

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 20, 2012

v

ANTHONY JO LAMBERT,

Defendant-Appellant.

No. 299138
Kalkaska Circuit Court
LC No. 10-003188-FH

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals his convictions of three counts of resisting, obstructing, or assaulting a police officer, MCL 750.81d(1), and one count of malicious destruction of police property, MCL 750.377b. For the reasons set forth below, we affirm.

I. FACTS

Defendant's girlfriend testified that, during an argument, defendant became physically violent with her. She further testified that defendant assaulted her in the kitchen and cut himself when he grabbed a knife away from her. In response to a 911 call, two state troopers arrived at the home and met defendant outside. Defendant invited the troopers into the house and, meanwhile, a Kalkaska County Sheriff's Department deputy spoke to defendant's girlfriend outside. While the troopers were inside the house, defendant placed his hand on the shoulder of one of the troopers and the trooper told him not to do so. The troopers testified that, in response, defendant became "irate" and said they could not to tell him what to do in his house. The troopers then attempted to place defendant under arrest, and he resisted both inside the house and after the troopers took him outside to their vehicle. Evidence showed that defendant cracked the vehicle's windshield and damaged its GPS system, radar, and computer. Defendant admitted that he damaged the car, but he characterized his conduct at trial as a "temper tantrum."

II. CLAIM OF SELF-DEFENSE

Defendant argues that the trial judge should have instructed the jury on self-defense. We find no abuse of discretion because the evidence did not support a self-defense instruction and it would have contradicted defendant's own theory of the case. We review issues of law arising from jury instructions de novo, but a trial court's decision whether to give an instruction is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The troopers testified that defendant yelled and attempted to pull his hands away as soon as they informed him that he was under arrest. This behavior constitutes both “the use or threatened use of physical interference or force” and “a knowing failure to comply with a lawful command.” MCL 750.81d(7)(a). Further, this evidence establishes that defendant was resisting arrest before he alleges that the troopers used any excessive force. MCL 780.972; *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). Moreover, a self-defense instruction would have been illogical because defendant took the position at trial that he did not resist the troopers. Because defendant denied that he ever took action to repel the troopers, there was no basis to instruct the jury that he should be excused for physically defending himself. Accordingly, the trial court did not abuse its discretion when it declined to give a self-defense instruction.

III. ASSISTANCE OF COUNSEL

Defendant claims that his counsel provided him ineffective assistance at trial. The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel, *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *Pubrat*, 451 Mich at 596.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Counsel’s performance is gauged by comparing it to an objective standard of reasonableness without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009).

A. JURY SELECTION

Defendant argues that, during voir dire, his attorney did not ask questions to reveal potential bias of a prospective juror who formerly worked as an Oakland County Sheriff’s deputy. Contrary to defendant’s argument, the record reflects that counsel did inquire into the potential biases of the juror. When asked whether a given action would constitute resisting arrest, the juror stated that he would need to assess the facts surrounding the arrest to make that determination. This demonstrates an understanding of the unbiased role of a juror. Moreover, when the trial judge questioned the juror, he specifically stated he could be impartial. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008).

The record also reflects that defense counsel made a strategic decision to retain the retired deputy on the jury. During closing arguments, defense counsel referred to the juror’s former experience as a police officer and explained that “part of the reason why I kept you on the jury is because you’re a former police officer. I expect and assume that a police officer will do a thorough and good investigation.” We will not second-guess counsel’s chosen strategy. *Payne*, 285 Mich App at 188.

B. ARREST

Defendant claims that defense counsel should have moved to quash the information on the ground that the law enforcement officers violated his Fourth Amendment rights. The Fourth Amendment of the United States Constitution and the analogous Michigan constitutional provision prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). Generally a warrant supported by probable cause is required for police to conduct a search and seizure. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). However, a police officer may arrest a person without a warrant if the officer has probable cause to believe a suspect committed a felony or certain misdemeanors. MCL 764.15(1)(d). MCL 764.15a specifically provides that a warrant is unnecessary if the officer receives information, as here, about a domestic assault. “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

The deputy sheriff testified that he interviewed defendant’s girlfriend, who was quite emotional and told him about the fight with defendant. After interviewing her, the deputy concluded that defendant was the aggressor in this domestic assault. Accordingly, he contacted one of the state troopers who was with defendant and said defendant should be arrested. Under these circumstances, the troopers had probable cause to arrest defendant without a warrant, and this would not have formed a basis to quash the information.

C. ALLEGED WITHDRAWAL OF CONSENT

Defendant argues that his counsel should have moved to quash the information because the troopers had no legal right to be in his home. Defendant does not dispute that he consented to the troopers’ entry into his home. See *Payton v New York*, 445 US 573, 589; 100 S Ct 1371; 63 L Ed 2d 639 (1980). Indeed, defendant testified at trial, “I waved them into my driveway. Here, you guys are at the right place. Come on in here. Introduced myself, brought them into my home, showed them the scene, showed them the coffee, showed them the knife.” See *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009) (providing that consent must be unequivocal and specific, and freely and intelligently given).

However, defendant argues that he withdrew his consent after one of the troopers told him to remove his hand from his shoulder and he told the trooper not to tell him what to do in his own home. The test for measuring whether a suspect has revoked consent is an objective one—“what would the typical reasonable person have understood by the exchange between the officer and the suspect.” *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001 (citations and internal quotation marks omitted)). Though defendant claims he apologized to the trooper, the troopers testified that defendant became irate and began yelling. In any case, the statements defendant made would not lead a reasonable person to understand that he had withdrawn his consent for the officers to be in his home.

For these reasons, no Fourth Amendment violation occurred, and defendant's counsel was not ineffective for failing to move to quash the information based on a Fourth Amendment violation. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

D. EQUAL PROTECTION

Defendant also argues that his attorney should have moved to quash the information because the police officers only arrested him because he is male. According to defendant, the police would not have arrested a similarly situated female and this violated his constitutional right to equal protection. This of course is pure speculation. The record is devoid of evidence that the deputy who determined that defendant was the aggressor in the domestic dispute made this determination solely because defendant is male. *People v Monroe*, 127 Mich App 817, 819; 339 NW2d 260 (1983). Indeed, as already stated, the record supports a finding of probable cause to arrest defendant. Again, trial counsel cannot be faulted for failing to advance a meritless the argument. *Moorer*, 262 Mich App at 76.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Henry William Saad