Circuit Court for Howard County
Case No. 13-K-16-056519

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1655

September Term, 2016

TAVIAN RUFFIN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: October 2, 2017

Appellant, Tavian Ruffin, was indicted in the Circuit Court for Howard County, Maryland, and charged with second degree assault of Brandi Carney, violation of a protective order, resisting arrest, making a false statement to a police officer, second degree assault of a law enforcement officer (Officer Andrew Saffran), two additional counts of second degree assault of Officer Saffran, and one count of second degree assault of Officer James Tippett. Appellant was tried by a jury, and the court granted a motion for judgment of acquittal on the count charging second degree assault of Officer Tippett at the end of the State's case-in-chief. At the end of all the evidence, the State entered a *nol pros* as to second degree assault of a law enforcement officer. The jury acquitted appellant of second degree assault of Brandi Carney, but convicted him of violating a protective order and resisting arrest. When the jury was unable to reach a verdict on two counts charging second degree assault of Officer Saffran and the one count of making a false statement to a police officer, the court declared a mistrial as to those three counts.[1] Appellant was sentenced to ninety days for violating a protective order and three years for resisting arrest, all of which was suspended, to be followed by three years supervised probation.[2] Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial court err when it refused to instruct the jury on self-defense?

[1] According to the Maryland Judiciary Case Search web site, the State ultimately *nol prossed* these remaining counts. *See State v. Ruffin*, Circuit Court for Howard County, Case Number 13K16056519 (http://casesearch.courts.state.md.us/casesearch/)

[2] Appellant's sentences were to be served concurrently with a 25 year, all but 10 years suspended, sentence in an unrelated case.

2. Did the trial court abuse its discretion when it permitted Officer Saffran to testify after he violated the court's sequestration order?

For the following reasons, we shall affirm.

BACKGROUND

Brandi Carney petitioned for a protective order against appellant in June 2015. Thereafter, appellant was personally served with an initial Interim Protective Order, and a Final Protective Order that was issued against appellant on June 23, 2015. The Final Protective Order provided, in part, that appellant was not to abuse, threaten or harass Carney, and was not to contact or attempt to contact Carney, either at her residence or her place of employment during the duration of the protective order (June 22, 2016.).

On February 15, 2016, while that order was in effect, Carney woke to the sound of someone banging on the door to her residence at 1:00 a.m. When she opened the door, she found the "clearly intoxicated" appellant, who proceeded to enter her residence uninvited. They argued for approximately fifteen minutes over a matter of some money, with Carney telling appellant to leave. Near the end of that argument, Carney slapped appellant and appellant slapped her back. According to Carney, he "backhanded [her] across the face." After Carney told appellant she was calling the police, appellant left.

Following Carney's 911 call, Officer Jason Sagel and Officer Sara Dorsey, of the Howard County Police Department, arrived at Carney's residence at around 1:30 a.m. Prior to speaking to Carney, the officers noticed vehicle tire tracks and footprints in the newly fallen snow, leading towards and away from Carney's residence. The officers learned that appellant had just been to Carney's residence and assaulted her during the

course of an argument. They also learned, and verified, that there was a protective order in effect at the time.[3]

Carney described appellant to the officers and they obtained further identifying information from the Maryland Motor Vehicle Administration, including his name, his address, and his photograph. Officer Sagel also learned that there were two open arrest warrants for appellant, and broadcast a radio alert for other police officers to be on the lookout for appellant. That broadcast included information that appellant might be found at his residence at 6721 Iron Ore in Elkridge, Maryland.

Officer Andrew Saffran, along with Officer James Tippett, responded to that address at 1:30 a.m. on February 15, 2016. Shortly after the police officers arrived, a vehicle pulled into the parking lot. Because the front seat passenger matched appellant's description, Officer Saffran asked the passenger to identify himself. He said his name was "Travis Scott" and that he lived at 6701 Iron Ore. Officer Saffran identified appellant, in court, as the passenger who provided the false name. He further testified that appellant eventually admitted that he actually lived at 6721 Iron Ore.

Officers Saffran and Tippett accompanied appellant as he entered the "atrium" or stairwell area of the apartment complex near 6721 Iron Ore. According to Officer Saffran, appellant was not then under arrest, but he was being detained and was not free to leave

[3] Appellant also texted Carney several times the night before the assault. Carney showed these text messages to Officer Sagel, and Officer Sagel would later see duplicates of these same messages on appellant's phone after he was arrested and booked at the Howard County Detention Center.

because Officer Saffran wanted to positively identify appellant based on the information that there were open arrest warrants for Tavian Ruffin. Officer Saffran testified that he told appellant that he was being detained and explained to him that, in the event of open arrest warrants, they would be "bound to serve that warrant and take him into custody." Had the warrants not been confirmed, Officer Saffran testified that he would have consulted with Officer Sagel to determine if there was probable cause to make a warrantless arrest.

While waiting in the atrium/stairwell area, appellant's mother came down and confirmed appellant's identity as Tavian Ruffin. And, when the police officers were notified, via their police radios, that the open arrest warrants for appellant were "confirmed," Officer Saffran told appellant he was under arrest and ordered him to place his hands behind his back. According to Officer Saffran, when he reached for appellant's arm, appellant "started to run past me and evaded my grasp and exited through the door which I was standing beside and then left the building." Officer Saffran then ran after appellant.

Officer Saffran, yelling for appellant to stop, chased him outside the apartment complex, through approximately two inches of fallen snow. During the pursuit, appellant looked back at Officer Saffran and ran into a light pole. That allowed Officer Saffran to catch up to appellant and grab him around the waist. At that point, Officer Tippett also caught up and grabbed appellant.

While the three men were on the ground struggling, Officer Saffran "yelled several times to Mr. Ruffin to stop resisting and put his hands behind his back." The three slid

down a snow covered hill, with appellant "flailing around and swatting to try and break [Officer Saffran's] grasp[.]" Officer Saffran described appellant as "frantic" and "was trying to get away and was trying to get us off of him." Officer Saffran continued to yell for appellant to stop resisting, and appellant continued "swatting his arms and feet, swatting and kicking and trying to break [Officer Saffran's] grasp off of him and to try and get away."

When they reached the bottom of the hill, Officer Saffran was able to get on top of appellant to "manipulate his arms and flip him over to his back." After several minutes, and with the assistance of Officer Tippett, the officers were able to place appellant in handcuffs.

Handcuffed and "irate," appellant continued to yell, and be uncooperative as the two officers walked him back up the hill. Officer Saffran testified that, as they climbed the hill, appellant would go limp and let his weight drop to the ground, which had the effect of causing the officers to fall. As a result, it took three to five minutes to walk appellant back up the hill. Eventually, the officers managed to buckle appellant in the back seat of Officer Saffran's patrol car and to transport him to Howard County Central Booking.[4]

On cross-examination, Officer Saffran testified as follows:

> Q. Officer Saffran, I just want to make sure I understood something correctly. I believe you testified that when you initially detained [appellant] in the stairwell, you were trying to confirm warrants. Is that right?

[4] There was additional evidence that appellant assaulted Officer Saffran at Central Booking and that, during the course of that event, appellant suffered a "knee strike" in the abdomen or groin area. These events occurred after appellant's arrest and related to one of the two assault charges involving Officer Saffran that resulted in a mistrial.

A. That's right.

Q. And you were also waiting for further information from Officer Sagel about his situation and whether there was any arrestable offense as a result of that. Is that right?

A. That's right.

Q. And did you get confirmation on the warrants before you heard back from Officer Sagel?

A. Yes.

Q. So, the reason that you relied upon to arrest [appellant] was the outstanding warrant. Is that right?

A. That's right.

Q. Okay. And dispatch confirmed them and informed you they would be faxed to Central Booking. Is that right?

A. That's right.

In the defense case, appellant called his mother, Lakesha Ruffin ("Ms. Ruffin") as a witness. She testified that, on the early morning hours of February 15, 2016, she received a phone call from her son, informing her that he was in the stairwell of their apartment building, being questioned by two police officers. When she responded to the area, the police officers asked her to confirm appellant's identity as her son, Tavian Ruffin.

At some point, Ms. Ruffin overheard the confirmation over the police radio that appellant was wanted on an open arrest warrant. When the officers informed appellant that he was under arrest, appellant became angry and "took off running." She saw the police officers chase appellant through the snow and run down a hill. She then saw a police officer overtop appellant, attempting to place him in handcuffs. She attributed the struggle to the slippery conditions and testified that appellant stated that he was not resisting. She further

testified that she saw a police officer place his knee in appellant's back after appellant stated he was already handcuffed and one of the police officers kick appellant, while appellant was down, and call him an "asshole." The three men had some difficulty coming back up the snow-covered hill, but once they got back up the hill, the officers placed appellant in the back of the police car and there was no further contact between the officers and appellant.

On cross-examination, Ms. Ruffin agreed the police officers and appellant were simply having a conversation in the stairwell when she first arrived. The officers stated they were there to investigate a protective order violation, and asked for her to identify appellant. Ms. Ruffin confirmed that she overheard the police radio dispatch inform the officers that there were open arrest warrants for appellant. She agreed the officers did not have their weapons drawn and had not touched appellant and had not told him he was under arrest until the dispatch came through. She acknowledged that the officers informed both of them that there were open arrest warrants and "there was nothing they could do." The officers were cordial and did not use profanity or become aggressive until appellant "elevated" his voice while trying to explain his side of the story. And, she confirmed that appellant fled after the police informed him he was under arrest.

During the chase, Ms. Ruffin lost sight of the men for a moment, but then she saw appellant on the ground with the officers on top of him, attempting to place him in handcuffs. She agreed that all three men were "fumbling around in the snow" and they "all were slipping." She heard appellant yelling and sounding "frustrated."

Appellant testified on his own behalf and admitted that he went to Carney's house on February 15, 2016 after a night of drinking. But, after Carney took his phone and slapped him, he left without striking her. When he arrived home accompanied by his cousin, he saw two police officers near his residence.

Appellant testified that he tried to walk around the officers, but one of them poked him in the chest and asked him his name. Appellant admitted identifying himself as "Travis Scott." When the officer asked for identification, appellant informed him that it was inside the residence. Appellant called his mother as he and the officers walked towards his building.

The police told him that he was being detained to see if he would be arrested in connection with a domestic violence call. While they were still in the stairwell, appellant heard the police dispatch inform the officers that "he has two active Baltimore City warrants." After he heard about the open warrants, appellant became frustrated and attempted to explain "that this is ridiculous." Officer Tippett then stated "I guess we've got to take you in for these warrants." Appellant testified that he then started walking down the stairs, but, "after I hit the door, I started running." As he fled, he ran into a pole, lost his balance and slid down a snow-covered hill. When he looked up, Officer Saffran "pounce[d]" on him and told him to stop resisting and started "hitting on" him. According to appellant, Officer Tippett then joined in by "pouncing" and "hitting" him as well.

After the police officers handcuffed him, they took him back up the hill, but, in doing so, they all three started slipping and falling. After they regained their balance, and appellant was taken up the hill, they placed him in a police car, and transported him to

Central Booking. Appellant admitted that he was not being "cooperative" at Central Booking. He also answered several questions about his state of mind concerning the several assaults at issue in this case, testifying that he feared police officers in general and was afraid that Carney and Officer Saffran would strike him again.

On cross-examination, and despite having earlier claimed that he had never received the protective order, appellant admitted that he knew that he was not supposed to contact Carney or be at her house on February 15, 2016. He agreed that Carney did not invite him into her residence and that she told him to leave. Appellant also agreed that, when the police first spoke to him, he gave them a false name. He confirmed that the police did not tell him he was under arrest until after they all heard confirmation over the police radio that there were two open warrants for his arrest for violating a protective order from Baltimore City. And, once he was told he was going to be arrested on these warrants, and before the officers placed their hands on him to effect the arrest, he ran.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that the court erred in not giving a self-defense instruction on the charge of resisting arrest. The State responds that appellant never requested a self-defense instruction in relation to the resisting arrest charge, and therefore, this issue is not preserved for our review. And, were that issue preserved and there was a right of self-defense to a lawful arrest, the State posits there was no evidence that appellant acted in

self-defense "because, under his version of events, he did *not* resist arrest." (emphasis in original).

Prior to instructions, appellant's counsel requested an instruction on self-defense with respect to the assault charge concerning Brandi Carney and the two assault charges related to Officer Saffran. Defense counsel argued that there was "some evidence" that Carney had slapped him first, and also, evidence that Officer Saffran had "kneed him in the genitals" before appellant kicked the officer in retaliation.[5] Defense counsel continued that appellant's fear of being assaulted by Carney and Officer Saffran was "some evidence" sufficient to generate a self-defense instruction to the assault charges. The State responded that self-defense was not generated because appellant did not testify that he struck any of the officers and, in fact, he expressly denied striking Carney.[6]

After hearing additional argument, the court agreed with the State that appellant "testified that he fell and slipped down and then the officers pounced on him and basically gave him a beating." The court, noting that appellant "never said, I hit them in self-defense or I did anything," took the issue under advisement. The next day, the court found that self-defense was "not sufficiently generated" and declined appellant's request for a self-defense jury instruction to the assault charges. Appellant noted his exception to the court's denial at the conclusion of jury instructions.

[5] As noted earlier, the allegations concerning whether Officer Saffran struck appellant in the abdomen or groin, and whether appellant kicked the officer in response, related to the events at the police station, *after* appellant was under arrest.

[6] The jury acquitted appellant on the assault charge related to Carney.

Maryland Rule 4-325(e) specifically provides:

> 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.
>
> Compliance with this rule requires that:
>
> 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.

Robinson v. State, 209 Md. App. 174, 200 (2012) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)) (further citation omitted), *cert. denied*, 431 Md. 221 (2013), and *overruled on other grounds in Dzikowski v. State*, 436 Md. 430 (2013).

"'A party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are.'" *In re Roberto d. B.*, 399 Md. 267, 311 (2007) (quoting *Harmony v. State*, 88 Md. App. 306, 317 (1991)). When a specific ground is asserted, "we consider all other grounds – including the ground stated in appellant's brief before this court – as waived." *Monk v. State*, 94 Md. App. 738, 746 (1993). We have explained that "the purpose and design of the rule is to correct errors while the opportunity to correct them still exists." *Vernon v. State*, 12 Md. App. 157, 163 (1971).

Our review of the record persuades us that appellant never asked the court to instruct

the jury to decide whether he acted in self-defense to the resisting arrest charge. Indeed, as the trial court noted, appellant made no argument concerning the resisting arrest charge when he moved for a judgment of acquittal. This argument was not preserved for our review, and had it been, appellant would not, in our view, prevail on the merits.

Maryland Rule 4-325(c) provides: "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." "[A] trial judge's decision whether to give a jury instruction" is reviewed under the abuse of discretion standard. *Arthur v. State*, 420 Md. 512, 525 (2011) (citations omitted). In determining whether a trial court has abused its discretion, we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction." *Bazzle v. State*, 426 Md. 541, 548 (2012) (citation omitted).

Because "[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge," our task is "to determine whether [appellant] produced that minimum threshold of evidence necessary to establish a *prima facie* case . . ." *Bazzle*, 426 Md. at 550 (citations omitted). To meet that burden, "a defendant needs only to produce 'some evidence' that [if believed] supports the requested instruction[.]" *Id*. at 551. (citations omitted).

As we have explained:

> The offense of resisting arrest, codified at Md. Code (2004, 2011 Cum. Supp.), section 9-408(b)(1) of the Criminal Law Article ("Cr.L."), retains its common law elements. *See, e.g., McNeal v. State*, 200 Md. App.

> 510, 526 (2011) ("Section 9-408 did not . . . change the elements as they existed at common law for the crime of resisting arrest."). The statute, in pertinent part, provides that " [a] person may not intentionally resist a lawful arrest." Cr.L. § 9-408(b)(1). To convict a defendant of resisting arrest, the State must prove the following elements beyond a reasonable doubt:
>
> (1) that a law enforcement officer arrested or attempted to arrest the defendant;
>
> (2) that the officer had probable cause to believe that the defendant had committed a crime, i.e., that the arrest was lawful; and
>
> (3) that the defendant refused to submit to the arrest [and] resist[ed] the arrest by force.
>
> [*Rich v. State*, 205 Md. App. 227, 240 (2012)] (citation omitted). The State also must show that the defendant knew that a police officer was trying to arrest him and that the defendant had the necessary intent to resist the arrest. *Id.* at 239 n.3, 240.[7]
>
> "The degree of 'force' that is required to find a defendant guilty of resisting arrest is the same as the 'offensive physical contact' that is required to find a defendant guilty of the battery variety of second degree assault." *Rich*, 205 Md. App. at 249 (quoting *Nicolas v. State*, 426 Md. 385, 407 (2012)). Resistance does not encompass mere flight from an arresting officer. *Id.* at 253.

Williams v. State, 208 Md. App. 622, 641 (2012) (concluding that defendant knew he was being arrested and used force against a citizen who tackled him, thus, requiring the police officer to use a taser to subdue him), *cert. granted*, 430 Md. 644 (2013), *aff'd in part, rev'd in part on other grounds*, 435 Md. 474 (2013).

There is a right to resist an unlawful arrest in Maryland, *Arthur*, 420 Md. at 528, and "an individual who is subjected to an illegal arrest may resist such an arrest using any

[7] "[T]he statute establishes a mens rea element, which requires that a defendant know that a law enforcement officer is attempting to arrest him and that the defendant resists the arrest intentionally." *Rich*, 205 Md. App. at 239 n.3.

reasonable means, including force, to effect his escape." *Barnhard v. State*, 325 Md. 602, 614 (1992), *accord State v. Wiegmann*, 350 Md. 585, 601 (1998). In support of his claim of entitlement to a self-defense instruction, appellant cites the Notes on Use from the pattern instruction on resisting a warrantless arrest, which provide that "[i]f there is evidence that the officer used excessive force and that the defendant acted in self-defense, the court should modify the instruction as needed. *See* MPJI-Cr 5:07 (Self-Defense)." *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:27.1, at 755-56 (2016) ("MPJI-Cr").

In this case, the State, without objection or a request for modification from appellant, requested that the trial court instruct the jury consistent with the pattern instruction for resisting a warrantless arrest.[8] Defense counsel never argued that self-defense generally applied to the resisting arrest charge, or that it applied because the officers had used "excessive force."

The Notes on Use to the instruction on arrest based on a warrant state, like MPJI-Cr 4:27.1 but without reference to MPJI-Cr 5:07, that "[i]f there is evidence that the officer used excessive force, the court should instruct the jury: 'If the police officer used more force than was reasonably necessary to arrest the defendant, the defendant was entitled to use reasonable force to resist the officer's excessive force.'" MPJI-Cr 4:27 – Notes on Use, p. 750. And, the Comment for that pattern instruction further provides that "[a] person

[8] Here, however, appellant was arrested on two outstanding warrants from Baltimore City. Therefore, the pattern instruction for resisting an arrest based on a warrant, *see* MPJI-Cr 4:27, was more applicable.

may defend against excessive force used to make an arrest regardless of whether the arrest is lawful or unlawful, and regardless of whether the arrest is made pursuant to a warrant. Force becomes excessive if it goes beyond the amount of force reasonably necessary, under the circumstances, for a reasonable police officer to discharge official duties." MPJI-Cr 4:27 – Comment, p. 753, and *see, e.g., French v. Hines*, 182 Md. App. 201, 260 (2008) (observing that there is a four-factor test in evaluating a claim of the unconstitutional application of excessive force: "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury; and (4) '[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm'") (quoting *Graham v. Connor*, 490 U.S. 386, 390-91 (1989)); *Wilson v. State*, 87 Md. App. 512, 520 (1991) (holding that "a police officer, from the perspective of a reasonable police officer, may use only that amount of force reasonably necessary under the circumstances to discharge his duties"); *see also Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that the use of deadly force to effectuate an arrest violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm).

The law related to the resistance of excessive force is generally consistent with the right of self-defense which, as set forth by the Court of Appeals, requires the following elements:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself in this danger;

> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must not have been unreasonable and excessive, that is, the force must not have been more force that the exigency demanded.

State v. Faulkner, 301 Md. 482, 485-86 (1984); *accord Haile v. State*, 431 Md. 448, 472 (2013). Self-defense includes an additional element – the duty to retreat. *See Burch v. State*, 346 Md. 253, 283 ("One of the elements of the defense of self-defense is 'the duty of the defendant to retreat or avoid danger if such means were within his power and consistent with his safety'"), *cert. denied*, 522 U.S. 1001 (1997).

As to the events relating to appellant's arrest, the facts establish that, once the officers learned of the open arrest warrants, they informed appellant and his mother that they were required to take him into custody. When they reached for appellant, he ran from them, pushing past at least one of the police officers. He ran into a pole and slid down the snow-covered hill with the officers closing in on him in slippery pursuit. When they overtook appellant, he would not cooperate, but instead resisted by "flailing around and swatting to try and break [Officer Saffran's] grasp[.]" It took two officers several minutes to handcuff him behind his back.[9]

[9] We note that Officer Tippett had earlier testified to appellant's apprehension on the day in question at appellant's address. As part of that testimony, Officer Tippett informed the jury that, as he and Officer Saffran struggled to handcuff appellant on the snow-covered hill, appellant kicked him in the chest. Referring to a "use force continuum," Officer Tippett admitted that, after being kicked, he struck appellant three times with a closed fist. The court struck Officer Tippett's testimony in its entirety and, later, granted appellant's motion for judgment of acquittal on the count charging second degree assault of Officer Tippett.

Based on these facts, appellant's claim of "some evidence" that he acted in self-defense to the use of excessive force in effecting his arrest fails on several grounds. First, (and aside from the fact that he denied resisting arrest), there is no evidence that the police used more force than was reasonably necessary to effect appellant's arrest; and second, there is no evidence that appellant believed himself to be in imminent or immediate danger of death or serious bodily harm. Considering the record as a whole, we conclude that, even if preserved, declining to give a self-defense instruction or to modify the resisting arrest instruction based on excessive force would be a proper exercise of discretion in this case.

II.

Appellant asserts that, after learning that three police officers violated the sequestration order, the court abused its discretion by permitting Officer Saffran to testify. The State, of course, disagrees.

Prior to jury selection, the parties both requested, and the court granted, a rule on witnesses, which is otherwise referred to as "sequestration." On the first day of trial, the court took a mid-afternoon break from 2:44 p.m. until 2:58 p.m. Once the court went back in session, the State then resumed its case, calling, in succession, Officers Sagel, Dorsey and Tippett.

The next day, before any further testimony, defense counsel informed the court that Ms. Ruffin had tried to contact him during trial via text message, but he did not have his cellphone with him. Counsel proffered that Ms. Ruffin saw several police officers discussing their testimony outside the courtroom in apparent violation of the sequestration

order. He requested that the court *voir dire* Ms. Ruffin, as well as Officer Saffran, who had not yet testified, in order to "decide what, if anything, to do about it[.]"

The prosecutor responded that she, too, had seen Officers Sagel, Dorsey, Saffran and Tippett together in the hallway outside the courtroom during the mid-afternoon break the day before. She reminded the officers about the rule on witnesses and that they were not to discuss their testimony "with anybody, each other or anybody else, while they were here."

Following the proffer and response, the court and the parties agreed that any violation was not relevant as to Officers Sagel and Dorsey, who were not present when appellant was arrested or when the other officers were allegedly assaulted. The court then heard from Ms. Ruffin concerning any issue relating to Officers Saffran and Tippett.

Ms. Ruffin testified that, at 2:18 p.m. on the first day of trial, she sent defense counsel the following text message: "The officer out here just stated that the father of Brandi pushed through the police department to get charges heard. Will he testify? And he called in some favors." Ms. Ruffin also texted defense counsel the following: "The officer stated he willfully kicked [appellant] on the heel and at the jail" and "They are out here laughing about it." Ms. Ruffin sent another text at 2:41 p.m. that read:

> "The officers out here are trying to make sure their stories match. They are walking through each step in the process of the arrest especially where – when, where and if Tavian hit him. They said he could get 25 years for this. I find it offensive that they are collaborating stories to sound truthful."

The following exchange between the prosecutor and Ms. Ruffin occurred:

[BY PROSECUTOR]:

> Q. Okay. And when you said they were trying to get their stories to match, do you recall specifically what they were saying?
>
> A. They were saying that what had occurred on the hill and the one officer, I don't know if it was Tippett or Saffran, but they were saying that they were on top of [appellant] trying to get the handcuffs on and they were sliding because of the snow.
>
> Q. Uh-huh.
>
> A. And he had to get his footing on [a] tree. So, he stepped back. So, again, it was just more scenarios of the events that happened that night.

Ms. Ruffin agreed that she overheard the officers before the prosecutor came out into the hallway during the mid-afternoon break, and that she heard the prosecutor remind the officers that they were not to talk about the case. After that admonishment, Ms. Ruffin did not see or hear the officers discuss the case.

Defense counsel then called Officer Saffran. He testified that he arrived in the hallway outside the courtroom on the first day of trial at around 2:30 p.m. He knew generally that a rule on witnesses was in effect when he arrived. Officer Saffran confirmed that he saw and spoke to Officers Tippett, Dorsey and Sagel outside the courtroom, but he denied hearing anyone talk about the events that transpired on the night appellant was arrested. On cross-examination, Officer Saffran confirmed that the prosecutor informed the officers about the sequestration order when she came out to speak to them during the mid-afternoon break. He did not recall if she had discussed sequestration at their pre-trial meeting.

Following this testimony, appellant's counsel, contending that there had been a violation of the court's sequestration order, requested that Officer Tippett's testimony be

stricken and that Officer Saffran be barred from testifying at all in the case. He agreed that he was not requesting a mistrial.

In response, the prosecutor stated that the first time she informed the four officers of the rule on witnesses was during this mid-afternoon break on the first day of trial. She agreed that officers should have anticipated a rule on witnesses, but "it doesn't happen in every case." And, even if she had mentioned the possibility of a rule on witnesses to Officer Saffran in a pre-trial meeting, the rule on witnesses did not occur until requested on the morning of trial. The prosecutor, stating, "I don't think we can say there was a knowing or willful violation of a rule when the officers weren't advised of that rule," asked the court not to strike Officer Tippett's testimony and to permit the State to call Officer Saffran to offer his testimony at trial.

The court found a "technical violation" of the sequestration order, but determined that the violation was "negligent" and "not willful[.]" The court further determined that, under the circumstances, the remedy would be to strike Officer Tippett's testimony in its entirety, but to permit Officer Saffran to testify to the events in question as they pertained to the alleged assaults upon him, but not as to anything that may have happened to Officer Tippett.

When the jury returned to the courtroom, the court informed them that it had struck Officer Tippett's testimony, stating:

> I'm going to instruct you, you are not to speculate as to any reasons why, however, the testimony of Officer Tippett that was given yesterday afternoon is not to be considered and is going to be stricken. The entire testimony of Officer Tippett. Okay? And you are not to speculate as to why. But that's what it – I'm ordering at this point.

In pertinent part, Maryland Rule 5-615 provides for the exclusion of witnesses as follows:

> (a) *In General.* -- Except as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . .
>
> * * *
>
> (d) *Nondisclosure*.
>
> (1) A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.
>
> (2) The court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.
>
> (e) *Exclusion of testimony*. The court may exclude all or part of the testimony of the witness who receives information in violation of this Rule.

Generally, the purpose of witness sequestration is "to prevent . . . [witnesses] from being taught or prompted by each other's testimony." *Tharp v. State*, 362 Md. 77, 95 (2000) (quoting *Bulluck v. State*, 219 Md. 67, 70-71, *cert. denied*, 361 U.S. 847 (1959)); *accord Rollins v. State*, 161 Md. App. 34, 87-88 (2005). The concern is two-fold: (1) that a non-sequestered witness will manufacture or consciously alter his testimony to match what he hears an earlier witness say; and, (2) that a witness might subconsciously amend his or her testimony to conform to testimony already offered into evidence. As this Court has explained:

> The "essential purpose" of the sequestration Rule, … "is to prevent one prospective witness from being taught *by hearing another's testimony*; its application avoids an artificial harmony of testimony that prevents the trier of fact from truly weighing all the testimony; it may also avoid the outright

> manufacture of testimony." (Emphasis supplied). There is nothing inappropriate, it seems to us, in prospective witnesses discussing the case among themselves, or even relating, one to another, what each proposes to say, *prior to any of them actually testifying*. What the Rule seeks to avoid is a prospective witness learning what another witness has, in fact, said—what, in fact, has occurred in the courtroom.

Watkins v. State, 59 Md. App. 705, 721 (1984) (emphasis in original, internal citations omitted); *see also Edmonds v. State*, 138 Md. App. 438, 448-49 (2001) ("Our judicial system has long recognized that sequestration of witnesses is 'one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.'") (citation omitted).

"When there has been a violation of a witness sequestration order, whether there is to be a sanction, and, if so, what sanction to impose, are decisions left to the sound discretion of the trial judge." *Redditt v. State*, 337 Md. 621, 629 (1995); *see also Anderson v. State*, 227 Md. App. 329, 345 (2016) ("We will not reverse a trial court's decision regarding whether sanctions should be imposed absent an abuse of discretion") (quoting *Lupfer v. State*, 194 Md. App. 216, 251 (2010), *rev'd on other grounds*, 420 Md. 111 (2011)). In determining the appropriate sanction, Professor McLain, citing *McGill v. Gore Dump Trailer Leasing, Inc*., 86 Md. App. 416, 427 (1991), has stated:

> If the trial court is faced with [an alleged violation of a sequestration order], it should: (1) excuse the jury temporarily; (2) order the witnesses to and the participants in the alleged infraction not to discuss the matter; (3) then have each witness and participant testify under oath regarding the infraction; (4) make his or her findings of fact on what occurred and determine what harm, if any, was done; (5) let the parties suggest dispositions that best fit the case; and (6) decide upon the least onerous sanction that will protect the litigants.

6 McLain, *Maryland Evidence: State and Federal* § 615:1 (d) at 822 (3d ed. 2013).

Maryland Rule 5-615(e) permits the court to, "exclude all or part of the testimony of the witness who receives information in violation of this Rule." But, because exclusion "is not lightly to be imposed as a penalty[,]" violating a sequestration order does not, by itself, mandate automatic exclusion of the witness. The *Redditt* Court explained:

> Rather, inasmuch as 'the ascertainment of the truth is the great end and object of all the proceedings in a judicial trial, we think that the complete exclusion of the testimony of witnesses for a violation of the sequestration rule is not lightly to be imposed as a penalty upon even an offending party.'

Redditt, 337 Md. at 629-30 (quoting *Frazier v. Waterman Steamship Corp*., 206 Md. 434, 446 (1955)) (further quotation omitted); *see also Anderson*, 227 Md. App. at 345 (observing that the sanction of the exclusion of witness testimony "is considered a harsh one"); 7 McLain, *Maryland Practice Maryland Rules of Evidence*, Rule 5-615: Commentary § 1(d), at 155 (2013-14 Edition) ("Exclusion ought not to be automatic; less restrictive alternatives must be considered"). Professor McLain explains:

> The question of what sanctions may be taken if a witness fails to comply with a sequestration order – or if a witness is told how other witnesses have testified – is to be determined in the trial court's discretion. The court may go so far as to preclude – or strike – all or part of the witness's testimony, although that sanction is not to be imposed lightly. A mistrial is another possibility. But the court must consider less restrictive alternatives. For example, it might allow the testimony, but give a cautionary instruction to the jury that the witness did not comply with the sequestration order and was present during other witnesses' testimony (opposing counsel may also elicit those facts on cross-examination). The court may also hold the witness in contempt, if appropriate. Or it may decline to impose sanctions altogether.

6 McLain, *Maryland Evidence: State and Federal* § 615:1 (d) at 819-21 (3d ed. 2013).

Here, we discern no abuse of discretion. When the court learned of the possible sequestration violation, it conducted a hearing outside the presence of the jury, and heard testimony both from Ms. Ruffin and Officer Saffran. Ms. Ruffin was given a full

opportunity to explain what she observed, with both parties asking questions. According to Ms. Ruffin, prior to their testimony in front of the jury, she overheard all four police officers discussing the case.[10] Officer Saffran acknowledged that he spoke to the officers, but denied speaking to them about the case. The crediting of Officer Saffran's testimony on this point could explain why the court decided to strike Officer Tippett's testimony, and permitted Officer Saffran's testimony, with the caveat that he was not to testify about any assault on Officer Tippett. But, in any event, there is no suggestion or indication that the court's resolution of any conflicting testimony was clearly erroneous. *See, e.g., Omayaka v. Omayaka*, 417 Md. 643, 659 (2011) ("In its assessment of the credibility of witnesses, the Circuit Court was entitled to accept – or reject – all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence"); *see also Morris v. State*, 153 Md. App. 480, 489 (2003) ("The basic rule of fact-finding review, therefore, is that the appellate court will defer to the fact-findings of trial judge or jury whenever there is some competent evidence which, if believed and given maximum weight, could support such findings of fact. That is the prime directive"), *cert. denied*, 380 Md. 618 (2004).

Moreover, the sequestration rule is directed to trial testimony or other evidence introduced at trial, and not to pre-testimonial conversations. *See Watkins, supra*, 59 Md.

[10] Ms. Ruffin testified that she overheard Officer Tippett, and possibly two or three other officers, outside the courtroom. The only time she directly referenced Officer Saffran was after she was asked whether she overheard the officers "trying to get their stories to match," and she replied, "[t]hey were saying that what had occurred on the hill and the one officer, I don't know if it was Tippett or Saffran, but they were saying that they were on top of [appellant] trying to get the handcuffs on and they were sliding because of the snow."

App. at 721. There is no dispute in this case that the discussion among the officers took place prior to their testifying. In short, we perceive neither error nor an abuse of discretion in the trial court's sanction for the violation of the sequestration order in this case.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.