

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MICHAEL ROATH,

Defendant-Appellant.

UNPUBLISHED

March 11, 1997

No. 181146

Barry Circuit Court

LC No. 94-000123-FH

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Defendant was convicted by a jury of resisting and obstructing a police officer, MCL 750.479; MSA 28.747, reckless driving, MCL 257.626; MSA 9.2326, and disorderly conduct contrary to § 12.40(2) of the City of Hastings code. He was also convicted of habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to an enhanced term of ten to fifteen years' imprisonment for the resisting and obstructing and habitual offender convictions and ninety days each for each of the reckless driving and disorderly conduct convictions. He now appeals of right. We affirm.

Defendant's first allegation of error, that his arrest was illegal because it was allegedly based upon constitutionally protected speech, is without merit. Trial testimony clearly indicates that he was taken into custody only after he yelled profanities loudly enough to disturb the peace and quiet of the neighborhood and ignored police officers' repeated warnings to desist.

Defendant next contends that error occurred when Hastings Police Chief Jerry Sarver was allowed to testify in rebuttal that the arresting police officers' conduct was appropriate to the circumstances and that defendant's post-arrest injuries reflected his strong resistance to arrest. Defense counsel objected to this testimony on the grounds that the issue of whether the officers used excessive force was irrelevant to the question of defendant's alleged resistance of arrest, and that Sarver had not been qualified as an expert witness.

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

Because defendant's testimony regarding alleged police brutality opened the door to Sarver's testimony, the trial court did not abuse its discretion by admitting it. *Phillips v Dehim*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Nor did the court abuse its discretion by qualifying Sarver as an expert witness. MRE 702; *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995).

Defendant also maintains that he was denied the effective assistance of counsel because his trial attorney failed to object to certain evidentiary matters, did not request instructions on defendant's theory of the case and on the circumstances under which a police officer may make a warrantless misdemeanor arrest, and allegedly failed to advise defendant that he was subject to penalties as a fourth felony offender. Because defendant did not request an evidentiary hearing on this matter, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to facts contained in the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Although the record reveals that defense counsel committed some errors, defendant was not denied the effective assistance of counsel under the above standard.

Defendant argues that his ten- to fifteen-year prison term is excessive and should be set aside. This Court's review of a sentence imposed pursuant to an habitual offender conviction is limited to consideration of whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), without reference to the sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). In view of the nature of the present offense and of defendant's extensive criminal record, including prior convictions of resisting and obstructing a police officer, we conclude that his sentence does not violate the principle of proportionality. *Milbourn, supra*. The trial court did not abuse its discretion in sentencing defendant.

Defendant's remaining allegations of error dealing with evidentiary matters have not been preserved for appeal by timely trial objection, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987), and no manifest injustice will result from our failure to address them, *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). Likewise, our review of alleged prosecutorial misconduct is foreclosed by the absence of trial objection because the error, if any, could have been cured by curative instruction given pursuant to timely objection. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper

