STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 279689 Otsego Circuit Court
ROBERT DANIEL WOOD, Defendant-Appellant.	LC No. 06-003659-FH

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of obstruction of justice, MCL 750.505, and assaulting a police officer causing injury, MCL 750.81(d)(2). Defendant was sentenced to concurrent jail terms of 12 months for each conviction. We affirm the conviction and sentences but remand to the trial court for clerical correction of the judgment of sentence.

Defendant's first issue on appeal is that the jury instructions given were unclear as to the meaning of "opposing" a police officer. However, defendant affirmatively waived any challenge to the jury instructions by indicating to the court through counsel, on two occasions, that the jury instructions as given were acceptable. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant's second issue on appeal is that the trial court abused its discretion in excluding evidence of potential police intimidation of defendant before trial. We disagree. We review preserved evidentiary decisions by a trial court for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

The evidence defendant intended to present included a video and testimony regarding two officers that were in defendant's yard with guns drawn in the early morning hours two weeks before the trial and a suspicious email. The video was taken from a camera and security system defendant had installed at his residence. The defendant had a verbal exchange with the officers and they indicated they were looking for a house in the area to perform a welfare check on a local resident and defendant asked them to leave his property. The trial court found that this incident was not relevant to his trial, as defendant had not demonstrated that he was intimidated and he was willing to testify during the trial. Defendant has not linked this evidence to the

complainant, Trooper Christopher Belt, in any way or otherwise shown how the videotaped incident may have affected the testimony of any witness. Therefore, the trial court's decision was within the range of reasonable and principled outcomes.

Defendant's third issue on appeal is that he was deprived of his constitutional right to a fair trial by prosecutorial misconduct involving comments and arguments made during opening and closing statements. Defendant did not preserve this issue for appeal; therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). The plain error rule requires that the error: 1) must have occurred, 2) must be clear and obvious, and 3) must have affected defendant's substantial rights or showed prejudice in the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has the burden of proving prejudice based on plain error. *Id*. Trial court findings will be reversed only if a plain error has resulted in the conviction of an innocent defendant or when the error will affect the fairness and integrity of the judicial proceedings. *Id*. Moreover, reversal is not required if the prosecutor's misconduct could have been cured with a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor's comments during opening statement and closing argument that the officer did not need a warrant to make an arrest at defendant's home is an improper, untrue statement and also plain error. We disagree. Violation of the sex offenders registration act is a felony. MCL 28.729(1). Therefore, because the officer had probable cause, no arrest warrant was required. Accordingly, there was no plain error. Moreover, any misstatement of the law could have been cured by a timely instruction.

Defendant's fourth argument on appeal is that he was denied the effective assistance of counsel when defense counsel failed to object to improper jury instructions and improper prosecutorial arguments. We disagree. In considering an unpreserved ineffective assistance claim, this Court must limit review to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). The defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140.

Defendant argues that defense counsel should have instructed the jury that defendant's asking the officer for a warrant does not constitute obstructing or opposing, and defense counsel should have objected to the prosecutor's improper arguments. Defendant's arguments fail for numerous reasons. First, according to the officer's testimony, defendant did more than ask him for a search warrant; defendant "pushed [the officer] with his left hand in [the officer's] chest / shoulder area" and threatened to get his shotgun to either make Belt sorry or to get him to leave the property. Although asking a police officer to produce a warrant is not obstructing or opposing a police officer, it was not unreasonable for the jury to conclude that pushing and threatening would be. Further, in light of this testimony, it is possible that defense counsel was

executing his trial strategy by limiting the jury instructions and defendant has not overcome this strong presumption.

Defense counsel's failure to object to the prosecutor's allegedly improper arguments also does not rise to the level of ineffective assistance of counsel. As discussed above, the prosecutor's arguments were not plain error and therefore the failure to object does not fall below an objective standard of reasonableness under the prevailing professional norms. Moreover, there is no indication that the results of the proceeding would have been different if defendant had objected. Therefore, defendant has failed to establish any prejudicial deficiency in his counsel's performance and a new trial is not warranted.

Defendant's final argument on appeal is that the conviction and judgment of sentence reflect an incorrect statute number and crime classification and not that intended by the trial court. We agree. The lower court record shows that the prosecutor's original complaint under count one was listed under statute MCL 750.505, which is a five-year felony. However, the prosecutor's second amended complaint filed with the trial court modified count one to a violation of MCL 750.81d(1), a two-year felony.

At trial and during the sentencing hearing, the trial court noted the charge of obstructing, opposing or endangering a police officer charge, but did not cite to a Michigan statute. The judgment of sentence indicates that count one is charged under MCL 750.505, however, the sentence is consistent with MCL 750.81d(1). The trial court presumably had acknowledged the change of charge shown in the prosecutor's second amended complaint, as evidenced by the jury instructions and the sentence. Therefore, this case should be remanded to the trial court limited only to appropriate clerical correction of the judgment of sentence.

We affirm defendant's convictions and sentences but remand for correction of the clerical error in the judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering