UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1280

September Term, 2016

DONNELL CANDY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 12, 2017

Donnell Candy, appellant, was arrested on February 6, 2016, and charged with second-degree assault and resisting arrest. In August 2016, a two-day jury trial was held in the Circuit Court for Baltimore City. At the conclusion of the trial, Candy was acquitted of the second-degree assault charge and convicted of resisting arrest.

Candy appealed, and now presents two questions for our review:

1. Did the trial court err when it instructed the jury on resisting arrest?

2. Did the trial court abuse its discretion when it permitted the prosecutor to lay a foundation for refreshing a witness's recollection during defense counsel's cross-examination of the witness?

For the following reasons, we answer no to Candy's questions and affirm the judgment of the circuit court.

BACKGROUND

Candy was charged with second-degree assault and resisting arrest in connection with events that occurred on February 6, 2016. A two-day jury trial commenced on August 1, 2016 in the Circuit Court for Baltimore City. Testimony adduced at trial revealed the following facts.

On February 6, 2016, at around 11:45 a.m., Officer Sufian Hassan received a call about two males selling drugs behind a building on North Carey Street. When Officer Hassan arrived at the scene, he saw Candy and another man facing each other. Candy was holding a large amount of money and a plastic bag with objects in it. Officer Hassan witnessed Candy hand the other man small objects and collect money in return. Officer

Hassan then said, "Stop, police; police, stop." At that point, the two men ran in opposite directions, with Candy running towards Officer Hassan. The back-up officer, Officer Ryan Ernst, arrived and chased after the other suspect.

Candy ran at Officer Hassan and hit him in the neck and chin with his forearm, after which a "brief struggled ensued." Officer Hassan could not gain control of Candy's hands, so he tried to deploy his taser, but it did not work. Officer Ernst heard Officer Hassan yelling for help, so he stopped chasing the other suspect and returned to help Officer Hassan. Together they were able to get Candy to the ground. While he was on the ground, Candy bit Officer Hassan's thumb and pulled his fingers. Officer Hassan took the cartridge out of his taser and deployed it on Candy's leg. It was at that point that Candy put his hands behind his back and was handcuffed. The officers recovered $440 from Candy. No drugs were recovered.

At the conclusion of the trial, Candy was found not guilty on the second-degree assault charge and convicted of resisting arrest. The court imposed a three-year sentence of imprisonment, with two years suspended and three years of probation. Candy filed a timely appeal.

Additional facts will be provided below as necessary.

DISCUSSION

I. Jury Instruction on Resisting Arrest

Prior to the trial, defense counsel filed a motion to suppress arguing that the police did not have probable cause to arrest Candy. The court found that Officer Hassan did have probable cause to make the arrest, and therefore denied the motion.

At the conclusion of the trial, the parties discussed prospective jury instructions. The court informed them that as part of the instruction on resisting arrest, it was going to announce that the court had already ruled that the arrest was lawful. Defense counsel objected to the language of this instruction. The court then gave the following instruction to the jurors:

> Defendant is charged with the crime of resisting arrest. In order to convict Defendant of resisting arrest, the State must prove, one, that a law enforcement officer arrested or attempted to arrest the Defendant.
>
> Two, Defendant knew that the law enforcement officer was attempting to arrest him. Three, the Defendant intentionally refused to submit to the arrest and resisted arrest by force or threat of force.
>
> **And, four, that the arrest was lawful. That is that the officer had probable cause to believe the Defendant had committed a crime.**
>
> **I have ruled in a pre-trial motion that the officer had probable cause to believe that Defendant had committed a crime; that is, distribution of a controlled dangerous substance.**
>
> Probable cause exists where the facts and circumstances, taken as a whole, would lead a reasonable law enforcement officer to believe that the Defendant had committed a felony or was committing a felony in the officer's presence.

(Emphasis added). Defense counsel renewed its objection to the language of the instruction on resisting arrest after it was read to the jury.

After closing arguments, the court recessed for lunch. When the parties returned after lunch, defense counsel raised the matter again and provided the court with a case on the issue. After reviewing the case, *Monk v. State*, 94 Md. App. 738 (1993), the court agreed with defense counsel that it needed to correct the jury instruction it had given. The following discussion then took place:

> The Court: I have to correct it.
>
> [State]: Yes. There's—you can give another instruction saying: You heard me mention before that I ruled this way. You are not to give any weight to the way I ruled (inaudible).
>
> The Court: That sounds—I'll say something like that.
>
> [State]: You just have to be instructive in your voice.
>
> The Court: But, I'm going to give them the whole instruction.
>
> [State]: Give them the whole instruction and tell them your decision is not binding on them. They could—they have to make up their own minds.
>
> The Court: I will tell them that.
>
> **[Defense Counsel]: Thank you, Your Honor.**

(Emphasis added).

The court brought the jury back and gave the following instruction:

> Before we recessed for lunch, I instructed you on the applicable law. I want to make a correction on one of the

> instructions. I told you the following before lunch: 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.
>
> And, two, Defendant knew that the law enforcement officer was arresting or attempting to arrest him. And, three, Defendant intentionally refused to submit to the arrest and resisted arrest by force, or threat of force.
>
> **And, four. This is where I have to correct myself.** I told you before lunch that the arrest was lawful and that the State must prove—excuse me; the State must prove that the arrest was lawful.
>
> That is that the officer has probable cause to believe Defendant had committed the crime of distribution of controlled dangerous substances. Now, on that item four, I told you that I had made a ruling—a preliminary ruling on a motion to suppress the arrest; that there was probable cause.
>
> That was a ruling I made for the purposes of that motion. It really was relating to any potential drugs**. The comment that I made, I would ask you to eradicate it from your mind.**
>
> **You are in no way bound by my decision that—where I said there was probable cause. Now, I'm going to come to probable cause; and this is an issue that you have to decide and you have to be convinced, like in the other elements of the crime beyond a reasonable doubt that probable cause exists.**

(Emphasis added). The court then went through the elements of probable cause before concluding by telling the jurors:

> But, I want to go back. **What I told you before about my ruling should not be considered in any way by you.**
>
> **But, it is your duty as jurors to determine whether probable cause exists and the State had the—has the burden of**

> **proving that** and any other element of the assault or resisting arrest.

(Emphasis added). When the court finished giving this corrected version of the jury instructions, defense counsel stated, "Thank you, Your Honor." At that point, the jury exited the courtroom and began deliberations.

On appeal, Candy now argues that the trial court failed to adequately correct the jury instruction. Candy acknowledges that the court gave a reinstruction, but argues that it "did not cure the prejudice the first instruction caused," because "this was a situation where the bell could not be unrung." Candy asserts that probable cause was a hotly disputed issue at trial and that it was not believable that the jury "was able to disregard its knowledge that the court had previously determined that probable cause in fact existed."

However, Candy has failed to preserve any argument on this issue. *See* Md. Rule 8-131(a) (providing that "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"). The trial court acknowledged that it had initially erred and agreed to give a curative instruction. Defense counsel made no objection to the corrected instruction, nor did she make a motion for a mistrial. *See* Md. Rule 2-517(c) (requiring a party, "at the time the ruling or order is made or sought," to "make [ ] known to the court the action that the party desires the court to take or the objection to the action of the court"); Md. Rule 4-325(e) (stating that "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"). Moreover, defense counsel apparently approved of the instruction, and even thanked the court after it read the curative instruction to the jury. As the State has argued, "any argument that the instruction was somehow insufficient to cure the error is an appellate afterthought that has been waived"; therefore, the issue is not preserved for appellate review.[1] *See Paige v. State*, 222 Md. App. 190, 200 (2015) ("Because defense counsel did not object to the supplemental jury instruction that was provided by the trial court at the time it was given, any question regarding the content of the supplemental instruction was not properly preserved for appellate review"); *Lamb v. State*, 141 Md. App. 610, 644-45 (2001) (Where an objection is sustained, a curative instruction given, and no further relief is requested, there is nothing for the appellate court to review).

II. Refreshing Officer Hassan's Recollection

During the cross-examination of Officer Hassan, defense counsel began to question him about what he saw when he first observed Candy and the other male. The following colloquy occurred:

[1] Even if Candy had preserved this issue for review, there was no error. "If a curative instruction is given, the instruction must be timely, accurate, and effective." *McIntyre v. State*, 168 Md. App. 504, 525 (2006) (Citation and internal quotation marks omitted). The court did precisely what it was required to do, and gave a thorough curative instruction. While doing so, the court repeatedly told the jurors to disregard the earlier instruction it had given them. "[O]ur legal system necessarily proceeds upon the assumption that jurors will follow the trial judge's instructions." *Alston v. State*, 414 Md. 92, 108 (2010) (quoting *State v. Moulden*, 292 Md. 666, 678 (1982)). Candy has given this Court no reason to believe that the jurors in this case failed to follow those instructions.

[Defense Counsel]: And, you didn't actually see an exchange or anything between these two individuals; is that correct?

[Officer Hassan]: Um, actually, I could see them exchanging stuff in their hands; but I—do I believe that, as I was walking up—if I may refer to my notes real quick?

[Defense Counsel]: Objection, Your Honor.

The Court: Sustained. You can't look at that without there being a legal issue raised.

[Officer Hassan]: Okay.

[State]: And, may I ask a question, Your Honor?

The Court: Go ahead.

[State]: Just to—

[Defense Counsel]: Objection, Your Honor. I—

The Court: Excuse me.

[State]: It's a voir dire issue.

The Court: I note your objection. He has a right to ask him.

[State]: And, would it help to refresh your recollection to use your notes to answer [defense counsel's] question?

[Officer Hassan]: Yes.

[State]: Your Honor, I'd ask that he be allowed to refer to his notes.

The Court: He'll be allowed to use his notes.

[Pause as Officer Hassan reviewed his notes.]

[Officer Hassan]: Um, as I approached Mr. Candy—well, as I entered into the cut where [Candy] was standing, I observed Mr. Candy handing the gentleman small objects; and that's when he collected the money with his left hand.

"Generally speaking, the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of such discretion." *Oken v. State*, 327 Md. 628, 669 (1992). Candy contends that the court abused its discretion when it permitted the State to refresh Officer Hassan's recollection during defense counsel's cross-examination. Candy argues that under *Oken*, the State had to first establish that Officer Hassan had exhausted his recollection before he could use a document to refresh his recollection.

As the State points out, the actual language in *Oken* is much broader. The Court of Appeals stated that:

> While it is true that in many circumstances, an examining attorney must first establish that a witness's memory is exhausted before refreshing the recollection of that witness, **laying such a foundation is not an absolute prerequisite**. Instead, the question of whether a witness's recollection may be refreshed by a writing or some other object **depends upon the particular circumstances present in each case, and therefore, is committed to the sound discretion of the trial judge**.

Oken, 327 Md. at 672 (Emphasis added) (Internal citation omitted). Although Officer Hassan did not state that he had no memory of what occurred, it was clear from his testimony that he needed to refresh his recollection given that he specifically asked the

court for a chance to review his notes. Md. Rule 5-611(a) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." The court properly exercised its broad discretion by allowing Officer Hassan to testify with a more complete recollection and avoided any needless delay that would have occurred by requiring the prosecutor to revisit the same issue again on redirect examination.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.