STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 284467 Emmet Circuit Court
REGGIE BERNARD BURKS, SR., Defendant-Appellant.	LC No. 07-002852-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of resisting or obstructing a police officer without injury, MCL 750.81d(1), and was sentenced as a fourth habitual offender, MCL 769.12, to 16 months' to 15 years' imprisonment. He appeals as of right and we affirm. This appeal has been decided without oral argument. MCR 7.214(E).

On September 18, 2007, Officer Todd Troxel was on patrol in a fully marked police car when he attempted to initiate a traffic stop of a black Dodge minivan. The vehicle's exhaust was extremely loud and the driver had twice failed to use the turn signal when turning left. The driver of the vehicle, Jacqueline Burks, did not respond to Officer Troxel's attempts to pull the vehicle over, and continued driving until she reached the ramp of the emergency department at Northern Michigan Hospital.

Ms. Burks' failure to pull over heightened Officer Troxel's concerns. Therefore, Officer Troxel approached the vehicle with his gun unholstered and behind his back. Ms. Burks had already exited the vehicle. Officer Troxel requested Ms. Burks' license, registration, and proof of insurance. Ms. Burks, who was very agitated, told Officer Troxel that she would provide him with that information after she removed her injured husband, defendant, from the vehicle. As Officer Troxel spoke with Ms. Burks, he re-holstered his firearm and attempted to de-escalate the situation. At one point during their conversation, Officer Troxel put his hands on Ms. Burks to stop her from leaving the scene as well as for his own safety because he needed to observe her actions.

Officer Troxel ordered defendant not to leave the vehicle because he did not appear to be in any immediate distress. In addition, Ms. Burks was standing in front of the vehicle and Officer Troxel feared that if defendant exited the vehicle, defendant could get behind him and put him in a compromised situation. While Officer Troxel was speaking to Ms. Burks, defendant

was yelling out of the driver's window at Officer Troxel and then exited the vehicle. Officer Troxel ordered defendant to stay back. Defendant disobeyed Officer Troxel's command and continued walking towards him. Defendant then struck Officer Troxel on the left side of the head with his cane. At that point, Officer Troxel placed defendant under arrest.

Defendant asserted that he hit Officer Troxel in the head with his cane because he believed that Officer Troxel might shoot either his wife or him. Defendant claimed that his belief was reasonable because Officer Troxel lied about why he pulled them over (for an ostensibly loud exhaust), put his hand on his wife when talking to her, and approached them with an empty holster.

Defendant argues on appeal that the trial court committed instructional error when it ruled that *People v Ventura*, 262 Mich App 370, 374; 686 NW2d 748 (2004), precluded a self-defense instruction. According to defendant, *Ventura* confirmed legislative intent to remove the legality of the arrest element from a resisting or obstructing charge, but it did not prevent defendant from presenting a defense of self-defense. Further, defendant claims that reading *Ventura* so as to prohibit a self-defense instruction would violate principles of federal constitutional due process.

This Court generally reviews claims of instructional error de novo on appeal, but we review the trial court's determination that a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

Under the common law and Michigan's earlier resisting arrest statute, MCL 750.479, it was necessary to prove as an element of the offense of resisting arrest that the defendant was subject to a lawful arrest. *Ventura*, *supra* at 374. Therefore, the right to resist an unlawful arrest was a defense to a charge under MCL 750.479. *Id*.

However, MCL 750.479 was replaced by MCL 750.81d, which provides in pertinent part:

> (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.

In *Ventura*, *supra* at 375-377, this Court held that, unlike MCL 750.479, because MCL 750.81d does not refer to the lawfulness of an arrest or detaining act, the lawfulness of a defendant's detention is not an element under MCL 750.81d: "[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."

Defendant argues, however, that even if the legality of the arrest is not an element of MCL 750.81d, a defendant may still assert as a defense under MCL 750.81d that he acted in self-

defense to resist an officer's unlawful use of excessive force. The Self-Defense Act, MCL 780.972, 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.

For purposes of this appeal, it is unnecessary to decide whether one may assert the defense of self-defense to the charge of resisting or obstructing a police officer under MCL 705.81d when the police officer has used unlawful excessive force. This is because the facts of this case do not support such a defense.

First, the Self-Defense Act does not apply to one who is engaged in the commission of a crime at the time that person allegedly acts in self-defense. Defendant was engaged in the commission of a crime, obstructing a police investigation, by yelling, disobeying lawful commands to stay back, and hitting Officer Troxel with his cane. Second, defendant was the initial aggressor and user of excessive force. Officer Troxel attempted to gain control of the situation in the midst of uncooperative and suspicious behavior by defendant and his wife. No force was employed in the encounter until defendant hit Officer Troxel on the head with his cane. Third and finally, defendant's belief that force was necessary to defend himself from the imminent use of excessive force by Officer Troxel was unreasonable. Officer Troxel never threatened defendant with serious injury or imminent bodily harm. At no point did Officer Troxel point his weapon at defendant or threaten to use his weapon on defendant. Rather, defendant's belligerent behavior caused Officer Troxel to touch his firearm out of concern for his own safety.

We do not believe that *Ventura* was wrongly decided and we decline to address whether a claim based on self-defense in the face of excessive force survives the holding in *Ventura* given that the facts of this case clearly establish that defendant was not entitled to claim that he acted in self-defense.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey