

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF WESTLAND,

Plaintiff-Appellee,

v

JEFFREY KODLOWSKI,

Defendant-Appellant.

FOR PUBLICATION
December 4, 2012

No. 301774
Wayne Circuit Court
LC No. 10-001712-01-AR

Advance Sheets Version

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent. After this case was tried, briefs filed and argument heard, the Supreme Court held in *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), that a necessary element of resisting arrest is that the underlying arrest was lawful. Because no such determination was made in this case, I would reverse and remand for a new trial on that charge.

Defendant was charged with resisting the officers when they arrested him for assaulting one of the officers. Since the jury found that defendant did not assault an officer, the obvious question is whether the arrest for that alleged assault was lawful. Given the proofs, particularly the police audio recording of all the events, this is far from certain.

The officers were responding to a nonviolent argument between defendant and his wife. Defendant's attitude toward the officers, while not hostile, was sullen and unpleasant. He acted immaturely, and the officers were understandably annoyed with him. However, he had committed no crime, and it is not alleged that he committed any crime until the officers walked past defendant on their way out of the house, at which time defendant made some physical contact with Officer Michael Little. Little testified that defendant grabbed his arm and attempted to forcefully turn him around. Defendant's wife testified that she did not see this occur, though she was within a few feet of them. Defendant testified that he merely tapped the officer on the arm to get his attention in order to tell him something before the officer left. On the audio recording, the officer is heard to say, "[D]on't touch me," and the defendant responds, "I'm sorry." Little agreed that the defendant apologized and testified that defendant was compliant and stepped back. Little also agreed that his partner, Officer Kyle Dawley, then said "You know, fuck him, let's take him." The recording does not reveal either officer telling defendant that he was under arrest or asking him to surrender. Instead, on the recording, immediately after Dawley

makes this remark, a physical altercation is heard. During that altercation, defendant was struck in the head with a baton and stunned with a Taser.

The only justification for initiating the physical contact with defendant described by the officers was the need to arrest him for the alleged assault on Little, an assault that the jury concluded did not occur. The jury rejected the officers' version of events and found more credible defendant's testimony that he merely tapped the officer on the arm in order to tell him something.¹

The jury convicted defendant of resisting arrest, but was not instructed, as we now know it should have been, that the arrest had to have been lawful, i.e., with probable cause, for defendant's actions to constitute the crime of resisting arrest. While the question of defendant's innocence is one that must ultimately be made by a properly instructed jury, listening to the audiotape of the incident makes clear that the central question is whether the officers had probable cause to arrest, an issue that defendant's jury would not have been permitted to consider under *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004).

The majority declines to address this issue, asserting that it was not properly preserved because at trial defendant did not argue that he should be acquitted because the assault arrest was unlawful. However, this argument would have been not only useless but completely inconsistent with the law as set forth in *Ventura*. The real question is not whether defendant made this then useless argument, but whether *Moreno* is to apply retroactively to all cases still pending on appeal. Clearly the answer to that question is yes, just as it was in *People v Pasha*, 466 Mich 378, 384; 645 NW2d 275 (1987), in which the Supreme Court held that a postconviction alteration of the elements of the charged offense should be applied retroactively to those cases in which "the defendant either preserved the issue in the trial court or is entitled to relief under [*People v Carines*, 460 Mich 750; 597 NW2d 130 (1999)]." Thus, retroactive application of *Moreno* is proper when the error is plain and affected substantial rights, i.e., either resulted in conviction of an innocent defendant or otherwise seriously affected the fairness or integrity of the proceedings. *Carines*, 460 Mich at 763.

In this case, the error could not be plainer: the trial court failed to include an element of the offense in its instruction. The error affected a substantial right—the right to a jury instructed on the elements of the offense—as well as the fairness of the proceeding. Indeed, failure to instruct the jury on an element of the offense is a form of constitutional error, *id.* at 766, and it is a structural error that undermines the entire legal process, *People v Duncan*, 462 Mich 47, 57;

¹ The majority's recitation of the facts adopts the officers' version of events as controlling our decision even though the jury rejected that version as not credible. It also ignores the wife's testimony that before any physical contact occurred, Dawley was making "bullying, sarcastic remarks" to defendant such as "You're an idiot" and "Push my buttons, just try to push my buttons." She also testified that when defendant asked the officers to leave his home, Dawley said, "Try to make me leave, just go ahead and try to make me leave" and that the altercation happened, as can be heard on the tape, a few seconds after defendant asked for the officers' badge numbers.

610 NW2d 551 (2000). Under *Moreno*, a necessary element of resisting arrest is that the underlying arrest was lawful, and this is precisely the type of ruling that is always given retroactive effect.²

Defendant acted in an annoying fashion, and it is not surprising that his behavior tested the officers' patience. However, being annoying and testing an officer's patience is not a crime. No one, including police officers, may physically attack another because he or she finds that person annoying. The prosecution at oral argument noted that we expect police officers to go into unpredictable and potentially dangerous situations and asserted that we should therefore not second-guess their actions. However, it is precisely because police officers are routinely sent into such situations that they must be properly trained to maintain a professional demeanor at all times and exercise the force of the state against an individual only when there is a lawful basis to do so, not because the person is irritating or disrespectful to them personally.³

/s/ Douglas B. Shapiro

² The majority declines to apply *Moreno* despite its relevance to actual innocence because defendant did not request an instruction contrary to then settled law. This ignores the fact that requesting such an instruction could not possibly have yielded anything except the ire of the trial court given that this request would have been contrary to the unambiguous rule set forth in *Ventura*. The purpose of issue preservation is to allow the trial court have an opportunity to consider an issue and avoid the possibility of an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Neither of these interests is even remotely relevant here. First, *Ventura* was clear and controlling; there was no possibility that the trial court would have instructed the jury in plain contravention of a Court of Appeals case that was directly on point. Second, defense counsel could not have been trying to create an appellate parachute given that, at the time of trial, *Ventura* was the law and there was no reason to believe that it would be overruled in a separate case years later. Defendant was convicted on October 5, 2009. *Moreno* was not decided until April 20, 2012, a full 2½ years after that conviction and 5 months after defendant had filed his brief on appeal.

Further, the majority's reliance on *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971) is highly attenuated. That case did not involve whether the jury was properly instructed on the actual elements of the offense, but whether the jury should have been informed that a verdict of not guilty by reason of insanity would result in the defendant's commitment to a psychiatric hospital, not freedom. Failing to advise a jury what will happen to a defendant after its verdict is far less central to a proper verdict than is informing the jury of the elements of the offense. Moreover, in *Hampton*, there was no controlling caselaw against the defendant's position as *Ventura* was in this case. Indeed, the question in *Hampton* had been "a matter of first impression" less than two years earlier in *People v Cole*, 382 Mich 695; 172 NW2d 354 (1969). *Hampton*, 384 Mich at 678.

³ "[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *City of Houston v Hill*, 482 US 451, 465; 107 S Ct 2502; 96 L Ed 2d 398 (1987).