

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL BERNARD BAKER,

Defendant-Appellant.

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UNPUBLISHED

June 25, 1996

No. 178783

LC No. 94-049793-FH

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of resisting/obstructing a police officer in the discharge of duty. MCL 750.479; MSA 28.747. Subsequently, defendant pleaded guilty to being an habitual offender, third offense. MCL 769.11; MSA 28.1083. Defendant was sentenced to concurrent terms of 2 to 4 years' imprisonment on each of the resisting/obstructing a police officer in the discharge of duty convictions. He now appeals as of right. We affirm.

Defendant first claims that he was denied a fair trial because of prosecutorial misconduct during trial. Consideration of the alleged instance of misconduct, which was unobjected to, is limited to whether our failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because any possible prejudice could have been cured by a timely instruction from the court, we find no miscarriage of justice. *Id.*

Defendant next claims that the trial court abused its discretion by failing to grant defendant's motion for a mistrial. The grant or denial of a mistrial is within the sound discretion of the trial court, and there must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). The trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice. *Id.* Defendant's argument that he is entitled to a mistrial is predicated upon the assertion that the prosecutor improperly elicited testimony from Officer Banks which indicated that defendant had a prior conviction. A review of the record reveals that defense counsel failed to object to Officer Banks'

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- Circuit judge, sitting on the Court of Appeals by assignment.

testimony and even exacerbated its effect by asking the police officer on cross-examination questions regarding defendant's identity which provoked testimony that the officer had previously arrested defendant on a drug charge. The testimony complained-of did not establish defendant's prior conviction. If there was any error in this regard, it was invited by defendant and could have been cured, had defendant timely objected. See *People v Reynolds*, 25 Mich App 112, 114; 181 NW2d 22 (1970). Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant also argues that the judgment of sentence should indicate that he was convicted of resisting/obstructing an officer in the discharge of duty instead of "assault of a police officer." We disagree. Whether the judgment of sentence is correct is a question of law which is reviewed de novo on appeal. See *People v Young*, 206 Mich App 144, 154; 521 NW2d 340 (1994). Defendant was convicted pursuant to MCL 750.479; MSA 28.747. Because there are several forms of prohibited conduct pursuant to this statute, the Judgment of Sentence is specific as to the type of proscribed conduct for which defendant was convicted. Moreover, the correct statutory citation, MCL 750.479, immediately follows the name of the conviction on the judgment of sentence and ameliorates any ambiguity contained therein. For these reasons, we find no error.

Defendant next argues that he was denied effective assistance of counsel. Specifically, defendant argues that his trial counsel was deficient in (1) failing to ascertain the proper defenses to the charged crime; (2) in eliciting damaging testimony regarding prior bad acts during his cross-examination of Officer Banks; and (3) in failing to request a curative instruction after the trial court denied his motion for a mistrial.

A defendant who claims he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, and must prove that, but for counsel's error, the outcome of the trial court would have been different. *Stanaway, supra*.

Defendant's argument that defense counsel failed to ascertain the proper defenses to resisting/obstructing a police officer is without merit. Because defendant failed to move for a new trial or to request a *Ginther*<sup>1</sup> hearing and this Court's review is limited to the appellate record, it is unclear whether defense counsel investigated and failed to present another defense, other than self-defense, or whether defense counsel did not investigate other defenses. Since defendant failed to present any allegations of prejudice, he cannot maintain this claim of ineffective assistance of counsel. See *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant's argument that defense counsel was ineffective because he failed to object to the prosecutor's elicitation of testimony regarding defendant's prior bad acts and then compounded the error by cross-examining a police officer regarding defendant's prior bad acts is without merit. Although the testimony could have been harmful to defendant, there was not a reasonable probability

that in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different which is necessary to sustain a claim of ineffective assistance of counsel. See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Testimony was elicited which indicated that defendant was uncooperative as Officer Banks attempted to place him in the holding cell, he was uncooperative as he was being transferred from the holding cell into the fingerprinting area, and he was uncooperative after he was taken back to the holding cell. Since the evidence against defendant was overwhelming, the outcome of the proceedings would have been the same even without the testimony of Officer Banks regarding defendant's prior bad acts.

Defendant also argues that defense counsel was deficient because he did not request a curative instruction when the trial court denied his motion for a mistrial. Although a curative instruction could have ameliorated the effect of damaging testimony, a curative instruction would not have changed the outcome of the proceedings as there was overwhelming evidence on which to convict defendant. See *Strickland, supra*. Therefore, defendant was not denied the effective assistance of counsel.

Next, defendant argues that he was entitled to a jury instruction regarding his right to resist arrest and that the trial court erred in failing to so instruct. Jury instructions are reviewed as a whole rather than examined piecemeal to establish error. *People v Vaughn*, 447 Mich 217, 232; 524 NW2d 217 (1994). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Contrary to defendant's argument, he was not entitled to an instruction based upon his "right" to resist arrest due to the alleged illegality of his arrest because he was not charged with the crime of resisting arrest. Although the lawfulness of an arrest is a necessary element of the crime of resisting arrest, *People v Daniel Rice*, 192 Mich App 240, 243; 481 NW2d 10 (1991), defendant was charged with assaulting/obstructing the investigation of three police officers for various incidents that occurred after defendant was taken to the police station. Because defendant was never charged with resisting arrest, he was not entitled to an instruction regarding his "right" to resist arrest and the trial court did not err in failing to so instruct.

Finally, defendant argues that he was denied a fair trial because of the cumulative effect of the alleged errors. This Court reviews whether the cumulative effect of all of the alleged errors warrants reversal to determine if defendant was denied a fair trial. See *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988). After a through review of all of the issues, we find no basis for reversal on one single issue. Therefore, defendant's claim that the cumulative effect of the alleged error warrants reversal, must fail.

Affirmed.

/s/ Marilyn Kelly  
/s/ Janet T. Neff  
/s/ Jeanne Stempien

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).