UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1319

September Term, 2016

FRANK JOSEPH DAVIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: June 9, 2017

FACTS AND LEGAL PROCEEDINGS

On the morning of 17 March 2015, Douglas Law, a meter foreman for Southern Maryland Electric Cooperative ("SMECO"), visited the Waldorf, Maryland, home of Frank Joseph Davis with the intention to replace his residential electric meter with one that could be read remotely from the street.[1,2] Accompanied by SMECO meter technician Brian Douglas, Law knocked on Davis's door. Davis refused to permit them to exchange the existing meter. Pursuant to the policies described in the SMECO Retail Electric Service Tariff,[3] Law called the Charles County Sherriff's Department for assistance in carrying out peaceably the meter swap.

Law and Douglas returned to Davis's home with several police officers, including Corporal John Freeman. Again, Davis rebuffed their efforts. They left, and, after considering their legal options, returned that afternoon. When Davis did not answer his door on this occasion (although present in the home), the sheriffs instructed Law and Douglas to begin working on the existing meter on the outside of Davis's home. Davis came outside and demanded to see a warrant. The officers told Davis to "back off" and

[1] This action is authorized by the governmentally-approved SMECO retail tariff between SMECO and its customers that governs its provision of electricity service.

[2] Three days earlier, Davis turned away SMECO employees who sought to perform the same work on Davis's property.

[3] In particular, the tariff states that SMECO "shall have access at reasonable times to the premises of any Customer for the purpose of . . . replacing its meters or other property."

"let them do their job," and that the SMECO personnel had the lawful right to be on the property.

Davis approached Freeman aggressively, stating, "I'm going to fuck you up, son." According to testimony, Davis "balled up his fists," "took an aggressive step toward [the officers]," assumed a "fighting stance," and "basically charged [Freeman] and was charging the SMECO people." Freeman took Davis to the ground for an arrest as Davis continued to resist. With the assistance of the other officers, Freeman handcuffed Davis and placed him under arrest. Freeman testified that, in response to hearing or seeing the commotion, at least two neighbors stepped out of their houses to get a better look at what seemed amiss.

The State charged Davis in the District Court of Maryland, sitting in Charles County, with disorderly conduct and resisting arrest. The matter was transferred to the Circuit Court for Charles County for a jury trial. During jury selection, the State used its four peremptory challenges to strike African-American *venire* persons from the jury pool. Once the clerk advised the State that it had exhausted its strikes, defense counsel requested to approach the bench, whereupon, the following bench conference ensued:

> [DEFENSE COUNSEL]: So, the State's four p[er]emptory challenges were all exercised to eliminate African American jurors.
> THE COURT: Um, hmm.
> [DEFENSE COUNSEL]: So, I would just like to raise this issue at this time for the Court to possibly inquire of the State if there were race neutral reasons for striking those jurors.
> THE COURT: Okay.
> [STATE'S ATTORNEY]: I would just note that there are black females that when they were in the jury panel the State did not strike. So, there

> certainly was no prima facie the State believes was made. If Your Honor is making that finding, we can provide race neutral reasons.
> THE COURT: No. Two of them I was waiting for you to say strike because I would . . . if I was the State I would have stricken them, too, because based on their answers. It's . . . I think it's totally appropriate the strikes for the ones they did. Okay?
> [DEFENSE COUNSEL]: Yes.
> THE COURT: Alright.
> [DEFENSE COUNSEL]: Please note my exception.
> THE COURT: Okay.
> [DEFENSE COUNSEL]: Thank you, sir.

A jury convicted Davis on both counts at trial on 22 April 2016 in the circuit court. The court imposed, on 29 July 2016, a three-year suspended sentence for resisting arrest, a concurrent suspended sentence of 60 days for disorderly conduct, and three years of unsupervised probation. On appeal, Davis presents the following questions for our consideration:

1) Did the court err in denying a *Batson* challenge raised by the defense?

2) Did the court err in admitting State's exhibit one?

3) Was the evidence insufficient to convict Mr. Davis?

Additional facts will be supplied as pertinent to our responses to the questions presented.

ANALYSIS

I. The Court did not Err in Denying Defense Counsel's *Batson* Challenge.

A. Arguments

Davis argues that the trial court violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and Articles 24 and 46 of the

Maryland Declaration of Rights when, in response to defense counsel's *Batson* challenge to the State's use of its four peremptory strikes against African-American *venire* persons, the court did not find a *prima facie* case of discrimination. *Batson v. Kentucky*, 476 U.S. 79 (1986). The State responds that "the reasons for the strikes were self-evident, and the net effect of the strikes did not eliminate jurors of a particular race from the panel." Davis retorts that, at most, racially non-discriminatory reasons for striking only three of the four stricken *venire* persons may have been self-evident: however, one of the four, Juror 156, answered no questions during *voir dire*, whereas the other three, Jurors 107, 157, and 160 provided answers that gave rise to race-neutral bases to strike. "The implication of the state's own brief is that Juror 156 was struck for no discernable reason other than race."

B. Standard of Review

Batson challenges are supposed to proceed at trial according to three steps: (1) the party invoking *Batson* must present a *prima facie* case of intentional discrimination; (2) if the trial judge is satisfied that step one has been met, the burden transfers to the non-moving party and the judge should ask the opposing party to present any race-neutral reasons for its strikes; and, (3) based on what the parties argued, the trial court determines whether intentional discrimination was proven. *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Ray Simmons v. State*, 446 Md. 429, 132 A.3d 275 (2016).

In 2016, the Maryland Court of Appeals elucidated further each of these three steps:

At step one, the party raising the *Batson* challenge must make a prima facie showing—produce some evidence—that the opposing party's peremptory challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases. *See Purkett v. Elem,* 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). "[T]he prima facie showing threshold is not an extremely high one—not an onerous burden to establish." *Stanley v. State,* 313 Md. 50, 71, 542 A.2d 1267 (1988). A prima facie case is established if the opponent of the peremptory strike(s) can show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California,* 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L.Ed.2d 129 (2005) (internal quotation marks omitted). Merely "a 'pattern' of strikes against black jurors in the particular venire . . . might give rise to or support or refute the requisite showing." *Stanley,* 313 Md. at 60–61, 542 A.2d 1267 (citing *Batson,* 476 U.S. at 97, 106 S. Ct. 1712).

If the objecting party satisfies that preliminary burden, the court proceeds to step two, at which "the burden of production shifts to the proponent of the strike to come forward with" an explanation for the strike that is neutral as to race, gender, and ethnicity. *Purkett,* 514 U.S. at 767, 115 S. Ct. 1769. A step-two explanation must be neutral, "but it does not have to be persuasive or plausible. Any reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation." *Edmonds,* 372 Md. at 330, 812 A.2d 1034 (citation omitted). "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation." *Hernandez v. New York,* 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). The proponent of the strike cannot succeed at step two "by merely denying that he had a discriminatory motive or by merely affirming his good faith." *Purkett,* 514 U.S. at 769, 115 S. Ct. 1769. Rather, "[a]lthough there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause," the striking party "must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge." *Miller–El,* 545 U.S. at 239, 125 S. Ct. 2317 (alterations omitted); *Stanley,* 313 Md. at 61, 542 A.2d 1267 (quoting *Batson,* 476 U.S. at 98 n. 20, 106 S. Ct. 1712).

If a neutral explanation is tendered by the proponent of the strike, the trial court proceeds to step three, at which the court must decide "whether the opponent of the strike has proved purposeful racial discrimination." *Purkett,* 514 U.S. at 767, 115 S. Ct. 1769. "It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Johnson,* 545 U.S. at 171,

> 125 S. Ct. 2410 (quoting *Purkett,* 514 U.S. at 768, 115 S. Ct. 1769) (emphasis omitted); *see also Edmonds,* 372 Md. at 330, 812 A.2d 1034. At this step, "the trial court must evaluate not only whether the [striking party's] demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the [striking party]." *Snyder,* 552 U.S. at 477, 128 S. Ct. 1203. Because a *Batson* challenge is largely a factual question, a trial court's decision in this regard is afforded great deference and will only be reversed if it is clearly erroneous. *Edmonds,* 372 Md. at 331, 812 A.2d 1034.

Ray-Simmons, 446 Md. at 436–37, 132 A.3d at 279–80.

C. So, What About This Case?

The judge in the present case seemed to determine at step one of the *Batson* analysis that the defense did not mount successfully a *prima facie* case of the State's purposeful discrimination in the striking of the four African-American *venire* persons. Because we agree that the *voir dire* answers of three of the relevant stricken jurors provided self-evident, race-neutral reasons for the State to strike them,[4] the principal quandary for our analysis is whether the absence of *any* discernable race-neutral reason to strike Juror 156 compels an inference of discriminatory purpose.

[4] During jury selection, three of the stricken jurors made the following statements. Juror 107 stated, "I was convicted of possession of marijuana, possession with intent to distribute[,] and like 5 DWIs like twenty years ago." Juror 160 stated that he was robbed in Baltimore City and had "several unpleasant experiences with the cops here," such as being "pulled over[,] . . . [f]ollowed, profiled, [and] . . . [w]hen I was sixteen was the first time I had a pistol pulled on me by a police officer here." Juror 157 stated that he was convicted of simple assault and served six months; additionally, he stated that he has "two uncles that are Sheriffs."

On this point, Davis relies principally upon *Mejia v. State*, 328 Md. 522, 616 A.2d 356 (1992), an opinion in which the Court of Appeals held that the petitioner established a *prima facie* case of purposeful discrimination by challenging as improper the State's peremptory strike of a single juror. Although, as Davis points-out correctly in his reply brief, "[a] prima facie case of discrimination can be made upon the improper strike of a single juror," the facts of *Mejia* differ substantially from those before us. In *Mejia*, the petitioner was Hispanic, and the stricken juror was the only Hispanic individual in the jury pool. "By that one strike, one hundred percent of the Hispanics in the venire were stricken." *Mejia*, 328 Md. at 539, 616 A.2d at 364. Here, after the State used its peremptory strikes against the four African-American *venire* persons, African-Americans remained still, apparently, in the jury pool.[5] This does not mean necessarily that the

[5] "As is sometimes the case when a *Batson* issue reaches an appellate court, we know little about the racial and gender composition of the jury venire or of the jury that was ultimately selected." *Ray-Simmons v. State*, 446 Md. 429, 451, 132 A.3d 275, 288 (2016) (McDonald, J., dissenting). The record includes "Juror Profile" sheets that include each juror's name, gender, age, reporting number, education, marital status, city and zip code, occupation, and spouse occupation. The profiles do not indicate the race of the jurors.

During the *Batson* exchange at Davis's trial, the State stated, in response to Defense Counsel's request for race-neutral reasons for the State's strikes: "I would just note that there are black females that when they were in the jury panel the State did not strike." In his reply brief, Davis does not contest the accuracy of the State's assertion that "the net effect of the strikes did not eliminate jurors of a particular race from the panel." Davis challenges only the statement's relevance and legal correctness, arguing, "there is no burden on the defendant to show that the State has eliminated jurors of a particular race." Although there is no such burden, had the State eliminated all African-American *venire* persons from the jury pool, the facts of this case would align, in Davis's favor,

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State's strikes were race-neutral. Had the State wanted to eliminate all African-Americans from the jury pool, it did not have enough strikes to do so. Thus, *Mejia* does not compel automatically the conclusion, in this case, that Davis established a *prima facie* case of discriminatory purpose merely because the State struck also Juror 156; rather, *Mejia* stands for the proposition that a single strike may be sufficient to satisfy a defendant's burden in certain circumstances.

The circumstances are to be reviewed in their totality: "[a] prima facie case is established if the opponent of the peremptory strike(s) can show 'that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Ray-Simmons*, 446 Md. at 436, 132 A.3d at 279 (quoting *Johnson v. California,* 545 U.S. 162, 168 (2005)). "At step one, the party raising the *Batson* challenge must make a prima facie showing—produce some evidence—that the opposing party's peremptory challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases." *Ray-Simmons*, 446 Md. 436, 132 A.3d 279. "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97.

(…continued)
more closely with those of *Mejia*. In any event, no signs in the record point toward a conclusion that the State eliminated all African-Americans from the jury.

At *Batson* step one in the present case, defense counsel attempted to "produce some evidence" of intentional discrimination by stating that "the State's four p[er]emptory challenges were all exercised to eliminate African American jurors." The judge rejected this as a *prima facie* showing of purposeful discrimination because, as he stated, he (apparently stepping into the prosecutor's shoes – not a favored approach) would have stricken two of those jurors based on their answers. Review of the record indicates that a third juror of the group also disclosed in his answers elicited in *voir dire* reasons for striking him that were non-racial in nature. The striking of four African-American *venire* persons appears facially to be a pattern, but the self-evident, race-neutral bases for three of the strikes undermines the argument that such a pattern signifies discriminatory intent here. Further, because the record, as to the other three stricken jurors, revealed race-neutral justifications for striking them, when we focus only on Juror 156, it is hard to say that striking one individual constitutes a pattern (or a *prima facie* showing) on this record.

In search of other indicia of discriminatory purpose, a court may look also to "the prosecutor's questions and statements during *voir dire* examination . . . ." *Batson*, 476 U.S. at 97. Here, the State's only race-related statement was its volunteering a *Batson* step two response: "I would just note that there are black females that when they were in the jury panel the State did not strike." This statement, attempting to swat away the defense's purported *prima facie* case of intentional discrimination, gives rise only to the inference that the State sought to preempt a common *Batson* challenge, that striking all

members of a given race may give rise to an inference of purposeful discrimination.[6] We do not find the State's statement to permit such an inference.

In *Mejia*, the striking of a single juror gave rise to an inference of purposeful discrimination because the stricken juror was the only Hispanic individual in the jury pool. Here, by contrast, the State's assertion that African-Americans remained in the jury pool is unchallenged. Because there were race-neutral reasons to strike three of the four jurors stricken by the State, we do not find a "pattern" or *prima facie* showing of discriminatory intent based on the unknown basis of a single strike, that of Juror 161. Finally, none of the "prosecutor's questions and statements during *voir dire*" give rise to an inference of discriminatory purpose. *Batson*, 476 U.S. at 97. Thus, we determine that the trial judge did not err in rejecting defense counsel's attempt to produce a *prima facie* case of purposeful discrimination.[7]

[6] Had the judge allowed the proper *Batson* interplay to reach step two, this statement would fail surely to carry the State's burden of producing a race-neutral explanation for its strikes because the statement is, on its face, race-based. The State hinted, however, that it had further race-neutral justifications for its strikes.

[7] Notwithstanding our holding, this record reflects some basic confusion about *Batson* procedures. By articulating a basis for which he would have stricken two of the jurors (pre-empting the State the necessity of responding), the judge appears to have deviated from the prescribed *Batson* process. The judge should have either rejected the *prima facie* case at step one and ended the inquiry, or required the State to offer race-neutral reasons for the strikes. By stepping-in to offer his own reasons for two of the State's strikes, the judge risked muddying the waters of whether he rejected Davis's offering at step one, or instead had moved to step two, performing the State's duty for it, before moving to step three where he found that the reasons that were supposed to have been provided by the State outweighed the "case" made by defense counsel.

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II. The Court did not Err in Admitting the State's Exhibit One

A. Arguments

Davis argues that

> . . . the court failed in admitting [the S]tate's exhibit one, the 59-page-long retail electrical service tariff of the Southern Maryland Electric Cooperative, which outlines at length the rules, regulations, and practices regarding SMECO's delivery of retail electricity. The tariff was not disclosed until the morning of trial, and the court['s] failure to exercise its discretion in fashioning a remedy for this discovery violation requires reversal.

The State retorts that no discovery violation occurred because the relevant legal standard, Md. Rule 4-263, applies to materials the State intends to use at trial, and "the State could not *intend to use* a document about which . . . it *did not know*." (emphasis in original). Further, according to the State, the exhibit was publicly available and made known specifically to SMECO members, including Davis.

B. Standard of Review

> Discovery questions generally involve a very broad discretion that is to be exercised by the trial courts. Their determinations will be disturbed on appellate review only if there is an abuse of discretion. A trial court's factual findings are not upset unless clearly erroneous. The application of the Maryland Rules, however, to a particular situation is a question of law,

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Moreover, the judge's specific statements on the record raise additional questions. For example, why, in his explanation for why he found apparently no *prima facie* case of discriminatory intent, did he state only that he would have stricken two of the four jurors based on their *voir dire* answers? Which two? What about the other two stricken jurors, (only) one of whom provided during *voir dire* an ostensible, race-neutral reason for striking him? A better practice is to follow the "drill."

> and we exercise independent *de novo* review to determine whether a discovery violation occurred. Where a discovery rule has been violated, the remedy is, in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse.

Cole v. State, 378 Md. 42, 55–56, 835 A.2d 600, 607 (2003) (quotation marks and citations omitted).

C. Analysis

Because the outcome of this argument may bear on the sufficiency of the evidence question, we shall address it.

"The general objectives of Maryland's criminal discovery rules are to assist the defendant in preparing his or her defense and to protect the accused from unfair surprise." *Cole*, 378 Md. at 58, 835 A.2d at 608–09. To accomplish these ends, Md. Rule 4-263 sets forth the discovery requirements of parties to a criminal case in circuit court. Subsection (d)(9) mandates, for example, the State's disclosure of evidence for use at trial, requiring provision of "[t]he opportunity to inspect, copy, and photograph all documents . . . that the State's Attorney intends to use at a hearing or at trial[.]" Moreover, "[e]ach party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly." Md. Rule 4-263(j).

Here, it was not until the day before trial, during a motions proceeding, that the State learned of Davis's defense theory of the case, that the SMECO employees entered

unlawfully his property. Thus, according to the State, "[i]t was only once the defense articulated that theory that the State had to establish SMECO's right to be on the land." Before this point in time, therefore, the State could not have *intended* to use this document at trial, a necessary condition of mandatory disclosure under Md. Rule 4-263(d)(9). We noted, moreover, in *Frances v. State*, 208 Md. App. 1, 27, 56 A.3d 286, 302, n.17 (2012), that, because the State's awareness of the need to resolve an inconsistency between witness statements did not arise until trial, it had no duty to disclose the relevant evidence during discovery ("As this inconsistency obviously did not arise *until trial,* the State was not required to disclose the pretrial statements in discovery.") (emphasis in original).

The purpose of Md. Rule 4-263, again, is to prevent unfair surprise. Davis argues that "[w]ithout any knowledge or reason to know of the document's existence, defense counsel was deprived of the opportunity to inspect and copy the document, or reasonably prepare for its use." Davis, as a member of SMECO, however, had reason to know of the document's existence, and based on his argument that SMECO had no right to be on his property, he had reason to know that SMECO's policies and practices would be relevant to the case. We agree with the State, ultimately, that it "could not produce what it did not have and what it did not know it needed." We determine, therefore, that the trial judge did not commit clear error or abuse his discretion by overruling Davis's objection to the admission of the SMECO document.

III. The Evidence was Sufficient to Convict Davis.

A. Arguments

Davis argues, finally, that the evidence was insufficient to sustain his convictions for disorderly conduct and resisting arrest. Arguing that he did not initiate any disorder or disturbance, Davis states that he "had not done anything disturbing or said anything that could disturb the peace until he was subject to unlawful police action." Davis maintains that, rather than resisting arrest, he exercised merely his lawful right to refuse a warrantless entry.[8]

The State ripostes that Davis "relies on a doubly flawed premise: that (1) he was acting in a lawful manner in response to (2) unlawful police conduct."

B. Standard of Review

The Court of Appeals, in 2014, articulated the standard of review in criminal law cases for appellate claims of insufficiency of evidence:

> In *Derr v. State*, 434 Md. 88, 129, 73 A.3d 254, 278–79 (2013), we recently reiterated the standard of review governing appellate review of the sufficiency of evidence to sustain a conviction, stating:
>
> > When determining whether the State has presented sufficient evidence to sustain a conviction, we have adopted the Supreme Court's standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979) (emphasis in original) (citation omitted), namely, "whether, after viewing the

[8] Davis's appellate counsel argues anticipatorily in his opening brief that the State may raise non-preservation because "[b]y failing to raise [at trial] any argument about Mr. Davis's intention to disturb the peace, and his right to reasonably resist an unlawful entry on his property, trial counsel denied Mr. Davis effective assistance [of counsel]." The State does not raise in its brief, however, any argument that trial counsel failed to preserve these contentions for appeal.

> evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Yates v. State,* 429 Md. 112, 125, 55 A.3d 25, 33 (2012), *Titus v. State,* 423 Md. 548, 557, 32 A.3d 44, 49–50 (2011). In applying this standard we have stated:
>
> > The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We recognize that the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.
>
> *Titus*, 423 Md. at 557–58, 32 A.3d at 50 (quotations and citations omitted).

Hobby v. State, 436 Md. 526, 537–38, 83 A.3d 794, 800–01 (2014).

C. Analysis

Md. Code, Criminal Law Art., § 10-201(c)(2) (2002, 2012 Repl. Vol.), states that "[a] person may not willfully act in a disorderly manner that disturbs the public peace." In addition, Md. Code, Criminal Law Art., § 9-408(b)(1) (2004, 2012 Repl. Vol.), states that "[a] person may not intentionally . . . resist a lawful arrest . . . ."

Davis argues, citing COMAR 20.31.02.02 and the SMECO Customer Rights Pamphlet, that "[w]hen, as here, a customer simply fails 'to permit the utility or its agents to have reasonable access to its equipment located on or in the customer's premises,'

COMAR 20.31.02.02 provides that the utility 'may terminate service' with notice." Instead of engaging this remedy, according to Davis, "the sheriffs, *sua sponte*, entered Mr. Davis's property to enforce the contractual rights of a private company against a customer." Thus, "[t]o the extent to which Mr. Davis made aggressive movements or used threatening language, such movements and actions were reasonable efforts at self-help under the circumstances." Davis argues that his actions were appropriate under *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), where the Court of Appeals reversed disorderly conduct and resisting arrest convictions. After exiting a car pulled over by the police, Diehl refused a police order to get back into the car, and instead shouted obscenities at the officer. Diehl fled the scene and was apprehended a half hour later by another officer, which arrest Diehl resisted. The Court held that "Diehl used reasonable force to resist an unlawful arrest" and that "[he] had a right to verbally protest this unlawful exercise of police authority." *Diehl*, 294 Md. at 478, 480, 451 A.2d at 122-23.

Davis, however, did not "simply fail[] 'to permit . . . reasonable access'" to his property by exercising lawfully reasonable force and First Amendment-protected speech. Davis escalated the confrontation, assuming a fighting stance and using fighting words: "come on," and, "I'm going to fuck you up." As the State argues, "*Diehl* permits an individual to protest unlawful conduct by responding *in a lawful manner*. But an individual's conduct in protesting police action cannot rise to the level of an assault, which formed part of the reason for Davis's arrest here in the first place." (emphasis in original). Further, by signing the service agreement with SMECO, he agreed to the

provision that SMECO "shall have access at reasonable times to the premises of any Customer for the purpose of reading, inspecting, testing, adjusting and otherwise caring for or replacing its meters . . . ."[9]

We determine first that a rational juror could have found that Davis resisted intentionally a lawful arrest because Davis had consented, via the SMECO service agreement, to SMECO having reasonable access to its meter on his property. A rational juror could have found the officers' presence justified by reasonable apprehension on the part of the SMECO personnel of resistance from Davis. Thus, given the lawful presence of SMECO and the police officers on Davis's property, Davis's threatening conduct could be viewed reasonably as giving rise to a lawful arrest, which arrest he resisted intentionally. Second, Corporal Freeman's testimony established that Davis's confrontation with the deputies and the SMECO personnel stimulated multiple neighbors to exit their homes to see what was afoot. Based on the evidence presented at trial, we determine that a rational trier of fact could find that Davis's aggressive behavior was disorderly, and that the commotion disturbed the peace of his neighbors. Thus, we hold that the evidence sufficed to convict Davis of resisting arrest and disturbing the peace.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[9] SMECO meter technician Douglas Law testified at trial that "[w]henever you sign up for electric service, you sign your name in the electric service . . . tariff . . . ."