STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 307844 Crawford Circuit Court
AARON CHRISTOPHER HAYNES, Defendant-Appellant.	LC No. 10-3110-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of resisting, obstructing, or assaulting a police officer, MCL 750.81d(1). Defendant was sentenced as a third habitual offender, MCL 769.11, to a prison term of 30 months to four years with credit for 37 days served. We affirm.

I. BASIC FACTS

This case arises out of an incident that occurred at defendant's home on November 23, 2010 at approximately 10:30 p.m. Crawford County Sheriff's Deputies Michael Jacobi and Matt Swope and Grayling Police Officer Arthur Clough arrived at defendant's home to execute a warrant for his arrest. The officers testified that defendant was immediately agitated and aggressive, although defendant did allow the officers into the home. Defendant was dressed only in shorts at the time, and was given permission by Jacobi to get dressed, provided that Jacobi accompanied him while he did so. Jacobi followed defendant to his bedroom and waited at the doorway while defendant retrieved clothes from a closet. After defendant put on a shirt, he began yelling "get the fuck out" several times. Jacobi testified that he could not see defendant's hands in the closet, and that he told defendant he was under arrest and ordered him to step back and place his hands behind his back. In response, defendant stepped across the room, "brought his arm up and closed his fists," and yelled again for Jacobi to "get the fuck out."

Jacobi testified that he drew his pepper spray and told defendant he would be sprayed if he did not comply. However, Jacobi decided not to use the pepper spray in such a small room, as it would have affected other people in the house. Jacobi testified that he took defendant down by encircling his neck and shoulder area with his left hand and forcing him onto the bed. The other officers ran into the room to assist Jacobi, and ordered defendant to stop resisting and put his hands behind his back. At one point, defendant's hand brushed or grabbed Swope's gun belt. Clough stated that it took all three officers to arrest defendant. Defendant eventually was

handcuffed and transported to county jail. Crawford County Corrections Officer Steven Detmer took custody of defendant at the jail. Detmer testified that defendant was "highly agitated" when he arrived. Detmer stated that defendant claimed that Jacobi had punched him in the face. Detmer examined defendant's face for injuries, but observed none.

Defendant and his family testified to a radically different version of that night's events. Defendant denied swearing at the officers as they approached the house. Defendant stated that while he was getting dressed, he heard Jacobi yelling at his mother and wife to get back and told Jacobi to "leave them out of this." Defendant then stated that Jacobi told him, "if you don't shut up, I'm just going to pepper spray you." Defendant's mother testified that Jacobi did not say anything, but was holding the pepper spray (described as a "black stick") near defendant's head.

Defendant testified that Jacobi punched him in the face with no provocation. Defendant's wife and mother stated that Jacobi punched defendant as well. Defendant stated that he pushed Jacobi away, and that he was then tackled by the other officers onto the bed. Defendant testified that Jacobi pressed his penis against defendant's rear end while restraining him, and thrust his groin against him at least five times; his mother also testified to this. Defendant admitted to touching Swope's gun belt accidentally, and stated that he decided to comply when it appeared that he had scared Swope.

Defendant testified that on his release from jail, he went to the hospital and was diagnosed with "concussion syndrome and neck sprain" as a result of Jacobi's punch. The jury convicted defendant of resisting arrest. At sentencing, defendant's recommended sentencing guidelines range was 5-34 months. Defendant was sentenced to a term of 30-48 months in prison.

II. PROSECUTORIAL MISCONDUCT

Defendant first alleges that the prosecution committed prosecutorial misconduct by (1) reading the full name of the charge on the warrant to the jury, despite being told not to do so by the trial judge; (2) stating during closing arguments that defendant and his witnesses were motivated by a civil suit, despite the lack of evidence of such a suit; and (3) claiming that defendant was "making faces" during trial. While we agree that the prosecution's conduct was improper in some respects, we find no error requiring reversal in light of defendant's timely objections and the trial court's curative instructions.

A claim of prosecutorial misconduct is a constitutional issue that this Court reviews de novo. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008), habeas corpus gtd on other grounds by *Brown v Aud*, ___ F Supp ___; 2012 WL 2236636 (ED Mich 2012). The role and responsibility of a prosecutor is to seek justice, not merely to obtain a conviction. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546, lv den 480 Mich 897 (2007). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Id.* A defendant can be denied a fair trial when the prosecutor "interjects issues broader than the defendant's guilt or innocence" into the trial. *Id.* at 63-64. Issues of prosecutorial misconduct are decided case by case, with this Court examining the entire record and evaluating the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631, lv den 471 Mich 868 (2004). "The propriety of a prosecutor's remarks depends on all the facts of

the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002), lv den 468 Mich 880 (2003).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In stating the inferences, he is not required to use the "blandest possible terms." *Dobek*, 274 Mich App at 66.

The goal of a defense objection to prosecutorial remarks is a curative instruction. *Stanaway*, 446 Mich at 687. Prejudice to a defendant from an improper remark can frequently be eliminated by a curative instruction following a timely objection. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444, lv den 459 Mich 935 (1998). Even absent a specific curative instruction, a trial court's "careful and explicit instructions to the jury that it was required to decide the case on the evidence alone and that the lawyer's statements were not evidence" can eliminate the prejudicial effect of improper remarks. *Id.* If this Court finds that prosecutorial misconduct occurred, reversal is not required unless, in light of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

We agree that the prosecutor should not have read the full name of the charge on the warrant i.e., "Interfering with a crime report, threatening to kill or injure." The full name of the charge was both irrelevant and misleading, as it included the factually inapplicable phrase, "threatening to kill." It therefore implied that defendant had threatened to kill a witness in the underlying case, which was not factually accurate. However, the trial court sustained defendant's objection to the prosecutor's comment, ordered defendant not to answer, and ordered the question stricken from the record. Additionally, the trial court instructed the jury, both before and after the trial, that it was to decide the case only on the evidence admitted, and that statements by attorneys were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There is no basis on the record for this Court to conclude that the trial court's instructions did not cure the error.

As for the prosecutor's comments during closing arguments, we agree that the prosecutor may have strayed from proper argument by referencing a civil suit of which there was no evidence, and claiming that defendant was "making faces" during trial. A prosecutor may argue from facts that a witness, including the defendant, is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), lv den 454 Mich 883 (1997). The prosecutor is not required to state inferences and conclusions in the blandest possible terms. *Id.* However, the prosecutor is not allowed to argue facts not in evidence, *Stanaway*, 446 Mich at 686, or to improperly interject his own opinion of defendant, *Launsburry*, 217 Mich at 361. Nonetheless, the trial court sustained defendant's objections to both comments, and the jury was carefully instructed by the trial judge to decide the case on the evidence. We therefore conclude that any error in the prosecutor's isolated comments was cured by the trial court.

III. JURY INSTRUCTIONS

Defendant next alleges that he was entitled to have the jury instructed on self-defense, and that the trial court committed reversible error by denying him such an instruction. We disagree, because the evidence did not support giving the instruction.

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), cert den 550 US 920; 127 S Ct 2132; 167 L Ed 2d 868 (2007).

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005), lv den 483 Mich 1073 (2008); *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The instructions must include all of the elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *McGhee*, 268 Mich App at 606. However, if an applicable instruction is not given, reversal of a defendant's conviction is not required unless it appears, in light of the weight and strength of the untainted evidence, that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MCL 750.81d provides in relevant part as follows:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
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> (7) As used in this section:
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> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

Thus, the elements of the charge are that (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties. *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860, lv den 488 Mich 496 (2010).

At the time of defendant's trial, this Court had stated that it was illegal to assault, resist, or obstruct an officer regardless of the legality of the arrest. *People v Ventura*, 262 Mich App 370; 686 NW2d 748, lv den 471 Mich 927, overruled by *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012). The *Ventura* Court approached its analysis of MCL 750.81d, enacted in 2002, by comparing it to the previous resisting arrest statute, MCL 750.479. *Ventura*, 262 Mich App at 374. The Court noted that under the common law of Michigan and the prior statute, a

person could use reasonable force to resist an illegal arrest because the statute required that the prosecution prove, as an element of the offense, that the arrest being resisted was lawful. *Id.* "Therefore, under MCL 750.479, the right to resist an unlawful arrest was, in essence, a defense to the charge of resisting arrest, because the legality of the arrest was an element of the charged offense." *Id.* The Court found no such requirement in MCL 750.81d. *Id.* at 375. The court found that the language of the statute was clear and unambiguous, and that expansion of the elements of an offense under that statute to include a lawfulness requirement would not be necessary or permitted. *Id.*

However, during the pendency of defendant's appeal, our Supreme Court concluded that the common-law right to resist an unlawful arrest was not abrogated by MCL 750.81d, and overruled *Ventura*. Changes to the law regarding jury instructions are generally given retrospective application to cases pending on appeal as of the date of the filing of the opinion containing the new rule. See *People v Hampton*, 384 Mich 669, 673, 678; 187 NW2d 404 (1971). Thus we consider whether *Moreno* requires the reversal of defendant's conviction and a remand for a new trial.

We conclude that *Moreno* does not compel such a conclusion. In *Moreno*, the defendant was found to have violated MCL 750.81d by attempting to close the door and physically resisting the arresting officers' attempts to enter his home. 491 Mich at 43.

> [T]he officers wanted to enter defendant's home without a warrant, and one of the officers physically prevented defendant from closing the door to his home. Accordingly, defendant's refusal to allow the officers into his home is not conclusive of whether defendant had reasonable cause to know that the officers were "engaged in the performance of their official duties." Consistently with the common-law rule, we conclude that the prosecution must establish that the officers' actions were lawful. [*Id.* at 51-52.]

Thus, the first action taken by the defendant was to close the door on officers that did not have a warrant to enter his home; when the officers applied physical force, defendant then resisted physically.

To be entitled to an instruction on an affirmative defense, a defendant must "produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). Section 2(2) of the Self-Defense Act, MCL 780.971 *et seq.*, provides in relevant part:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972(2).]

In the instant case, defendant was ordered to place his hands behind his back and submit to his arrest by officers who had a valid warrant for his arrest. He refused to do so, and instead assumed a fighting posture and yelled at the officers to "get the fuck out." 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).

Defendant sought a self-defense instruction "limited to any claim that he physically resisted being handcuffed" after allegedly being punched in the face. Defendant offered his version of events and testified that he was *not* resisting arrest prior to being punched by Jacobi. Thus, defendant's theory of the case was that he was compliant, got punched, and then resisted being handcuffed. Defendant's theory does not support a self-defense instruction. The charge against defendant was premised on actions he took prior to being handcuffed, and the evidence supports a finding that defendant was engaged in the crime of obstructing an officer prior to the use of any force by the officers. We therefore conclude that the trial court did not abuse its discretion in determining that a self-defense instruction was not applicable to the facts of the case before it.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecution did not meet its burden of proving the elements of resisting arrest, because the prosecution did not prove beyond a reasonable doubt that defendant's use of force in self defense was not justified. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo, viewing all evidence in a light favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In a criminal case, "[d]ue process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that [the] defendant is guilty beyond a reasonable doubt before [he] can be convicted of a criminal offense." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1974), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant does not allege that the prosecution failed to prove that defendant resisted and/or obstructed a police officer, or that defendant knew or had reason to know that the persons that he resisted and/or obstructed were police officers performing their duties. Rather, he argues that he introduced sufficient evidence of self-defense, which the prosecution failed to rebut beyond a reasonable doubt.

Defendant is correct that once a defendant introduces evidence of self-defense, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. CJI2d 7.20; *Dupree*, 486 Mich at 709-710. However, as discussed above, defendant's theory of the case was that he did not resist at all prior to allegedly being punched, and that after that his resistance to being handcuffed was self-defense. The prosecution presented evidence that defendant obstructed the officers by failing to obey commands and by threatening the use of force, prior to any use of force by the police. Defendant did not argue that his failure to obey commands and threatened use of force was self-defense, but rather that he did not engage in these acts. Thus, defendant did not present evidence of self-defense sufficient to require the prosecution to prove lack of self-defense beyond a reasonable doubt.

Further, even assuming that defendant did present sufficient evidence of self-defense, the prosecutor presented evidence that (1) defendant was not punched by Jacobi, (2) that the officers wrestled with defendant only long enough to restrain him, (3) that Jacobi chose not to use his pepper spray because of the enclosed room, and (4) that defendant had no visible injuries directly after the encounter. Thus, the prosecution presented sufficient evidence to enable a rational factfinder to conclude that the force used against defendant was not unlawful. Although defendant offered an alternate version of events, all conflicts in evidence must be resolved in favor of the prosecution. *Terry*, 224 Mich App at 452.

IV. SENTENCING

Defendant's final argument is that his sentence, although within the recommended guidelines range, is disproportionate. Upon challenge to the proportionality of a sentence imposed within the recommended guidelines range, this Court reviews the trial court's sentencing decision for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992); citing *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

The principle of proportionality guides the Legislature's scheme for the punishment of crimes. *Milbourn*, 435 Mich at 650. The role of the trial judge in sentencing is to determine "the sentence to be imposed upon each offender within given bounds" by taking into account "the nature of the offense and the background of the offender." *Id.* at 651. A trial court abuses its sentencing discretion when it "abdicates" its sentencing discretion, for example by imposing the maximum possible sentence in the face of compelling mitigating circumstances or when a sentence is "so disproportionate to the seriousness of the circumstances of the crime" that the principle of proportionality is violated by rendering a sentence that is "disproportionately severe or lenient." *Id.* at 652, 661.

A sentence within the guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607, lv den 482 Mich 974 (2008). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 188; 622 NW2d 71 (2000), lv den 464 Mich 859 (2001).

Defendant has simply not presented any sort of unusual circumstance that would compel this Court to find an abuse of discretion despite the trial court's adherence to the sentencing

guidelines. Although defendant contested the scoring of several of the offense variables and prior record variables scored at sentencing, he does not challenge them on appeal. Although the trial court was not required to articulate reasons for a sentence within the guidelines, *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006), the trial court stated that it found defendant to be a poor candidate for probation because of his history of repeat felonies and problems cooperating with law enforcement. We therefore find no abuse of discretion in the trial court's imposition of a sentence near the high end of the recommended guidelines range.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra