UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1087

September Term, 2015

DONAVAN F. WALKER

v.

STATE OF MARYLAND

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: April 5, 2016

* 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.

Appellant, Donavan Walker, was tried before a jury in the Circuit Court for Anne Arundel County, (Klavans, J.) for resisting arrest and disorderly conduct, but found not guilty by the jury of three counts of assault in the second degree. He was sentenced on May 26, 2015 to a term of three years incarceration under the jurisdiction of the Department of Corrections. Appellant noted the instant appeal in which he raises the following questions,[1] which we quote, for our review:

> Where appellant was charged with resisting arrest, and there was a *bona fide* factual dispute as to the legality of the arrest, did the lower court err in failing to instruct the jury that a person has the right to resist an unlawful warrantless arrest?

FACTS AND LEGAL PROCEEDINGS

At trial, the State adduced evidence that two unmarked police cars, occupied by four police officers, who were not in uniform,[2] were conducting crime-suppression efforts in Anne Arundel County, Maryland. During these efforts, the police officers witnessed a motor vehicle operated by appellant, Donavan Walker, cross multiple lanes of traffic. The driver of the first police vehicle, Corporal Ronald Kessler, testified that he decided to stop the vehicle because it did not use a turn signal and made an erratic lane change. He activated the emergency equipment on his vehicle, *i.e.*, engaging its lights and intermittently sounding the siren, in an effort to stop the car. According to Corporal Kessler, the vehicle did not stop, but

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[1] The Question Presented, as posited by the State is "If considered, did the trial court properly exercise its discretion by giving, without supplementation, the pattern jury instruction on resisting a warrantless arrest?"

[2] Corporal Kessler averred that his shirt had a badge printed on the chest and that the other officers were wearing tactical vests with "Police" printed upon them.

rather, turned into a shopping center, drove across the parking lot and then into the "drive-thru" lane of a Chick-fil-A fast food restaurant. Corporal Kessler pulled behind the vehicle, and shouted, "This is police, I am pulling you over, you need to stop," but appellant stated "Fuck you, I don't have to stop."

Corporal Kessler testified that his companion, Detective Stallings,[3] exited the vehicle, approached appellant’s vehicle and eventually engaged him in conversation. Detective Stallings began to open the driver's side door of the vehicle, but appellant closed the door quickly. The car then "took off," moved forward a short distance and eventually parked. Appellant exited the vehicle and, as the officers closed in, there was "a brief struggle trying to get him to the ground" because appellant was "not willfully putting his hands behind his back to be arrested . . . .”

Detective Stallings testified that he was with Corporal Kessler when they saw the vehicle make an erratic lane change and that the officers activated their emergency equipment to signal for the driver to stop the vehicle. According to Detective Stallings, when the vehicle came to a stop in the fast-food drive-thru lane, he exited his vehicle, approached the vehicle from the passenger side and heard Corporal Kessler direct appellant to stop. Detective Stallings testified that he also commanded appellant to turn off the vehicle’s

[3] Appellant’s brief indicates that the record does not reveal Detective Stallings' first name. The State’s brief accepts the appellant’s Statement of Facts and does not provide a first name for Detective Stallings.

engine, but appellant repeatedly said that he would not. Detective Stallings moved to the driver's side of the vehicle, proceeded to open the door and informed appellant that he was under arrest.

When Detective Stallings twice tried to open the door, appellant grabbed the door both times and slammed it shut. The vehicle moved forward and then parked about fifteen-to-twenty feet away. Appellant exited the vehicle and adopted a "fighting stance" as the officers approached, but they eventually subdued him. While on the ground, appellant tried to pull away from the officers, but they handcuffed him and threatened to employ a Taser. Appellant, who wore his hair in dreadlocks, had multiple dreadlocks pulled from his head during the struggle.

Detective Dan Delorenzo and Detective Jeremy Tepper were the occupants of the other unmarked police vehicle and they also testified about the incident. Both officers confirmed that they followed appellant’s vehicle into the restaurant parking lot, heard the driver screaming and cursing at Corporal Kessler and saw Detective Stallings approach the vehicle. Detective Delorenzo saw Detective Stallings order the driver to exit the vehicle and attempt to open the door to appellant’s vehicle. The officers confirmed that appellant’s vehicle moved forward and, that when appellant sped away, the driver’s side wing mirror struck Detective Delorenzo on the hip, “causing him to spin and fall to the ground.” After appellant parked a short distance away and exited the vehicle, he was subdued at gunpoint after Detective Delorenzo struck him several times with a heavy metal flashlight. According

to the officers, before appellant was handcuffed, he was "passively resisting" by showing "a fighting stand" and "show[ing] aggressive behavior, not complying with . . . demands."

Appellant testified in his defense[4] and offered a version of what transpired that differed greatly from that proffered by the officers. According to appellant, on the evening in question, he drove to the shopping center to buy a sandwich. As he entered the shopping center, there were no vehicles behind him and he did not observe any flashing lights or hear a siren. According to appellant, he drove normally and he acknowledged that he did change lanes, but he did so with his turn signal engaged. Appellant testified that he proceeded to the drive-thru lane of the restaurant and, as he was placing his order, he heard someone tell him to get out of the car. According to appellant, the man placed the gun in his face. Appellant testified that he stated, "I'm not getting out of my car, man," but that the man said, "get out of the F-ing car—I don't curse, so he be like, get out the F-ing car."

Appellant testified that he did not see a badge or any indicia of authority. The man then "pulled the door and grabbed me by my—my leather jacket and started pulling me out the car." When the man lost his grasp, appellant "quickly slammed the door" and locked it. It was at this point, for the first time, the man stated, "Police officer, get out the car." Appellant testified that the man was wearing only a gray sweatshirt and "didn't have a badge,

[4] The State notes, in its brief, that appellant was impeached with prior convictions for cocaine distribution and identity theft.

no nothing. Had just a black pistol in his hand." When the man began to break the windows of appellant's vehicle, appellant drove off.

Appellant testified that he parked his car to "see why they busting up my car and why you come up at my window with a gun." When he exited his vehicle, the man ordered appellant not to move. It was only after appellant exited his vehicle and approached the man that he first recognized that the man was a police officer because the badge, located on his left hip, was visible to appellant. Immediately after this realization, according to appellant, one of the officers approached and "blindsided" him by grabbing him and striking his head and shoulders. Appellant went limp and fell to the ground. At this point, the officer grabbed him by his hair. Appellant was then transported from the scene to the police station for booking. According to appellant's testimony, an ambulance transported him from the station to the hospital.

At the close of the evidence, the parties requested instructions. Appellant, through counsel, addressed the judge, stating that, in his request for instructions, he wanted to add the "right to resist an unlawful arrest," acknowledging that the judge had discretion concerning the instructions given to the jury. The judge declined to add the instruction, but noted appellant's exception. Appellant, in reiterating his request that the instruction be propounded, argued that it was "easy to give." The judge responded, "I've made my ruling and you're free to argue."

As to the crime of resisting arrest, the jury was instructed:

> The defendant is charged with the crime of resisting arrest. In order to convict the defendant of resisting arrest the State must prove, one that a law enforcement officer arrested or attempted to arrest the defendant. Two, that the defendant knew that a law enforcement officer arrested or was attempting to arrest him or her. Three, that the defendant intentionally refused to submit to the arrest and resisted the arrest or threat of force. And, four, that the arrest was lawful, that is that the officer had probable cause to believe that the defendant had committed the crime, in this—in this case a failure to obey the lawful order of a police officer.
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> 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. Failure to obey a police officer 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 acts or words that indicate the officer's intention to take him or her into custody. And that subjects him or her 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 or she was under arrest. Just running away from an officer without more is not resisting arrest.

Ultimately, appellant was acquitted of three counts of second degree assault, but convicted of resisting arrest and disorderly conduct. Appellant was sentenced to a term of three years incarceration and noted this timely appeal.

STANDARD OF REVIEW

> A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard . . . [*i.e.*, whether the exercise of that discretion is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Stabb v. State, 423 Md. 454, 465 (2011) (quoting *In re Don Mc.*, 344 Md. 194, 201 (1996) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). The Court of Appeals has also stated

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Id. (citing *Gunning*, 347 Md. at 348).

DISCUSSION

A. Preservation — Timely Objection and Substantial Compliance

Appellant, while acknowledging that he did not submit exceptions to the trial judge's instructions *after* the court's charge to the jury, nevertheless asserts that his exception is preserved because the court "recognized his complaint, and noted his exception to the instructions."

The State, in response, cites Md. Rule 4-326(e) and argues that appellant did not object on the record promptly after the instruction was given and, therefore, failed to preserve the argument for our review.

Maryland Rule 4-325[5] governs jury instructions and provides, in part

> (c) **How Given.** The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

* * *

[5] Adopted April 6, 1984, eff. July 1, 1984. Current with amendments received through February 1, 2016.

> (e) **Objection**. 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.

(Emphasis supplied).

The Court of Appeals, in *Johnson v. State*, 310 Md. 681, 687 (1987), elaborated on the sequence of the court's charge *vis-á-vis* counsel's objection(s) thereto:

> 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. There are good reasons for [this] . . . . If the omission is brought to the trial court's attention by an objection, the court is given an opportunity to amend or correct its charge. Moreover a party initially requesting a particular instruction may be entirely satisfied with the instruction as actually given.

(Emphasis supplied).

Appellant's retort to the explicit requirement, under Md. Rule 4-326(e), that exceptions to the court's instructions be tendered after the court's charge to the jury is that his failure to object timely is cured by the fact that the trial judge stated that he noted the exception prior to the court's charge. Appellant's argument is patently answered by the reasoning of the Court of Appeals, in *Johnson*, *supra*.

Appellant presents the "alternative" argument that, if we determine that the acknowledgment of this exception is insufficient to preserve this issue for appeal, "there was at least substantial compliance with the preservation argument." The State acknowledges

that “this Court will recognize substantial compliance with Rule 4–325(e) under four conditions;” however, appellant has not met two of the conditions.

> Several conditions for the establishment of substantial compliance with Rule 4-325(e) emerge from *Bennett*: there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore v. State, 309 Md. 203, 209 (1987) (citing *Bennett v. State*, 230 Md. 562, 568–69 (1963)).

In the case *sub judice*, appellant posits that all four conditions are satisfied, but the State asserts that appellant failed to meet the third and fourth conditions. Although the first and second condition are not disputed, they are both easily resolved. Appellant did object to the instruction, albeit, prior to the charge. The objection is also on the record, as the transcripts reflect.

Regarding the third condition, an objection that “must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record,” appellant, in his brief, states that “the request was supported by argument—that “a citizen has a right to resist an unlawful arrest.” We are unpersuaded. First, the *request* for jury instruction is not an *objection* to the instruction, or lack thereof. Accordingly, based on our review of the record, counsel failed to provide the court with a definite statement of the grounds for the objection. Furthermore, appellant does not argue that the grounds for the

objection are apparent from the record. Finally, the State posits that the "basis for the objection is far from clear, as the colloquy between defense counsel and the court is littered with segments that were 'indiscernible' to the transcriptionist." We agree. This condition has not been met.

The fourth condition requires that "the circumstances show that 'a renewal of the objection after the court instructs the jury would be futile or useless.'" Appellant states, in his brief, that "the court twice indicated that it would not give the requested instruction." Appellant also asserts that the court "lulled" counsel into believing that he had "perfected his challenge" by acknowledging the exception. The State argues that renewal of the objection was not futile or useless, but rather, unnecessary because the "instruction actually given addressed [appellant's] counsel's concern." We are not persuaded by either parties' assertion, as they pertain to this condition; however, there cannot be substantial compliance to preserve the argument without compliance with *all four conditions*. Accordingly, appellant did not substantially comply with Md. Rule 4–325(e) and the argument has not been preserved.

B. Requested Jury Instruction

Even if appellant's argument had been preserved for our review, the trial court would not have erred in declining to instruct the jury as to the legality of the arrest. Appellant contends that the lawfulness of the arrest and the reasonableness of appellant's resistance, *vel non*, was factually generated at trial; specifically, because the police officers were not in

uniform or displayed any indicia that they were policeman. In sum, appellant proposes that his requested instruction regarding the right to resist an unlawful arrest is an accurate statement of law, supported by his testimony and not fairly covered by the instructions actually given.

In response, the State does not dispute that appellant's requested instruction is both a correct statement of the law and supported by appellant's testimony. The State argues, however, that the instructions actually given fairly cover the substance of appellant's requested instruction and, accordingly, this is where we shall focus our review.

> [T]o merit an instruction, the issue as to which the request is made must have been generated by the evidence adduced. For an instruction to be factually generated, the defendant must produce "some evidence" sufficient to raise the jury issue. As we described in *Martin*, this standard is a fairly low hurdle for a defendant:
>
> > *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; *it may emanate solely from the defendant*. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support [the defense], the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defense does not apply.

Arthur v. State, 420 Md. 512, 525–26 (2011) (Emphasis supplied) (citing *State v. Martin*, 329 Md. 351, 356 (1993)).

> Even considering this low threshold of "some evidence,"
>
> The court need not grant a requested instruction if the matter is fairly covered by instructions actually given. In other words, we have interpreted this rule to require a trial judge to give a requested instruction that *correctly states the applicable law* and that has not been *fairly covered in instructions actually given*.

Id. at 525 (Emphasis supplied) (internal quotation marks omitted) (citing MD. RULE 4–325(c); *Martin*, 329 Md. at 356).

According to the State's brief, the portion of the instruction, at issue, that was actually given instructed the jury as follows:

> The [appellant] is charged with the crime of resisting arrest. In order to convict [appellant] of resisting arrest the State must prove, one, that a law enforcement officer arrested or attempted to arrest [appellant.] Two, that [appellant] knew that a law enforcement officer arrested or was attempting to arrest him or her. Three, that [appellant] intentionally refused to submit to the arrest and resisted the arrest by force or threat of force. *And four, that the arrest was lawful, that is that the officer had probable cause to believe that the defendant committed the crime, in this—in this case a failure to obey the lawful order of a police officer.*

(Emphasis supplied).

Although the Court of Appeals, in *Arthur*, determined that "the only way for the appellant to have a fair trial is for the jury to understand the law concerning his right to resist an unlawful arrest," the Court focused on the potential ambiguity that the language of the pattern jury instruction created. Specifically, the Court noted that the "reasonable grounds" language of the jury instruction could be used to describe two different standards and discerning the correct use could be ambiguous, especially for a jury. When probable cause

is at issue and, without clarifying whether that element of the crime of resisting arrest had been met, the Court opined that

> a reasonable juror, without the benefit of an instruction explicating this point, might believe that, when a police officer proclaims that a suspect is under arrest, he must yield, regardless of the circumstances and wait for relief (or release) until he is taken before a judicial officer.

Id. at 528. The Court, citing commentary on the pattern instruction, noted that "where probable cause is an issue, the court should draft a fact-specific version of, or supplement to, the requirement that the officer had reasonable grounds to believe that the defendant was committing [or] had committed [a] crime." *Id.*

In the case *sub judice*, appellant relies heavily upon *Arthur* to support his argument; however, *Arthur* employed the prior version of the pattern jury instruction. The instruction actually promulgated in the instant case is modeled on the *current* pattern jury instruction on resisting a warrantless arrest. The current version[6] addresses the potential ambiguity concerning the element of probable cause, when it is at issue, that plagued the earlier version of the pattern instruction. The current instruction defines "probable cause" as "less than a certainty," and that it "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

[6] MPJI-Cr 4:27.1 RESISTING ARREST (WARRANTLESS), *Maryland State Bar Standing Committee on Pattern Jury Instructions* (2d ed., 2013 Supp.).

misdemeanor in the officer's presence." Therefore, the "fact-specific supplement" that the Court of Appeals prescribed in *Arthur* is no longer necessary under the current version.

Furthermore, after examining the instruction actually given, the defense of resisting an unlawful arrest is fairly covered. The instruction states, *inter alia*, that the arrest must be *lawful* in order to charge appellant with the crime of resisting arrest. Significantly, the instruction states that an arrest is lawful when "the officer had probable cause to believe that the defendant committed the crime." Although the instruction also provides that, "failure to obey a police officer is a misdemeanor, the instruction also states, "in this case [the criminal offense is] failure to obey the *lawful* order of a police officer." In his brief, appellant asserts that,

> [g]iven that the jury was told that the mere failure to obey a police officer was a misdemeanor, the jury could reasonably believe that a person was required to passively obey *any* order, without limitation, and thus would have to obey even an order utilized to effect an unlawful arrest.

(Emphasis in original).

We disagree. The distinguishing use of the word *lawful* to describe both the arrest and the police officer's order infers that the inverse is true, *i.e.*, resisting an *unlawful* arrest or an *unlawful* order by a police officer does *not* constitute the crime of resisting arrest. Accordingly, we hold that the instruction actually given, in the instant case, fairly covered

appellant's requested instruction. Consequently, the judgment of the Circuit Court for Anne Arundel County is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.