STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263185 Kalkaska Circuit Court
WILLIAM DANIEL RAUCH, Defendant-Appellant.	LC No. 04-002506-FH

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of domestic violence, MCL 750.81(2), assaulting, resisting, or obstructing a deputy sheriff, MCL 750.81d(1), and assaulting, resisting, or obstructing a deputy sheriff causing injury, MCL 750.81d(2). He was sentenced to 93 days in jail for the domestic violence conviction and 18 months' probation for the resisting or obstructing convictions, with the first six months to be served in jail. He appeals as of right. We affirm.

I

Defendant's convictions arise from an incident on June 26, 2004, in which he assaulted his brother at their home. According to defendant's brother, David Rauch, defendant became angry and starting throwing things at him after he accidentally bumped into defendant's knee. David punched defendant when defendant came toward him. Defendant then punched David in the face.

There was conflicting evidence at trial regarding the events that occurred after Kalkaska County Sheriff's deputies were dispatched to the home. According to the deputies' testimony, Deputy Scott Frank found David outside the home when he arrived. David had blood on his face and red marks and scratches about his upper chest, neck, and face area. David told Deputy Frank about his fight with defendant. Defendant's parents arrived at the home, but their presence did not calm the situation. Deputy Frank and Sergeant Marvin Walters arrested defendant for domestic violence after Sergeant Walters attempted to speak with defendant about the incident. Defendant punched Sergeant Walters after being told that he was under arrest. Sergeant Walters and Deputy Frank struggled with defendant and pepper sprayed him in the face in order to handcuff him. Defendant bit Deputy Frank's arm before he was handcuffed. Defendant was

taken to a health center for treatment because he was bleeding and had been pepper sprayed, and he also complained that his knee was hurting.

By contrast, according to the testimony of defendant's parents and brother David, Deputy Frank jumped on defendant and pepper sprayed him in the face after defendant told Deputy Frank to leave. Defendant allegedly grabbed a brace on his leg, which was sensitive from recent surgery, and was in pain and attempting to protect his leg during the arrest.

II

On appeal, defendant claims that a structural due process error occurred when the trial court allowed the jury to submit questions for witnesses at trial. Because defendant did not object to the trial court's instruction that jurors could submit questions for witnesses, this issue is unpreserved and we review it under the plain error doctrine set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the time of defendant's trial in March 2005, it was settled case law in Michigan that a trial court could allow jurors to submit questions for witnesses. The decision to allow the questioning of witnesses and the method for such submission rested in the trial court's sound discretion. *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972).[1] The basic reason for allowing juror questions is that they might aid the jurors' fact-finding process. *Id*. at 187-188; *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). Because defendant does not argue that any abuse of discretion occurred in this case, but rather seeks to discontinue the practice of allowing jurors to submit questions for witnesses as a matter of law reform, we hold that defendant has not established plain error. *Carines, supra*.

Further, we find no record support for defendant's assertion that the two questions submitted by jurors in this case, only one of which was allowed by the trial court, indicates that the jury was "deliberating" before the conclusion of the case. The sole juror question that the court allowed sought to have Sergeant Walters diagram where people were situated in the house when Deputy Frank entered. The disallowed juror question sought information from defendant's father about "consumption" by defendant. These questions do not indicate that jurors were deliberating. Absent any indication to the contrary, we may presume that the jury followed the trial court's preliminary instruction "to keep an open mind and not make a decision about anything in the case until you go to the jury room to decide the case." See *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000) (absent a showing to the contrary, jurors are presumed to follow their instructions). We conclude that defendant has not established a plain error arising from the actual questions submitted by jurors.

III

Next, defendant claims that defense counsel was ineffective for failing to request a jury instruction that the right to resist excessive force is a defense to a charge of assaulting, resisting,

[1] We note that MCR 6.414(E), as amended after defendant's trial, expressly permits a trial court, in its discretion, to permit jurors to ask questions of witnesses.

or obstructing under MCL 750.81d. Because defendant did not move for a new trial or *Ginther*[2] hearing, our review is limited to mistakes apparent from the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

> For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. [*People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted).]

Here, it is apparent from the record that defense counsel's strategy was to argue that the prosecutor did not prove the charges because defendant's parents and brother David provided the credible account of the circumstances of defendant's arrest. In light of this strategy, it cannot be said that defense counsel's failure to seek an "excessive force" instruction fell below an objective standard of reasonableness. The testimony of defendant's parents and brother David indicated that defendant did not resist the arrest. Pursuing a defense that defendant had a right to resist excessive force, as proposed on appeal, would have been inconsistent with the defense strategy. Cf. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003) (defense counsel not ineffective for not requesting cautionary accomplice instruction that would have been inconsistent with the defense theory of the case).

Further, although "[j]ury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them," *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), counsel need not make futile requests for instructions, see *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). MCL 750.81d(1), as added by 2002 PA 266, provides that "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 . . . ." MCL 750.81d(2) contains the additional element that the individual cause a bodily injury.

Before MCL 750.81d was enacted, it was recognized that 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 charge." *People v Ventura*, 262 Mich App 370, 374; 686 NW2d 748 (2004). Further, a claim that an arrest was unlawful because the degree of force was excessive was a defense to the charge. *People v Baker*, 127 Mich App 297, 299; 338 NW2d 391 (1983). Reasonable force was permitted to resist the unlawful arrest, "the basis for such . . . resistive action being the illegality of an officer's action, to which defendant immediately reacts." *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965). The right to resist the unlawful arrest was but one aspect of self-defense. *People v Eisenberg*, 72 Mich App 106, 111; 249 NW2d 313 (1976). The unlawful arrest was viewed as "nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

any other unlawful intrusion upon his person or liberty." *Id.*; see also *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999) (an illegal arrest can be an assault).

In *Ventura, supra* at 377, this Court held that, under MCL 750.81d, the lawfulness of the arrest is no longer an element of the charge: "[A] person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion." We note, however, that the circumstances in *Ventura* did not involve a claim of excessive force, but rather a claim that a police officer lacked the right to make a warrantless arrest of the defendant. We find it unnecessary to decide if some form of self-defense to a charge under MCL 750.81d survives the holding in *Ventura*, *supra.* A self-defense claim is generally founded on necessity. See *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002). Lawful self-defense is not available to a defendant who was the initial aggressor or used excessive force. *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990) (opinion by Riley, C.J.).

The evidence in this case does not support defendant's proposed instruction that he had a right to resist excessive force because the testimony of his parents and brother, if believed, indicated that defendant did not resist the arrest, but rather was jumped on by Deputy Frank. The deputies' testimony does not aid defendant's position because their testimony, if believed, established that defendant was resistant to the arrest from its inception. There was no testimony to support an inference that Sergeant Walters was using excessive force when he was punched by defendant. Sergeant Walters testified that defendant hit him after he told defendant that he was under arrest and tried to grab his arm. Further, there was no testimony to support an inference that Deputy Frank was using excessive force when defendant bit him. Deputy Frank indicated that he was bitten in the arm while trying to get defendant's arm out from underneath him.

We conclude that defendant has not shown that defense counsel's failure to request an instruction on the right to resist excessive force deprived him of a material defense to the charges under MCL 750.81d. Even assuming that some form of self-defense claim survives the holding in *Ventura*, defense counsel was not required to request an instruction that lacked evidentiary support. Accordingly, and in light of the strong presumption that defense counsel followed a sound trial strategy, defendant's claim of ineffective assistance of counsel cannot succeed.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra