STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF WESTLAND, Plaintiff-Appellee,	FOR PUBLICATION December 4, 2012 9:00 a.m.
v	No. 301774 Wayne Circuit Court
JEFFREY KODLOWSKI, Defendant-Appellant.	LC No. 10-001712-01-AR

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

MURRAY, J.

Defendant appeals by leave granted two orders of the circuit court. The first order embodies the circuit court's decision affirming the district court's judgment convicting defendant of resisting arrest in violation of Westland Ordinance, § 62-36(a), while the second order denies defendant's motion for reinstatement of oral argument. We affirm both orders.

I. FACTS AND PROCEEDINGS

This case arises from a marital dispute that resulted in the arrest of defendant after he allegedly battered two Westland Police Officers, Michael Little and Kyle Dawley, and resisted arrest in his Westland residence. On March 18, 2009, Marilyn Kodlowski resided with defendant (her husband), son, and daughter in the city of Westland. Around 4:00 a.m., Kodlowski and defendant had a disagreement regarding Kodlowski's cellular telephone. Defendant accused Kodlowski of having an extramarital affair, and he wanted to see Kodlowski's cellular telephone to determine to whom she had been talking.

Kodlowski called the Westland Police Department on two occasions that morning to seek assistance in retrieving the personal belongings that defendant withheld from her. After calling the police the first time, Kodlowski handed defendant the phone, defendant spoke with the police, and then defendant provided Kodlowski her keys and purse, but not her cellular telephone. Kodlowski called the second time to receive assistance in retrieving her cellular telephone from defendant.

After the second phone call, uniformed Westland Police Officers Michael and Lawley arrived at the residence and located Kodlowski in the driveway near her van. When first speaking with the officers, Kodlowski informed them that she had an argument with defendant and that he accused her of cheating on him, but there had never been violence in the home and

that defendant had not been drinking. There was conflicting testimony as to whether Kodlowski informed the officers that there were no weapons in the residence.

After speaking with the officers, Kodlowski walked with the officers to the residence and defendant "allowed them in." Again, there was conflicting evidence regarding defendant's demeanor when the officers first entered the house. Nevertheless, the officers proceeded to talk to defendant and inquire into the location of the cellular telephone. Although the testimony was not consistent on what was initially said upon entering the home, there is no dispute that Officer Dawley made several antagonistic and sarcastic remarks to defendant, and that when defendant was asked where the cellular telephone was located, defendant responded by saying something along the lines of, "I'm not giving the phone back. You'll have to arrest me."

In order to control the situation, Officer Little instructed defendant to sit down in a chair, after which, according to Officer Little, defendant changed his mood from irritated to calm. At one point, defendant became irritated, stood up and attempted to go to the back bedroom. Officer Little, however, instructed defendant to stay in the chair. Officer Little observed that when defendant stood up, "He looked irritated. He had [a] clenched fist down at his side and on and off would tighten his neck and jaw muscles and he just looked mad and upset." Officer Little then placed his arm on defendant's chest to keep a distance from him to defendant and to keep defendant from going to the back bedroom. As Officer Little spoke with defendant, Officer Dawley walked with Kodlowski around the house looking for the cellular telephone.

According to Kodlowski, defendant asked the officers to leave. While the officers were present, Kodlowski grabbed defendant's wallet and told him that she would take his wallet if he did not return her cellular telephone. However, Kodlowski then decided to leave the residence without her phone. Officer Little believed that at that point the incident was over, so he followed Kodlowski toward the front door as Officer Dawley followed. As Officer Little was walking out of the door, he felt defendant grab and squeeze his left arm. As witnessed by Officer Dawley, defendant then "spun" Officer Little around so that he was facing defendant. Officer Little then used his arm to create distance between himself and defendant, and after telling defendant that he was under arrest, Officers Little and Dawley each grabbed onto one of defendant's arms so that he could be handcuffed.

Defendant then "started pulling and just kind of thrashing his body, swinging his arms to try to make [Officer Little] let go." Officer Little indicated that as defendant twisted and attempted to break from the officers' grip, the officers and defendant ended up on the couch. Officer Dawley then instructed defendant to stop resisting, but defendant continued to thrash his body and swing his arm. While trying to secure defendant in handcuffs, defendant kicked backward, "like a rearward kick," striking Officer Dawley.

After defendant continued to twist, Officer Dawley applied a brachial stun to defendant's neck, yet defendant continued to twist and fight the officers. Officer Dawley then pulled out his baton and struck defendant on his arm and the top of the baton "also hit the back of [defendant's] head." Officer Dawley testified that after he struck defendant's arm, defendant released his grip,

Officer Dawley dropped the baton, grabbed the handcuffs, and the officers were then able to secure defendant with the handcuffs. Officer Dawley indicated that he struck defendant once with the baton.[1] Both Kodlowski, who "could see everything that was going on" and defendant testified that defendant was not resisting when Officer Dawley instructed defendant to "stop resisting." Defendant in fact testified that he never offered any resistance to the officers, and never engaged in physical contact with them.

The prosecutor filed a motion in limine in the district court, seeking to exclude evidence regarding the nature and extent of defendant's injuries and any documentary evidence concerning the department policy on the use of force. Defendant argued that the evidence was relevant to show that the officers fabricated the facts of the case to cover up their use of excessive force, while the prosecution argued that defendant's argument would be relevant to a civil excessive use of force claim, not to any issues in the criminal case.

The prosecution also separately raised the issue of the admissibility of a transcript prepared from an audio recording which captured a portion of the events surrounding defendant's arrest.[2] Apparently defense counsel intended to either have the transcript read to the jury, or have the jury read the transcript while listening to the audio recording. The prosecution's position was that the transcript was inaccurate and therefore inadmissible. The district court indicated that it would be for the jury to determine the content of the audio recording, and that it could do so through the playing of the audio recording for the jury.

In regard to the prosecution's motion to exclude evidence, the district court concluded that because defendant was charged with assault and battery along with resisting arrest, any evidence regarding the treatment and nature of defendant's injuries was irrelevant and thus inadmissible. The district court indicated, however, that it would allow defendant to introduce evidence that he was injured during the exchange. The district court then decided to withhold until trial its final ruling of whether to exclude documentary evidence regarding department policy, procedures, and records, as well as any expert testimony, concerning the use of force. At trial the court made its ruling:

> Based on the testimony that - - that I've heard so far, we've - - we've had - - we've had four people that were in the room. We've heard from three of them. Defense did indicate earlier that the [d]efendant would be testifying. Obviously, he doesn't - - you don't have to be held by that, but I think so far I would find that - - that testimony from an expert on the use of force and force scale - - continuum scale, I don't think would assist the trier of fact to understand the evidence or to determine a fact and issue.

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[1] Defendant alleges in his brief on appeal that the officers "inflicted a large gash several inches long on the back of his head, which required . . . emergency medical attention . . . ." As will be discussed later in this opinion, the trial court excluded from trial any evidence regarding the extent and nature of defendant's injuries.

[2] During defendant's arrest, one of the officers was wearing a lapel recording device.

> Furthermore, we have audio from the incident that's already been played for the Jury, so I think we have all of the facts that led to these charges have been heard by the Jury and I think that they can make a determination based on the law and the facts that we've gotten from the witness stand so far without any need for any technical or expert assistance.

On October 5, 2009, the jury found defendant not guilty of the assault and battery charges but guilty of resisting arrest. The district court's judgment of conviction was appealed to the circuit court, which denied oral argument on the appeal and affirmed the conviction. Defendant then filed an application for leave to appeal both orders, which we granted.

II. ANALYSIS

A. FILING FEE

In our order granting defendant leave to appeal, we directed defendant to "address in his brief why he should not be required to pay an additional entry fee for the second order being appealed under MCL 600.321(1)(a)." *People v Kodlowski*, unpublished order of the Court of Appeals, entered August 31, 2011 (Docket No. 301774). We did so because when filing his application from the two separate orders, defendant refused to pay two filing fees, arguing that this Court's Internal Operating Procedure (IOP) regarding fees applicable to appeals (which requires two separate fees) misinterprets MCL 600.321.[3]

MCL 600.321, which governs the taxation of costs and fees for appeals to this Court, provides in relevant part:

> (1) The following fees shall be paid to the clerk of the court of appeals and may be taxed as costs if costs are allowed by order of the court:
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> (a) For an appeal as of right, for *an* application for leave to appeal, or for an original proceeding, $375.00. This fee shall be paid only once for appeals that are taken by multiple parties from the same lower court order or judgment and can be consolidated. [Emphasis added.]

IOP 7.205(B)(7)-1, which interprets MCL 600.321, provides that a fee must be paid for each order appealed:

> The entry fee is set by statute, MCL 600.321. Presently, the fee is $375. *When multiple orders on the merits are appealed, the entry fee is $375 for each order being appealed* (an order denying rehearing is not an order on the merits). However, only a single fee is required when the application for leave to appeal is from a final order, as defined by MCR 7.202(6)(a)(i), that could have been

[3] After oral argument before this Court defendant paid a second filing fee, with our instruction that if he should prevail the second fee would be immediately returned.

> appealed of right and when the application seeks review of the multiple orders entered at the same time or prior to the final order. If the clerk's office determines that an inadequate entry was submitted, the outstanding amount will be requested by letter. Fee payment may be made by personal or corporate check or money order. [Emphasis added.]

Defendant argues that the use within MCL 600.321 of the singular "an" prior to indicating the manner of appeal indicates that a party is required to pay one fee for each appeal, regardless of the number of orders appealed, as long as the orders form the basis for the application for leave to appeal.

Defendant's argument is too limited: it ignores the corresponding court rules regarding applications for leave to appeal. In particular, MCR 7.205(A)(1) provides that "[*a*]*n* application for leave to appeal" must be filed within 21 days after entry of "*the* judgment or order" appealed from, while MCR 7.205(A)(2) addresses when to file applications from "*an* order" deciding motions for new trial, reconsideration, or other such relief. (Emphasis added.) Additionally, MCR 7.205(B)(2) specifies the number of copies of "*the* judgment or order appealed from" that need to be submitted with the application. (Emphasis added.)

Consequently, under our rules regarding applications for leave to appeal, an application is to be filed from "an" order or "the" judgment that is sought to be appealed. Thus, strictly applied, MCR 7.205 requires that a separate application be filed for each order or judgment appealed.[4] But, under IOP 7.205(B)(7)-1, the Court has permitted the filing of one application seeking to appeal separate orders, but the statutory requirement of one filing fee per application is still enforced. In other words, rather than requiring separate applications challenging each separate order with a fee for each one, for administrative convenience (to both the parties and the Court) the Court has opted to allow one application to challenge multiple orders, but the statutory fee requirement has – and must – remain intact. Because defendant has now filed two fees for his challenge to the two separate orders, we have jurisdiction to decide both issues. We now turn to that task.

B. ORAL ARGUMENT

Turning to the first issue, defendant argues – and we agree – that the circuit court erred in denying defendant an opportunity for oral argument before the appeal from the district court was decided.[5] We review de novo the interpretation and application of a court rule. *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009).

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[4] Except, as indicated by IOP 7.205(B)(7)-1, when the application is filed from a final order, as case law provides that all interlocutory orders entered prior to the final order can be challenged in an appeal from the final order. See *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996).

[5] We note that the court rule on appeals to the circuit court was amended effective May 1, 2012, and that under the new rules a circuit court can under certain circumstances dispense with oral argument. MCR 7.114(A). This new rule does not apply to this case.

MCR 7.101 governs the general procedure applicable to appeals from the district court to the circuit court, and under MCR 7.101(K), "any party who has filed a timely brief on appeal and requested oral argument is entitled to oral argument." *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 88; 438 NW2d 878 (1989). MCR 7.101(K) specifically provides that, "[a] party who has filed a timely brief is entitled to oral argument by writing 'ORAL ARGUMENT REQUESTED' in boldface type on the title page of the party's brief." Thus, the direct and plain language of MCR 7.101(K) requires the circuit court to provide a party with an opportunity to present an oral argument if it complies with MCR 7.101(K) by requesting oral argument when filing a brief on appeal. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009) (courts must enforce the plain language of a court rule). Because defendant complied with this provision, the circuit court erred in denying defendant's motion for reinstatement of oral argument.

The failure to provide oral argument as required by MCR 7.101(K) does not require reversal or a remand. Generally, this Court will not impose a sanction for a violation of a court rule where the Supreme Court has not provided for any particular sanction, *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993); *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991), and since the Supreme Court did not provide a sanction or remedy for violation of MCR 7.101(K), we refrain from imposing a specific remedy for the violation.[6] Instead, such a violation raises the harmless error test set forth in MCR 2.613(A), which states:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Further, this Court must construe the rules "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105. In applying MCR 2.613(A), we reach the inescapable conclusion that the failure of the circuit court to allow oral argument was not inconsistent with substantial justice. This holds true for two reasons.

First, the inability to present oral argument is not a significant detriment to success on appeal. Indeed, our Court and the Supreme Court have the ability to – and do – decide cases without oral argument on a routine basis. See MCR 7.214(E); MCR 7.302(H). So do circuit courts when deciding motions. MCR 2.119(E)(3). Briefs filed with our Court or the circuit court should contain all of the arguments, issues, facts and law necessary for a proper resolution of the case. See MCR 7.212(C); MCR 2.119(A)(2). Additionally, briefs should have relevant documentary evidence attached as exhibits. Thus, by reading the briefs the court should already know the parties' position and the reasons why that position should prevail on appeal. Assuming

[6] In *Moore v Spangler*, 401 Mich 360, 368-371; 258 NW2d 34 (1977), the Court held that the failure to provide oral argument does not violate a party's right to due process.

such a proper brief was filed on appeal-as it was in this case when defendant filed his appeal to the circuit court – missing out on 15 or 30 minutes of argument will not be inconsistent with substantial justice. Indeed, if the brief is written and prepared as it should be, and the party is entitled to prevail under the law, that party must succeed, whether they had oral argument or not. Second, we point out that defense counsel did present oral argument to this Court on the same issues that he presented in writing to the circuit court, and so any loss of oral argument below was harmless.

C. EVIDENTIARY ISSUES

Defendant also argues that the trial court improperly excluded (1) evidence regarding the extent and nature of injuries he sustained during his arrest, (2) evidence regarding the use of excessive force, and (3) evidence regarding the police department's policies and procedures when employing force. Specifically, defendant argues that this evidence is relevant to show that the officers employed excessive force and that in order to conceal the use of such force, the officers fabricated the charges against defendant.

We will not disturb a trial court's decision to exclude evidence unless it is established that it abused its discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Decisions regarding the admission of evidence frequently require a de novo review since they generally involve preliminary questions of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If a trial court admits evidence that as a matter of law is inadmissible, it abuses it discretion. *Id.* Ordinarily, a trial court's decision on a close evidentiary question, however, cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). "Relevant evidence" is evidence which has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998), quoting MRE 401. It was not an abuse of discretion to exclude evidence of the defendant's hospitalization after his arrest because that evidence was irrelevant to determining whether defendant committed the charged crimes of assault and battery and resisting arrest. *People v Solak*, 146 Mich App 659, 674; 382 NW2d 495 (1985). Similarly, evidence regarding the extent and nature of defendant's injuries, along with evidence regarding the use of excessive force, is irrelevant to a determination of whether defendant committed the crime of assault and battery or resisting arrest.[7] The extent of defendant's injuries or whether the officers employed excessive

[7] Westland Ordinance § 62-36. – Resisting Arrest, states in the relevant part, "(a) [n]o person shall resist arrest, or physically obstruct an arrest, by any officer empowered to make arrests."

force does not make it any less or more probable that defendant battered the officers or resisted arrest. Both charges focus on the conduct of defendant, not on the conduct of the officers. Therefore, we conclude that even if the officers employed excessive force, it is irrelevant to prove or disprove that defendant battered the officers or resisted arrest. As both trial courts correctly noted, this evidence may well be relevant in a civil matter where the jury has to determine whether the force employed by the officers was reasonable, see *Alexander v Riccinto*, 192 Mich App 65; 481 NW2d 6 (1991); *Guider v Smith*, 157 Mich App 92; 403 NW2d 505 (1987) aff'd 431 Mich 559 (1988),[8] but it is not in this case because what happened after the crimes would have been committed is not relevant to whether the crimes were committed. Further, the police department's procedures, manuals, and policies were properly excluded as inadmissible hearsay evidence. *McCallum v Dep't of Corrections*, 197 Mich App 589, 598; 496 NW2d 361 (1992).

We also disagree with defendant's argument that the exclusion of this evidence deprived him of his right to present a defense. While "[t]he right to present a defense is a fundamental element of due process . . . it is not an absolute right" as it extends only "to relevant and admissible evidence." *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010) rev'd on other grounds 492 Mich 367 (2012). Accordingly, defendant was not deprived of his right to present a defense when denied the opportunity to present irrelevant and inadmissible evidence at trial. Further, defendant was able to introduce evidence, including his testimony, Kodlowski's testimony, and the audio recording to support his theory that he was not resisting arrest but, rather, that the officers fabricated the incident to conceal the excessive force they employed against him at the residence. Therefore, we conclude that the trial court did not abuse its discretion in excluding evidence regarding the use of force or the extent and nature of defendant's injuries.

Defendant also argues that the trial court erred in excluding the prepared transcript of the audio recording where it would have assisted the jury in determining what transpired at defendant's residence.

Before submitting a transcript of an audio recording to the jury, the trial court should take steps to ensure its accuracy. *People v Lester*, 172 Mich App 769, 775-776; 432 NW2d 433 (1988). The preferred procedure is to have the parties stipulate to the transcript's accuracy. *Id*. at 775. Absent a stipulation, the trial court may verify the transcript's accuracy by relying on the verification of the transcriber or by conducting an independent determination by comparing the transcript with that of the audio recording. *Id*. at 776. These procedures are not exhaustive, as the aim is to utilize procedures that ensure the reliability of the transcript. *Id*. at 775. Thus, under certain situations the trial court may find that the best course of action is to allow the jury

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Westland Ordinance § 62-67. – Battery, states in the relevant part, "[n]o person shall with force or violence touch or put some substance in motion which touches another person or something closely connected with another person."

[8] While the evidence proving that the officers employed excessive force may be slightly relevant to show that the officers used greater force than indicated at trial, which would undermine the officers' credibility, the trial court did not abuse its discretion in excluding such evidence due to the close nature of the evidentiary question. *Sabin (After Remand)*, 463 Mich at 67.

to determine the contents of the audio recording itself and decline to admit a prepared transcript. This is such a case, as the prosecution refused to stipulate to the accuracy of the transcript. In the absence of a stipulation, the trial court was acting well within its discretion by concluding that it would be best for the jury to determine the content of the audio recording at trial.[9] The district court did not abuse its discretion in excluding the transcript of the audio tape.

Turning to a different sort of evidentiary question, defendant argues that the police officers violated his Fourth Amendment rights by remaining at his residence after he revoked his consent to their presence and, therefore, the officers' testimony regarding defendant's statements made during his arrest should have been suppressed by the district court.

Due to defendant's failure to file a pretrial motion to suppress his statements to police, we review defendant's unpreserved assertion of constitutional error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish plain error, defendant must show that: (1) an error occurred; (2) the error was plain; and, (3) the plain error affected his substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '''seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Carines*, 460 Mich at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. While warrantless searches and seizures are unreasonable per se, there are several exceptions that validate an otherwise unreasonable search and seizure, including voluntary consent. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Consent must be given freely, intelligently, specifically and unequivocally. *Id.* Further, "consent may be limited in scope and may be revoked." *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001). Consent is valid if obtained from the person whose property is to be searched or from a third party that has common authority over the property. *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). A co-occupant, however, will invalidate the consent given by another occupant if he is present on the premises and expressly objects to the search. *Georgia v Randolph*, 547 US 103, 106; 126 S Ct 1515; 164 L Ed 2d 208 (2006).

While a co-occupant may invalidate another co-occupant's consent in cases where the police are entering to search for evidence, a co-occupant's withdrawal of his consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence. *Randolph*, 547 US at 118-119. The United States Supreme Court emphasized that its holding in *Randolph* concerning the powers of a co-occupant to invalidate the consent of another occupant

[9] Interestingly, during trial one of the witnesses testified that the transcript contained inaccuracies, and the clarity of the audio recording itself is not such that would lead to a stipulation as to its accuracy.

> has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. [*Id*. at 118.]

Here, the officers arrived at the residence in the early morning in response to a domestic dispute, having received two calls from Kodlowski regarding disputes with defendant. With respect to defendant's retention of Kodlowski's phone, defendant suspected that Kodlowski was having an affair and he intended to check her phone to determine whether his suspicions were correct. Due to their disagreement, Kodlowski believed that it would be better to leave and discuss the issue later, but she did not want to leave the residence without her cellular telephone, and so called the police (a second time). The police arrived at the residence, and after receiving consent from both defendant and Kodlowski, the officers entered the residence to assist in locating the cellular telephone. According to the officers, when they entered the house, defendant appeared angry and irritated. Officer Little testified that defendant's mood shifted back and forth between irritated and calm. At one point, Kodlowski told the officers that, "I got somebody who will come back with me that'll knock the shit out of him." Clearly a domestic disturbance was occurring while the officers were present in the home.

Later during the incident, defendant asked the officers to leave the residence, thereby revoking his consent. However, in applying *Randolph*, we hold that defendant's withdrawal of consent was irrelevant to the Fourth Amendment analysis given that the officers were present to respond to a domestic dispute. Since the officers were present to respond to a domestic dispute, they had an obligation to investigate potential domestic violence. They were not there to search for evidence. Consequently, defendant's decision to revoke his consent did not render the officers' presence unlawful. Because defendant's Fourth Amendment rights were not violated, defendant has failed to establish plain error affecting substantial rights.

D. *PEOPLE V MORENO*

After oral argument before this Court, the Supreme Court decided *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012). Because we had some concern that *Moreno* may impact this case, we ordered supplemental briefing to address two questions: "(1) whether defendant presented (and therefore preserved for appeal) a defense to the resisting arrest charge on the basis of the polices' allegedly unlawful conduct, and (2) the effect, if any, of [*Moreno*, 491 Mich at 38] to this case." *People v Kodlowski*, unpublished order of the Court of Appeals, entered June 4, 2012 (Docket No. 301774).

Turning to the first issue raised in the order, we hold that defendant failed to raise the defense that he resisted an arrest that was unlawful because of excessive force used by the

officers, and so the *Moreno* issue has not been preserved.[10] See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), citing *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974); *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). At no time during trial did defendant argue that the case should be dismissed – or that he should be found not guilty – because his actions involved resisting an arrest that was made unlawful because of excessive force used by officers.[11] Nor did he attempt to raise that argument on appeal, either before or after *Moreno* was released. Just as importantly, defendant testified – and argued to the jury – that he *never* resisted the officers. To now argue that he did resist because the arrest was unlawful is contradictory to the record and incompatible with our preservation requirements. Consequently, the issue is not preserved for appeal. *Winters*, 225 Mich App at 729.

Even though defendant never argued that he was resisting an unlawful arrest, the dissent argues that defendant should have use of *Moreno* by giving it full retroactive effect.[12] However, controlling Supreme Court precedent provides that *Moreno* should only have limited retroactive application. A situation similar to that presented here was addressed by the Court in *People v Pasha*, 466 Mich 378; 645 NW2d 275 (2002). In *Pasha*, the defendant was convicted of, amongst other things, carrying a concealed weapon. *Id*. at 379. His conviction was upheld by our Court on the basis of *People v Marrow*, 210 Mich App 455; 534 NW2d 153 (1995) rev'd 466 Mich at 378, which had held that one must lawfully possess a pistol in order to utilize the dwelling house exception contained in the carrying a concealed weapon statute, MCL 750.227(2). *Id*. at 380-381. The *Pasha* Court reversed the seven year old *Marrow* decision on the basis that it added a prerequisite to application of the statute that did not exist. *Id*. at 382-383.

Having reversed the Court of Appeals decision in *Marrow*, the *Pasha* Court then had to determine whether its ruling would apply retroactively. The Court held that because prosecutors and trial courts had relied on *Marrow* in making changing decision on whether to charge or convict, applying its decision with full retroactive effect "would undermine the interest in finality of convictions and disrupt the effective administration of justice." *Pasha*, 466 Mich at 384. Hence, the Court applied its ruling to only those cases where the defendant had raised the

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[10] Defendant did argue that the police were no longer lawfully in the house at the time of his arrest, so to that extent the argument was preserved. But we have already concluded that the trial court correctly held that the officers were legally present in the home when defendant was arrested.

[11] See *People v Baker*, 127 Mich App 297, 299; 338 NW2d 391 (1983) ("Defendant did not deny that he used force to resist the arrest. Rather, he claimed that the arrest was unlawful in that the degree of force used by the officer was excessive. Those claims, if believed, would have constituted complete defenses to the charge.").

[12] In *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006), our Court stated that "judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved." Under this rule, *Moreno* would not apply to this case because defendant did not raise the issue.

exception on appeal and defendant preserved the issue in the trial court or was entitled to relief under *Carines*, 460 Mich at 750. *Id*.

This same limited retroactive effect has been utilized by the Court in cases even where the issue "goes to the very heart of our jury trial system." *People v Hampton*, 384 Mich 669, 676; 187 NW2d 404 (1971). In *Hampton* the Court held that one of its prior decisions mandating that a jury instruction defining the consequences of a finding of not guilty by reason of insanity be read to the jury, *People v Cole*, 382 Mich 695; 172 NW2d 354 (1969), would only apply to those cases where "the issue was properly preserved for appeal." *Id*. at 679.

In light of *Pasha* and *Hampton*, we conclude that *Moreno* should only apply in cases where the defendant has preserved the issue in the trial court and raised it before our Court, or if the defendant can show plain error under *Carines*. *Pasha*, 466 Mich at 384. Much like in *Pasha*, here prosecutors, defendants and trial courts across the state relied upon *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004) rev'd 491 Mich 38 (2012) in making decisions affecting charging, trial strategy, and guilt or innocence. To apply *Moreno* to all cases would detrimentally effect the effective administration of justice. Consequently, we employ the limited retroactive principles utilized by the *Pasha* Court. Accord *People v Lorey*, 156 Mich App 731, 734-735; 402 NW2d 84 (1986) (giving a Supreme Court decision that reversed this Court's decision limited retroactive effect to cases where the issue was raised to ensure the efficient administration of justice).

In doing so, we hold that defendant has neither raised the issue in our Court,[13] nor did he preserve the issue in the trial court. And, no plain error exists because, as previously discussed, defendant's position in the trial court was that he did not resist arrest at all, a position completely at odds with an available defense under *Moreno*. Consequently, defendant cannot show plain error.

For the reasons expressed, the circuit court's orders are affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey

[13] In fact, the only reason retroactivity is being addressed is because this Court *sua sponte* raised this issue by requesting briefing from the parties.