Circuit Court for Harford County
Case No. C-12-CR-19-000438

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 511

September Term, 2021

ADONIS SAM THOMAS

v.

STATE OF MARYLAND

Kehoe,
Reed,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 8, 2022

On May 5, 2021, a jury sitting in the Circuit Court for Harford County convicted Adonis Sam Thomas of disorderly conduct and interfering with the lawful arrest of another. The court sentenced him to a total term of three years' incarceration, with all but 60 days suspended, to be followed by two years of supervised probation. He presents three questions, which we have reorganized and reworded:

1. Did the trial court commit plain error when instructing the jury on the elements of disorderly conduct that disturbs the public peace?
2. Did defense counsel's failure to object to the court's disorderly conduct that disturbs the public peace jury instruction deprive Mr. Thomas of his right to effective assistance of counsel?
3. Was the evidence sufficient to sustain Mr. Thomas's convictions?[1]

We will reverse the judgments of the circuit court in part and affirm them in part.

BACKGROUND

Because Mr. Thomas challenges the sufficiency of the evidence to sustain his convictions, we present the facts in the light most favorable to the State. *Koushall v. State*, 249 Md. App. 717, 723 n.1 (2021).

[1] In his brief, Mr. Thomas frames the issues as follows:

1. Did the trial court commit plain error when it incorrectly instructed the jury regarding the elements of disorderly conduct, or did defense counsel render ineffective assistance by failing to object to the erroneous instruction?

2. Is the evidence insufficient to sustain Appellant's conviction for disorderly conduct?

3. Is the evidence insufficient to sustain Appellant's conviction for interfering in the arrest of another?

At approximately 7:00 p.m. on the evening of March 4, 2019, Harford County Sheriff's Deputies Kevin Smith and Tyler Dinan responded to a report of a "verbal disturbance" at a Walmart in Abingdon. Upon arriving, Deputies Smith and Dinan spoke with the Walmart employee who had reported the incident. The employee directed them to a man, later identified as Marlon Thomas (Mr. Thomas's brother), who matched the description of the male suspect given by the dispatcher.[2] The deputies approached Marlon and Jazmia McNeill, both of whom were still shopping in the store.

Deputy Dinan spoke to Ms. McNeill. Deputy Smith approached Marlon. When Deputy Smith asked Marlon for his name and date of birth, he refused to answer and attempted to leave. Deputy Smith blocked Marlon's path and advised him that he was not free to go. Marlon responded by clenching his fists, squaring his body toward Deputy Smith, and cursing at him. Upon observing Marlon's aggressive behavior, Deputy Dinan came to his colleague's assistance.

Deputy Smith repeated his request for Marlon's name and date of birth. At first, Marlon refused to provide this information but eventually did so. But then he attempted to leave the scene. Both deputies tried to stop Marlon and a fracas ensued. A blow-by-blow description of what happened next is unnecessary. In summary, as the deputies attempted to detain Marlon, Mr. Thomas joined the fray and grabbed Deputy Dinan around the neck. After a brief struggle, Deputy Dinan broke out of the headlock, fought

[2] For the sake of brevity and intending no disrespect, we will henceforth refer to Marlon Thomas by his first name.

him off, and drew out his pepper spray canister. Mr. Thomas then fled on foot. Rather than chasing after him, Deputy Dinan assisted Deputy Smith in arresting Marlon. Marlon broke free, the deputies gave chase, and soon caught up with him. Mr. Thomas made it out of the Walmart but was arrested several hours later.

The State charged Mr. Thomas with two counts of second-degree assault on a law enforcement officer; two counts of general second-degree assault; resisting arrest; failure to obey a lawful order of a police officer; interfering with the lawful arrest of another; acting in a disorderly manner that disturbs the public peace, a violation of Crim. Law § 10-201(c)(2); and entering upon the premises of another and disturbing the peace by making an unreasonably loud noise or acting in a disorderly manner, a violation of Crim. Law § 10-201(c)(4).

The trial court granted Mr. Thomas's motion for judgments of acquittal as to the resisting arrest, entering upon the premises of another and disturbing the peace by making an unreasonably loud noise or acting in a disorderly manner, and failing to obey a lawful order charges, and the jury acquitted Mr. Thomas of the assault charges.[3] The jury convicted Mr. Thomas of interfering with the arrest of another and willfully acting in a disorderly manner that disturbs the public peace.

[3] Marlon was tried separately and was convicted of resisting arrest, disorderly conduct, and failure to obey a lawful order. *See Marlon Thomas, Jr. v. State*, No. 34, Sept. Term 2020, filed May 6, 2021.

ANALYSIS

The Disorderly Conduct Instruction

Mr. Thomas first challenges the trial court's instruction to the jury as to the elements of the crime of disorderly conduct. The court told the jury that:

> The Defendant is also charged with disorderly conduct. In order to convict the Defendant of disorderly conduct, the State must prove the Defendant was in a public place; and that the Defendant acted in a disorderly manner; and that the Defendant's actions were intentional.

The court's error was one of omission. Maryland Code, Crim. Law § 10-201(c)(2) states (emphasis added):

> A person may not willfully act in a disorderly manner *that disturbs the public peace.*

Defense counsel did not object to the instruction. On appeal, Mr. Thomas raises two related contentions regarding trial counsel's failure to object.

The first is that by failing to instruct the jury as to the disturbing the public peace element of the disorderly conduct offense, the trial court committed plain error, which warrants the exercise of our discretion to review the instruction for plain error. The second is that counsel's failure to object was so deficient that Mr. Thomas's Sixth Amendment right to counsel was violated.

In response, the State presents three arguments:

First, while acknowledging that the instruction omitted the statutory requirement that the conduct in question "disturb the public peace," the State asserts that "the instruction as delivered was sufficient to communicate that requirement." For support, the State

points to *Reese v. State*, 17 Md. App. 73, 80 (1973), and *Dziekonski v. State*, 127 Md. App. 191, 200–01 (1999). These cases interpreted the statutory predecessor to § 10-201(c).[4] In *Reese*, we explained that the purpose of that statute was to prohibit

> conduct of such a nature as to *affect the peace and quiet of persons actually present who may witness the conduct or hear the language and who may be disturbed or provoked to resentment thereby*. . . . Implicit in [the statute] is the prohibition against a person wilfully acting in a disorderly manner by making loud and unseemly noises or by profanely cursing, swearing or using obscene language.

17 Md. App. at 80 (emphasis added).

In *Dziekonski* we explained that the gravamen of the offense was that "the effect of the actor's conduct need only be that the peace was disturbed." 127 Md. App. at 201.

Returning to the case before us, we fail to see how *Reese* or *Dziekonski* supports the State's position that the instruction actually given by the trial court "effectively communicated [to the jury] that the public peace must be disturbed" when the instruction in the present case made no mention whatsoever of disturbing the public peace.

The State's second contention is that Mr. Thomas's trial counsel affirmatively waived his right to challenge the instruction. We do not agree.

[4] Former Md. Code (1957, 1976 Repl. Vol.) Art. 27 § 123(c) stated in pertinent part (emphasis added):

> No person shall act in *a disorderly manner to the disturbance of the public peace*, upon any public street, highway, ... or parking lot, . . .in any . . . county in this State, . . . or in any store during business hours[.]

In the plain error review context, Maryland law distinguishes between forfeiture and affirmative waiver. "Forfeiture is the failure to make a timely assertion of a right[.]" *State v. Rich*, 415 Md. 567, 580 (2010) (cleaned up). Waiver, by contrast, is the "'intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). In the case of instructional error, waiver occurs when "'the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, *proposed or accepted* a flawed instruction.'" *Id.* at 581 (emphasis added) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)).

Mr. Thomas did not propose the instruction, the State did. Nor did Mr. Thomas accept the instruction. After it had given the prosecutor and defense counsel an opportunity to review the jury instructions, the court asked whether they proposed any modifications. Defense counsel simply answered: "No, Your Honor." In *Yates v. State*, 202 Md. App. 700, 722 (2011), *aff'd*, 429 Md. 112 (2012), after instructing the jury, the trial court asked defense counsel whether he had any objections to the jury instructions as given. Counsel answered, "'None.'" *Id.* at 719. Just as in the present case, the State asserted that Counsel's one-word response constituted an affirmative waiver of the right to challenge the instruction. We explained that counsel's response was not an affirmative waiver but was "a forfeiture of his right to raise the issue on appeal" and that mere forfeiture "did not preclude this court from deciding whether to exercise its discretion to engage in plain error review." *Id.* at 722. The same reasoning applies to counsel's response to the court's question in this appeal.

The State's third argument is that the threshold criteria for plain error review were not met in this case. The States points to a line of our decisions referencing the Court of Appeals' analysis in *State v. Rich*, wherein the Court stated (emphasis added):

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. *Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings*. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

415 Md. 567, 578–79 (2010) (cleaned up) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009).

The State contends that Mr. Thomas is unable to satisfy the third prong, i.e., that the failure to give the instruction "affected the outcome of the proceeding." This is so, says the State, because there was evidence introduced at trial from which the jury could have concluded that Mr. Thomas's conduct "affect[ed] the peace and quiet of persons actually present." (quoting *Reese*, 17 Md. App. at 80).

For purposes of plain error review in the context of an erroneous jury instruction, it is not necessary for a defendant to demonstrate that he would inevitably have been acquitted if the jury had been properly instructed. The standard is not so high. But, even if it were, the State's contention is unconvincing.

Mr. Thomas was tried on two disorderly conduct/disturbing the peace charges. We will first consider Crim. Law 10-201(c)(4), which states:

> A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:
> (i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or
> (ii) act in a disorderly manner.

After the State closed its case, Mr. Thomas moved for a judgment of acquittal on each count of the indictment. Relevant to the charge of violating Crim. Law § 10-201(c)(4), the trial court stated (emphasis added):

> [As to the] disturbing the peace [count, there was evidence that] the Defendant [was] in a public place. [The statute also requires that the Defendant] made an unreasonable noise. I'm not sure about that. But the point [is that Crim. Law § 10-201(c)(4) requires that] *the public was disturbed by the Defendant's noise* and the Defendant had no lawful right to make the noise. Those are the four elements. Although we have heard testimony that people were gathering in the store, we saw in the video that there were some people gathering, *there was not any testimony that the public was disturbed by the Defendant's noise*. So, on that element alone, even though I have some concerns about the other elements, I'll grant the Defendant's motion as to the disturbing the peace count.

If there was no evidence that the public peace was disturbed by the noise generated by Mr. Thomas's altercation with the deputies for the purposes of Crim. Law § 10-201(c)(4), then Mr. Thomas's conduct could have "disturb[ed] the public peace" for the purposes of Crim. Law § 10-201(c)(2) only by the effect of his conduct. The Court of Appeals has explained (emphasis added):

> The gist of the crime of disorderly conduct under [the statutory predecessor to Crim. Law § 10-201(c)(2)], as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, *a number of people gathered in the same area.*

Drews v. State, 224 Md. 186, 192 (1961), *vacated on other grounds sub nom. Drews v. Maryland*, 378 U.S. 547 (1964).

The State does not direct us to any testimony about the "number of people gathered in the same area" who witnessed Mr. Thomas' conduct. The State asserts that the jury could conclude that Mr. Thomas' conduct disturbed the public peace based on the Walmart security camera footage. We do not agree.

The video evidence that was shown to the jury came from a security camera in the housewares section of the store. After an uneventful initial few minutes, the footage depicts two individuals watching what turned out to be the struggle between the Thomas brothers and the deputies. Initially, the four men are off-camera. As they move into the area covered by the camera, the two onlookers depart in opposite directions. A few moments later, a second pair of apparent shoppers approach the location of the fracas, see what is going on, promptly make an about-face, and disappear from view.

Shortly after the second couple disappears from the camera's view, two additional patrons, a man and a woman, approach the scene. They appear on the surveillance footage for approximately one minute. The man walks toward the fracas and pulls a male (identified at trial as Marlon) off one of the deputies. As the deputy rises to his feet, a woman (perhaps Ms. McNeill?) approaches the man and the two briefly exchange words.

Once the deputies gain the upper hand in their struggle with Marlon, the man and his female companion (who was watching but not participating in these events) take a few steps back and pause for about ten seconds. Then the man takes hold of their shopping cart and walks away. After a final glance at the deputies and Marlon, the woman follows him, and they disappear from the camera's view. The man and the woman appear on the surveillance footage for approximately one minute. That is the extent of the video evidence.

"[T]the elements of disorderly conduct, proscribed by [Crim. Law] § 10–201(c)(2) . . . are well settled. Under subsection (c)(2), the defendant must willfully, in a public place or public conveyance and in the actual presence of other persons, act in a disorderly manner to the disturbance of the public peace of those other persons." *Att'y Grievance Comm'n of Maryland v. Mahone*, 435 Md. 84, 104–05 (2013). The video footage depicts six onlookers. The first four saw the fracas between the Thomas brothers and the deputies and moved on. Transient curiosity does not equate to a disturbance of the public peace. The fifth intervened to assist the deputies, a process that took about a minute. The sixth watched while her companion helped the deputies and then moved on with him. Because every onlooker left the scene after a brief time, no one "gathered" in the area where the fracas took place. *See Drews*, 224 Md. at 192.

To summarize, Mr. Thomas has demonstrated to our satisfaction that there was a clear error in the jury instruction. His trial counsel did nothing that would constitute a waiver of the issue for plain error review purposes. Finally, a conviction based on an

erroneous jury instruction is the sort of trial error that seriously affects the public reputation of judicial proceedings. We will exercise our discretion to address Mr. Thomas's contention that the jury instruction was deficient.

Turning to the merits, the jury instruction omitted one of the elements of the offense of disorderly conduct, namely that the conduct in question disturbed the public peace. We are not persuaded by the State's contention that the instruction was nonetheless legally correct. We reverse the conviction for disorderly conduct that disturbs the public peace. Because we are reversing that conviction, there is no reason for us to address Mr. Thomas's ineffective assistance of counsel contentions.

2. The Sufficiency of the Evidence

Mr. Thomas challenges the sufficiency of the evidence to sustain his convictions. When reviewing the sufficiency of the evidence, "the test is whether the evidence either shows directly or supports a rational inference of the facts to be proved, from which the trier of fact could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged." *Chisum v. State*, 227 Md. App. 118, 127 (2016) (quoting *Williams v. State*, 5 Md. App. 450, 459 (1969)). "In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." *Johnson v. State*, 245 Md. App 46, 57 (cleaned up), *cert. dismissed as improvidently granted*, 471 Md. 429 (2020).

A. Disorderly Conduct that Disturbs the Public Peace

Even though we have reversed the disorderly conduct conviction for other reasons, we must address Mr. Thomas's sufficiency challenge with respect to this count, as an affirmative holding with respect to that contention would prohibit the State from retrying him. *See, e.g., Benton v. State*, 224 Md. App. 612, 629 (2015). For the reasons that we have explained, we hold that the State failed to produce legally sufficient evidence that Mr. Thomas violated Crim. Law § 10-201(c)(2).

B. Interfering with the Arrest of Another

Finally, Mr. Thomas challenges the sufficiency of the evidence to sustain his conviction for interfering with the arrest of another, arguing that "the State failed to prove the 'essential element' that the arrest of Marlon Thomas was lawful." He argues that the deputies lacked reasonable articulable suspicion to conduct the initial investigatory stop, rendering it an unlawful detention that Marlon was entitled to resist using reasonable force.[5] From this premise, Mr. Thomas reasons, Marlon's subsequent assault arrest also constituted an illegal detention with which Mr. Thomas "was likewise entitled to interfere[.]" We do not agree for two reasons.

First, the two deputies testified that they treated the dispute between Marlon and Ms. McNeill as possibly involving domestic violence. The deputies could have, and clearly did, develop a particularized and objective basis for suspecting that Marlon had engaged

[5] Mr. Thomas does not argue that Marlon's initial detention was an arrest.

in criminal activity, namely domestic violence. Under the circumstances, the deputies were entitled to detain Marlon in order to obtain additional information, i.e., to conduct a *Terry* stop. *See, e.g., In re D.D.*, 479 Md. 206, 223–24 (2022). When Deputy Smith attempted to question Marlon, the latter refused to provide his name and birthdate (which he had the right to do), attempted to leave (which he did not have the right to do), and then slapped Deputy Smith's hand away when the latter attempted to detain him. At this point, the deputies had probable cause to arrest Marlon for assault.

Second, Maryland recognizes "the long-standing common law privilege permitting persons to resist an illegal warrantless arrest." *Lamb v. State*, 141 Md. App. 610, 640 (2001). However, the privilege to resist an unlawful *arrest* does not equate to a privilege to resist an unlawful *stop*. *See, e.g., Hicks v. State*, 189 Md. App. 112, 125 (2009) ("There is no privilege to resist either an unlawful *Terry* stop or an unlawful frisk." (citations omitted)). Therefore, Marlon's assault of Deputy Smith was not privileged.

Under either rationale, the detention of Marlon was lawful. When he struck one of the deputies in an effort to escape, the deputies had probable cause to arrest Marlon for assault. Because Marlon's arrest was lawful, there was legally sufficient evidence to sustain Mr. Thomas's conviction for interfering with that arrest.

In summary, we reverse the disorderly conduct conviction because the instruction to the jury as to the elements of the offense was incomplete. Because the State did not present legally sufficient evidence that Mr. Thomas violated Crim. Law § 10-201(c)(2),

no remand is necessary. We affirm the conviction for interfering with the lawful arrest of another.

THE JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY ARE REVERSED IN PART AND AFFIRMED IN PART.

COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND HARFORD COUNTY.