a light most favorable to the prosecution, a rational jury could find that defendant violated MCL 750.81d(1) by knowingly failing to comply with numerous lawful commands.

[2] Amended on other grounds 441 Mich 1201; 489 NW2d 748 (1992).

We also reject defendant's argument that his 18 to 36 months' imprisonment was disproportionate to the offender and the nature of the crime and thus was improper. Again, we disagree. Generally, "[i]f the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); accord MCL 769.34(10). In this case, the calculated minimum range was 2 to 21 months. Because the 18 to 36 months' term of imprisonment was within the guidelines, defendant fails to show plain error affecting substantial rights. *Babcock*, *supra* at 261; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Further, defendant asserts that MCL 769.34(10), which provides that this Court "shall affirm" a lower court's sentencing decision if the "minimum sentence is within the appropriate guidelines sentence range . . . absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence," is an unconstitutional violation of the doctrine of separation of powers and of due process. Our Supreme Court rejected this argument in *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot

I concur on the basis that the failure to sever was harmless, there was sufficient evidence that defendant resisted arrest, and the sentence was within the guidelines.

/s/ Helene N. White