

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 18

September Term, 2017

---

ABEL Y. RIVERA-ALVIRA

v.

STATE OF MARYLAND

---

Woodward C.J.,  
Graeff,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

---

PER CURIAM

---

Filed: May 2, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On March 2, 2017, a jury sitting in the Circuit Court for Worcester County convicted appellant, Abel Rivera-Alvira, of resisting arrest. The court sentenced appellant to six months of incarceration. Appellant appeals and argues that the trial court abused its discretion when it failed to instruct the jury that appellant had the right to resist an unlawful arrest. We affirm.

### **BACKGROUND**

At about 11:40 p.m. on June 11, 2016, officers of the Ocean City Police Department responded to a report of a fight in the area of Somerset Street and Atlantic Avenue. This location is part of the Ocean City boardwalk. Officer Matthew MacFarlane was one of the first to respond and testified that he saw two groups of people, whom he identified as the people who had been involved in the fight. The two groups began to exit the area and walk south on the boardwalk towards the area of Worcester Street. He and several other officers followed the group to ensure that no other altercations occurred. As the officers followed the two groups, they observed shouting and yelling between them. Officer MacFarlane also observed that one individual simulated a gun with his hand, and motioned to the other group as if he was shooting them.

The boardwalk was crowded at the time, and included a number of families who appeared to be disturbed by the actions of the two groups. Officer MacFarlane observed bystanders begin to walk around and away from the area as the tension between the two groups of people escalated. The officers then decided to arrest the main aggressors for disorderly conduct. As the three officers attempted to make the arrests, the arrestees resisted and other individuals with them began to assault the officers. Officer MacFarlane

called for backup over his police radio. Additional officers arrived about thirty seconds later, as the officers and the subjects were situated directly in front of a police substation.

Deputy Juliane O’Toole was in the police substation when she heard Officer MacFarlane’s call for assistance over the radio, and left the substation to assist. Officer Gary Cooper, who was among the initial set of officers on the scene, testified that during such incidents on the boardwalk the police are trained to set up and maintain a perimeter around the police activity to ensure the safety of the officers, the suspect(s), and the general public. Deputy O’Toole testified that when she arrived on the scene she observed several officers on the ground attempting to place suspects under arrest and a very large crowd of people in the immediate area. Upon observing a suspect fighting with Officer Cooper on the ground as Officer Cooper was attempting to place him under arrest, Deputy O’Toole moved in to create a perimeter around Officer Cooper and the other officers. She first made numerous commands for the people around Officer Cooper to back up. Everyone in the group, except appellant, obeyed her commands and backed up. Officer O’Toole then pushed appellant back in an effort to create more space for the officers attempting arrests, and again told him to back up. Appellant was still not at the perimeter which had been established and so Deputy O’Toole pushed appellant back a second time. Appellant then slapped Deputy O’Toole’s arm away, and believing she had been assaulted, Deputy O’Toole decided to place him under arrest.

When Deputy O’Toole grabbed appellant’s arm to begin placing handcuffs on him, appellant pulled away from her. At trial Deputy O’Toole could not remember “specifically saying things to him,” but was “sure [she] was telling him to stop, stop resisting.” Another

officer then took appellant to the ground and told him to place his hands behind his back. Appellant failed to comply. When a third officer pointed his taser at him, appellant submitted to the arrest and began to cooperate. The taser was never deployed.

All officers were wearing police bicycle uniforms which included a bright blue top with the word “police” written in reflective letters on it, and a badge. A surveillance camera attached to the police substation captured the incident and was shown to the jury at trial.

At the conclusion of the evidence, the court and the parties discussed the jury instructions outside of the presence of the jury. When the court asked if either party had any additional instructions they wished to be read to the jury, counsel for appellant requested a “right to resist an unlawful arrest” instruction, whereupon the following occurred:

[DEFENSE COUNSEL]: And as to the right to resist an unlawful arrest, I know we’ve discussed this before in other cases, and I’m aware of the State’s argument and the Court’s belief that the right to resist an unlawful arrest is subsumed within the pattern instruction for resisting arrest because the pattern instruction requires the State to prove beyond a reasonable doubt that the arrest was lawful and describes what a lawful arrest is.

However, the right to resist an unlawful arrest is a legitimate and recognized defense still within the State of Maryland, not within many states, but still within the State of Maryland pursuant to the case of *State v. Weigmann* at 350 Md. 588. And to deny the defendant the opportunity to have that instruction read to the defense is tantamount to saying that a self-defense instruction is as well unnecessary because the State has the affirmative obligation of proving offensive physical contact as noted within the pattern instruction for second degree assault. Therefore, Your Honor, I would ask that both defense instructions be provided. And I will defer at this point.

\*\*\*

THE COURT: The Court will not give the requested instruction as to the right to resist an unlawful arrest. The defendant has the right to resist an unlawful arrest. The State is required to prove that the arrest was lawful as an element of resisting arrest. If the State fails on that, then the defendant is found not guilty. So it doesn't seem to me that that's an appropriate instruction because it is subsumed within the elements of resisting arrest. The defense is free to argue on that particular issue.

\*\*\*

[DEFENSE COUNSEL]: I fully understand, Your Honor. I will note the objection, but otherwise, thank you.

The jury was then brought back into the courtroom, and the court read to them the jury instructions. At the conclusion of the jury instructions, the court asked the parties if they had any “exceptions to the instructions.” Both the State and defense counsel responded, “[n]o, Your Honor.”

### DISCUSSION

Appellant argues that the court abused its discretion when it refused to give the requested jury instruction because, “the instruction was a correct statement of the law and was not fairly covered by the resisting arrest instruction that was actually given.” The State responds that this Court should “decline to consider whether the trial judge erred” because “[d]efense counsel did not object at the conclusion of the instructions” and, therefore, the objection was waived. We agree that the objection was waived.

We review a trial court's decision not to give a requested jury instruction for abuse of discretion. *Carroll v. State*, 428 Md. 679, 689 (2012). A requested jury instruction must be given where “(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly

covered elsewhere in instructions actually given.” *Cost v. State*, 417 Md. 360, 368-69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)).

In *Johnson v. State*, the Court of Appeals discussed appellate review of a trial court’s failure to give a requested jury instruction as follows:

Although the trial court’s failure to give a requested instruction may constitute error, the rules go on to indicate that such error is ordinarily not preserved for appellate review unless the requesting party objects after the trial court instructs the jury.

310 Md. 681, 686 (1987). Maryland Rule 4-325(e) provides the following:

No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

“The language of the rule plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused.” *Johnson*, 310 Md. at 686. The rule requires an objection after the instructions are given, in part, because, “a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given.” *Id.* at 687.

While counsel for appellant initially requested an instruction regarding the right to resist an unlawful arrest, he did not object on the record promptly after the court instructed the jury. To the contrary, upon the court’s inquiry, counsel indicated that he had no exceptions to the instructions given. As a result, appellant’s claim is not preserved.

Nevertheless, even had appellant’s claim been preserved, it is without merit as the content of appellant’s requested instruction was “‘fairly covered elsewhere in instructions actually given.’” *Cost*, 417 Md. at 368-69 (2010) (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)). Here, the court instructed the jury as to resisting arrest, as follows:

The defendant is charged with the crime of resisting arrest. In order to convict the defendant of this offense the State must prove first that a law enforcement officer attempted to arrest the defendant. Secondly, that the defendant knew that a law enforcement officer was attempting to arrest him, thirdly, that the defendant intentionally refused to submit to the arrest and resisted the arrest by force or threat of force, and *fourth, that the arrest was lawful, that is, that the officer had probable cause to believe that the defendant had committed the crime of assault in the second degree.*

Probable cause exists where the facts and circumstances taken as a whole would lead a reasonable law enforcement officer to believe that the defendant was committing a misdemeanor in the officer’s presence. Assault in the second degree is a misdemeanor. Probable cause is less than a certainty but more than a mere suspicion.

An arrest is the taking, seizing or detaining of a person by touching or putting hands on that person or by any act or words that would indicate the officer’s intention to take him into custody and that subjects him to the actual control and will of the officer making the arrest. The test is an objective one – that is, whether a reasonable person in the defendant’s position would have understood that he was under arrest. Just running away from an officer without more is not resisting arrest.

(emphasis supplied). This instruction mirrors the current Maryland Criminal Pattern Jury Instruction for resisting arrest. MCPJI § 4:27.1.

Appellant relies on *Arthur v. State*, 420 Md. 512 (2011) to support of his argument that the lower court erred when it failed to include a separate instruction regarding the right to resist an unlawful arrest. In *Arthur*, the Court of Appeals held that the lower court erred when it did not supplement the resisting arrest pattern instruction, and stated the following:

Here, because the evidence presented at trial generated the issue of whether [the officer] had probable cause to arrest Arthur, we think the only way for Arthur to have a fair trial is for the jury to understand the law concerning his right to resist an unlawful arrest. A reasonable juror, without the benefit of an instruction on this point, might believe that, when a police officer tells him he is under arrest, he must succumb, regardless of the circumstances, and wait for relief (and release) until he is taken before a judicial officer. The trial court abused its discretion in failing to provide the jury instruction on such a law.

420 Md. at 528. The pattern jury instruction read to the jury in *Arthur* was different, however, than that read to the jury in the instant case. The *Arthur* instruction did not include language regarding whether the officer had probable cause to arrest, and simply required the fact finder to find “that the officer had reasonable grounds to believe that the defendant [was committing] [had committed] (crime)” 420 Md. at 519 n.3.<sup>1</sup>

Since the Court of Appeals decided *Arthur*, the Maryland Criminal Pattern Jury Instruction has been modified. The current instruction, which was read to the jury in the

---

<sup>1</sup> The complete resisting arrest instruction read to the jury in *Arthur* was the following:

Resisting Arrest (Warrantless)

The defendant is charged with the crime of resisting arrest. In order to convict the defendant of resisting arrest, the State must prove:

- (1) that a law enforcement officer attempted to arrest the defendant;
- (2) that the defendant knew that a law enforcement officer was attempting to arrest [him][her];
- (3) that the officer had reasonable grounds to believe that the defendant [was committing][had committed] (crime); and
- (4) that the defendant refused to submit to the arrest and resisted the arrest by force.

420 Md. at 519 n.3.



present case included the language that, to convict appellant, the fact finder must find “that the arrest was lawful, that is, that the officer had probable cause to believe that the defendant had committed the crime of assault in the second degree.” Further it defined probable cause and its application to a resisting arrest charge. As such, the resisting arrest pattern instruction read to the jury in the present case sufficiently covered the content of appellant’s requested instruction, and therefore the court did not abuse its discretion in denying appellant’s request.

**JUDGMENT OF THE CIRCUIT COURT  
FOR WORCESTER COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANT.**