

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 25, 2013

v

LAVELL DEPRIE GREEN,
Defendant-Appellant.

No. 310699
Jackson Circuit Court
LC No. 11-005045-FH

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting or obstructing a police officer, MCL 750.81d(1). After sentencing, defendant moved the trial court for a new trial. The trial court denied the motion. Defendant appeals that decision as of right. For the reasons set forth below, we affirm.

Police responded to a call at an apartment building regarding a loud party. Defendant, an attendee of the party, made threatening gestures toward the police officers as they spoke with the apartment's resident. When the police arrested the resident, defendant continued to antagonize the police. Subsequently, when the officers attempted to arrest defendant, an altercation ensued which involved defendant flailing on the hood of a police car while the police attempted to handcuff him, and ended with an officer deploying a taser on defendant. During the ensuing trial, defendant did not argue that his arrest was unlawful or that the unlawfulness of the arrest required a verdict of acquittal or dismissal.

After defendant's conviction but prior to sentencing the Michigan Supreme Court released its opinion in *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012). The Court held that individuals had always had the right to resist an unlawful arrest. *Id.* at 58. The prosecutor thus is required to prove as an element of the crime that the officers' actions were lawful. *Id.* at 51-52. Prior to *Moreno*, the law stated that, "[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." *People v Ventura*, 262 Mich App 370, 377-378; 686 NW2d 748 (2004). Defendant moved the trial court for a new trial arguing the change in case law, and claiming that it would have been futile at trial to argue that his arrest was unlawful. The trial court denied that motion. Defendant argues that the trial court erred when it denied his motion for a new trial. We disagree.

The relevant court rule states, “[o]n the defendant’s motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). Further, appellate courts review “for an abuse of discretion a trial court’s decision to grant or deny a motion for a new trial.” *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012) (citation omitted).

This Court recently held that *Moreno* was only to be given retroactive effect in cases where the defendant preserved the issue at trial. *City of Westland v Kodlowski*, 298 Mich App 647, 672; 828 NW2d 67 (2012). This Court stated that in order to preserve the issue, the defendant in *Kodlowski* would have had to assert at trial that his arrest was illegal. *Id.* at 670. This decision is binding, MCR 7.215(J)(1), and applies to this case. Accordingly, because defendant did not properly preserve the issue by raising it at trial as required by *Kodlowski*, the trial court correctly determined that *Moreno* does not apply to defendant’s case. Given that defendant’s motion for a new trial relied solely on availing himself of the decision in *Moreno*, and the fact that *Moreno* would not retroactively apply to his case, the trial court did not abuse its discretion when it denied defendant’s motion for a new trial.

Affirmed.

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens