Circuit Court for Howard County
Case Number 13-K-16-56326

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1657

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 charged in the District Court of Maryland for Howard County with four counts of violating a protective order pursuant to Section 4-509 of the Family Law Article, three counts of second-degree assault, one count of harassment, and one count of resisting arrest. He elected to be tried by a jury sitting in the Circuit Court for Howard County. The trial court, prior to jury deliberations, granted appellant's motion for judgment of acquittal as to three of the four counts of violating a protective order. The jury acquitted appellant of one count of second degree assault, and convicted him of the remaining charges. He was sentenced to ninety days for the violation of the protective order, concurrent sentences of ten years each for the two second degree assault convictions, a concurrent sentence of three years for resisting arrest, and a concurrent sentence of sixty days for harassment. All of these sentences were suspended, and ordered to run concurrent with an aggregate ten year sentence imposed in an unrelated robbery case. Appellant timely appealed and presents the following questions for our review:

> 1. Was the evidence insufficient to support [his] conviction for violating a protective order, where the State failed to prove that [he] had notice of the protective order?
>
> 2. Did the trial court abuse its discretion when it refused to instruct the jury that [he] had the right to resist an unlawful arrest?
>
> 3. Did the trial court abuse its discretion when it overruled defense counsel's objection to prejudicial comments made during the prosecutor's closing argument?
>
> 4. Must [his] convictions and sentences for second-degree assault be merged into his conviction and sentence for resisting arrest?

For the following reasons, we shall vacate appellant's sentences for second-degree assault but otherwise affirm the judgments of the circuit court.

BACKGROUND

As will be explained in more detail in the discussion that follows, on June 14, 2015, at approximately 10:50 p.m., Officer Candelaria[1], of the Baltimore City Police Department, served an Interim Protective Order on appellant while he was at 300 East Madison Street in Baltimore, Maryland, which is the city jail otherwise known as "Central Booking." The petitioner for the order was Brandi Carney.

Carney, a high school health teacher, obtained a Final Protective Order against appellant on June 23, 2015. That order provided that appellant: "shall not abuse, threaten to abuse, and/or harass [Carney];" "shall not contact (in person, by telephone, in writing, or by any other means) or attempt to contact [Carney];" "shall not enter the residence of [Carney,] wherever [she] resided;" "shall stay away from [Carney's] place of employment;" and "shall immediately surrender all firearm(s)" and "refrain from possession of any firearms during the duration of this Final Protective Order." The Final Protective Order was effective through June 22, 2016 at 11:59 p.m.

On December 8, 2015, at 6:15 a.m., prior to expiration of that order, Carney opened the door to her residence to find appellant waiting outside. He then came into Carney's residence, uninvited. Carney told him "I don't want you here. You must leave" but appellant refused to leave. Carney proceeded to get ready for work, with appellant "pleading and begging that I talk to him." They both left Carney's residence at approximately 6:50 a.m.

[1] Officer Candelaria's first name is not included in the record.

That day, appellant sent Carney Instagram messages "all day long."[2] Approximately fifteen to twenty messages were sent to her while she was at her place of employment, and another fifteen to twenty were sent throughout the rest of the day.

When Carney left work that afternoon, she saw that appellant was parked across the street. He followed her in his vehicle when she drove away. Concerned about going home, she drove to a nearby Target store, that "was near [her] house" because it "had people around that if, you know, something were to get out of hand, I wouldn't have been alone."

After she parked in the Target parking lot, appellant got out of his vehicle, approached her car, and knocked on the window. Carney testified that she told him "you have to let go. You need to let me leave," but he continued to beg Carney to talk to him. He followed her into a McDonald's, paid for her meal, and sat down next to her inside the restaurant. Carney continued to tell appellant to leave her alone and that she did not want to talk to him.

Carney left McDonald's about an hour later with appellant following. She returned to her car, sat down on the curb, and, at some point, asked appellant if she could go. Appellant replied, "you can go" but when Carney got into her car, appellant got in as well. For approximately two hours, appellant continued to beg and plead, and she continued to tell him to get out of her car.

[2] "Instagram is a mobile, desktop, and internet-based photo-sharing application and service that allows users to share pictures and videos either publicly or privately." https://en.wikipedia.org/wiki/Instagram

After appellant got out of Carney's car and she drove away, he started to follow her again. She then tried to find a Howard County police station, and, when that proved unsuccessful, she parked behind a business until she was sure she had lost appellant. She drove to a friend's house, and, while she was there, learned from "Jess," another friend, that appellant was at Jess's house, "yelling and screaming and banging" and trying to locate Carney.

At this point, Carney called the police and informed them of the protective order and appellant's actions throughout the day, including his sustained and continued contact with her through Instagram. She agreed to meet the police back at the Target parking lot, but, either before or at around the time she returned to Target, Carney received another Instagram message that stated that "if [she] did not show up at his house by 7:30, he was going to kill himself."

She conveyed appellant's threat to harm himself, to Officer Grayson Kershner, of the Howard County Police Department in the Target parking lot. Carney believed appellant was going to kill himself, because he sent her a picture of "him in the garage revving his engine, basically telling me that he was going to kill himself in his garage if I did not come to his house."

Officer Kershner testified that he met Carney at the Target parking lot at around 7:25 p.m. and saw the protective order and several of the Instagram messages that appellant had been sending Carney. He also saw some of the messages appearing on Carney's phone in "real-time at the same time that she was receiving them" from appellant. The content of

those messages included appellant's threats to "kill himself if she didn't contact or come to his house."

Officer Kershner then advised his supervisor and called for other officers to respond to appellant's address at 6721 Iron Ore in Elkridge. Officer Kershner informed the other police officers that appellant had violated a protective order and was threatening to kill himself inside his parked vehicle inside his garage. Officer Kershner did not respond to appellant's address. Instead, he started to prepare an emergency petition, under the Health-General article, to have appellant evaluated at a hospital.

Officer Justin Frei and Officer Beatrice Navarro went to 6721 Iron Ore at around 7:30 p.m. in response to a call that appellant had violated a protective order and was threatening to harm himself. Appellant's mother advised Officer Frei and Officer Navarro that appellant was inside a nearby detached garage. Appellant's brother accompanied the officers to the garage. When they reached the garage door, the officers heard a car engine "revving at a fairly high intensity." Concerned about appellant's physical safety due to the likely presence of carbon monoxide and the possibility that "someone inside a confined space running a car engine with fumes and emissions going on would be a threat to themselves," appellant's brother attempted to open the garage door using a keypad, but appellant kept closing the door from the inside.

Eventually, when the officers were able to open the door, "large amounts of smoke," and "fumes and emissions" came out of the garage. After the smoke cleared, the officers saw appellant in the driver's seat of a vehicle that had been backed into the garage. Officer Frei went to see if he was responsive and alert. And, seeing that he was, the officer advised

appellant through the open driver's side window that he believed appellant was a "danger to himself" and that they were going to take him into custody for an emergency evaluation at a hospital. Officer Frei further testified that, because appellant had violated "a court order, a protective order [they] were also going to detain[]" and place him in custody.

When asked to exit the vehicle, appellant rolled up the window and became "verbally aggressive" and "loud." Appellant's noncompliance resulted in Officer Frei reaching into the vehicle, turning off the ignition, and taking the keys. Officer Frei agreed that he was taking appellant into custody at this point. He placed a handcuff on one of appellant's wrists and attempted to physically remove him from the vehicle. But, because appellant was "flailing" about, they were unable to handcuff his other hand. Meanwhile, appellant was saying, "you can't make me. There's no reason. I don't have to get out."

With Officer Frei pulling appellant from the driver's side and Officer Navarro pushing from the passenger side, they were able to remove appellant from the vehicle, standing up, with only one handcuff in place. He continued to flail and tense his arms to avoid his other wrist being handcuffed.

As appellant continued to resist, the police officers told him to stop resisting so that he could be evaluated. They managed to move appellant towards the front of the garage, and with the aid of a third responding officer, Officer Matthew Shiplett, they were able to place a second handcuff on appellant's wrist and remove him from the garage.[3]

[3] The fire department had been asked to respond to the scene, but, after appellant refused medical treatment, the call for the fire department was cancelled.

The initial attempts to place appellant into Officer Frei's "cage car" were unsuccessful because appellant continued to "flail his arms" and "tense up his legs." "[B]ased on his combativeness and the situation, [they] called for a prisoner transport van to respond." Appellant remained "verbally aggressive and resisted" after the van arrived. And, while Officer Navarro was holding appellant's legs in an attempt to place him in the van, appellant kicked her in the face, underneath her left eye.[4] Officer Frei's face was scratched at around this same time.

After placing plastic restraints around appellant's legs, they were then able to get appellant inside the van, but, due to his continuing struggles, they could not restrain him safely. Therefore, they decided to place him back in Officer Frei's car. As they were doing so, appellant, who was still restrained with restraints around his ankles, kicked Officer Shiplett in the head. Once in the patrol car, they transported appellant to the Howard County police station.

On cross-examination, Officer Frei agreed that the two reasons to take appellant into custody were for the protective order violation and for an emergency evaluation. He explained that police protocol called for appellant to be processed first for the violation of a protective order at the Howard County Central Booking station, where he would be seen by a commissioner. He would then be taken to a hospital for the emergency evaluation. According to Officer Frei, "we had a lawful arrest and we have an emergency petition that

[4] A photograph of Officer Navarro's injury was admitted into evidence at trial.

both need to be dealt with. The supervisors and the previous protocols make the determination as to where he goes first."

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the evidence was insufficient to sustain his conviction for violating a protective order "because the State failed to prove that [he] had notice of that order." The State responds that the evidence was sufficient to establish that appellant knew of the order.

In considering a challenge to the sufficiency of the evidence, we ask "'whether after viewing the 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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). We will not reverse on the evidence unless the finding is clearly erroneous. *Id*. (citing *State v. Manion*, 442 Md. 419, 431 (2015)).

Protective orders are civil orders, issued by a judge, ordering one person to refrain from committing certain acts against another. *See* Md. Code, Family Law Article (2012 Repl. Vol), §§ 4-501 *et seq*. Their statutory purpose "is to protect and 'aid victims of

domestic abuse by providing an immediate and effective' remedy" that is "designed to separate the parties and avoid future abuse." *Coburn v. Coburn*, 342 Md. 244, 252 (1996) (quoting *Barbee v. Barbee*, 311 Md. 620, 623 (1988)). In other words, "the primary goals of the statute are preventive, protective and remedial, not punitive. The legislature did not design the statute as punishment for past conduct; it was instead intended to prevent further harm to the victim." *Id.*; *accord Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 134 (2001).

Family Law Section 4-504 "authorizes a person eligible for relief (petitioner) to file a petition alleging abuse against the alleged abuser (respondent) and requesting immediate and temporary relief from the violence." *Coburn*, 342 Md. at 253 (footnotes omitted). The petitioner then appears at an *ex parte* hearing, where "the presiding judge may enter a temporary order to protect a petitioner from abuse and grant emergency relief if the judge finds that there are 'reasonable grounds' to believe that abuse occurred." *Coburn*, 342 Md. at 254 (citation omitted). "The temporary order also states the time and date of a second hearing to determine if a final protective order should be issued." *Id*. at 255 (citations omitted). At the second hearing, the respondent will have an opportunity to respond and to be heard whether a final protective order should issue. *Id*. But, even if the respondent does not appear, "the court may issue a final protective order based on evidence presented by the petitioner, as long as the respondent has been served with the temporary protective order or the court otherwise has personal jurisdiction over the respondent." *Id*.

A person who violates the terms of an interim, temporary, or final protective order is guilty of a misdemeanor and is subject to fine or imprisonment. Family Law Section 4-

509 (a). In addition, and pertinent to our discussion of the second issue presented, "[a]n officer shall arrest with or without a warrant and take into custody a person who the officer has probable cause to believe is in violation of an interim, temporary, or final protective order in effect at the time of the violation." Family Law Section 4-509 (c).

Appellant claims that the evidence in this case is insufficient to establish that he received proper notice of the protective order. The State responds that it has not found Maryland authority "squarely holding that notice or knowledge of the existence of a protective order is an element of the crime of violating the order" and neither have we. However, as the State notes, the pattern instruction for "Violation of Protective Order" includes the element that: "(4) the defendant knew of the order[.]" *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:26A, at 746.2 (2016) ("MPJI-Cr"). And, the trial court in this case instructed the jury to determine whether "the Defendant had notice of the protective order that ordered him to remain away from Brandi Carney's place of employment." Therefore, we shall assume that knowledge or notice is an element of the offense. *See also* 25 Am. Jur. 2d, *Domestic Abuse & Violence* § 45, p. 101 (2014) ("Knowledge of a protective order has been said to be an essential element of the offense of violating the order") (footnote omitted, citing cases); 11 C.J.S. *Breach of the Peace* § 36, p. 337-38 (2008) ("According to some authority, the defendant's knowledge of a protective order is an essential element of the offense of violating the order, as the state is required to prove, beyond a reasonable doubt, that the defendant knowingly violated the order") (footnotes omitted, citing cases).

In the motion for judgment of acquittal at the end of all the evidence, appellant's counsel argued there was insufficient proof that appellant was served with the Interim Protective Order and therefore, he did not have notice or knowledge of the protective order. More specifically, defense counsel argued that his cross-examination established that Officer Candelaria did not properly serve appellant at Central Booking. The court disagreed, stating, "[y]ou kept pressing him and he would not quote, bite. . . . You kept pressing him and he kept giving you the same answer. He gave it to them. And whether it was in the conference room or his room or whatever and he told him what it was about." After hearing further argument, including from the State, the court, denied the motion for judgment of acquittal, stating:

> All right. Thank you.
>
> The court has before it State's Exhibit Number 1 which is the interim protective order. The court recalls the testimony of Officer Candelaria and I agree with the State's recollection on this. It's clear that the officer remembered and recalled serving the Defendant. Even, as I said, when he was pressed on cross-examination about whether or not another officer served him or handed him the papers the officer was certain because he said this is his procedure. This is what he normally does. And so, his actions were consistent with that.
>
> And the court is looking at page 3 of the interim order and there's a big paragraph that says, and it's right in the middle, communications with the court. The second paragraph said, (Reading.) The clerk's office will use the address shown on the petition to send and serve any future papers or orders in this case. You are responsible for advising the court of your current address and telephone number. And if your address or number change you must advise the clerk in writing. The post office will not forward District Court mail to you.
>
> So in the order that was served on him it was told that any future orders will be mailed to him, which is consistent with State's Exhibit Number

> 3 that clearly shows that the final order was mailed to the Defendant at 6721 Iron Ore, Unit 324, Elkridge, Maryland 21075.
>
> So as it relates to the notice the court is going to deny the motion based on the exhibits that have been submitted that the Defendant received notice as is allowed pursuant to the orders and the law. The motion is denied as it relates to that.

The record established the following facts. On June 14, 2015, the District Court issued an Interim Protective Order against appellant, following the filing of a petition by Carney. The order included the following address for appellant: "6721 Iron Ore Unit 324, Elkridge, Md. 21075" and stated, among other things, that the respondent was required to stay away from Carney's place of employment. That order was in effect until June 16, 2015 at 11:59 p.m., and also stated that a hearing on a subsequent Temporary Protective Order would be held on June 16, 2015, and a hearing on a Final Protective Order would be held on June 23, 2015.[5] The order also stated that "[a]fter initial service, orders and notices may be by first class mail to your last known address," and it explained that the respondent was "responsible for advising the Court of your current address[.]" A return of service was attached to this Interim Protective Order, dated June 14, 2015. Signed by Officer Candelaria, the return indicated that the order was served on appellant at 300 E. Madison Avenue, Baltimore, Md. 21202, or "Central Booking," at 2150 hours, or 10:50 p.m.

Officer Candelaria testified about service of the Interim Protective Order at trial. On direct examination, he testified that he served appellant with that order at Central Booking on June 14, 2015, at 10:50 p.m. On cross-examination, the officer testified that

[5] Appellant was not present at either of these two hearings because he was incarcerated.

he handed the papers to appellant. However, Officer Candelaria also testified that, normally, the officers at Central Booking would bring the inmate out to meet him, and he would then give them the protective order. When asked if he specifically remembered appellant, Officer Candelaria replied, "if my signature is here, I'm sure that I did and I gave him the copy." He agreed that he could not recall meeting appellant "face-to-face," but stated that "[it] doesn't matter. The protocol doesn't change. It's done the same way." The officer also testified that "[u]sually" he served the order on the person and told them that they were to have no contact with the complainant and that, if they do, that violated the terms of the order. The officer agreed that the Interim Protective Order was in effect until June 16, 2015 at 11:59 p.m.

The Temporary Protective Order issued on June 16, 2015 and was effective until June 23, 2015 at 11:59 p.m. It also explained that if appellant did not appear at a hearing on the Final Protective Order, to be held on June 23rd, the Final Protective Order could be served by mail on appellant's last known address and "will be valid and enforceable upon mailing."

The Final Protective Order issued on June 23, 2015 and was effective until June 22, 2016 at 11:59 p.m. Appellant was notified, in the order, that violation of the order may result in criminal prosecution, imprisonment and/or fine, and contempt of court. He was also informed that he was subject to arrest if a law enforcement officer had probable cause to believe that appellant violated the terms of the order. The Record of Service of Protective Order indicates that appellant was served a copy of the Final Protective Order by mail to his address at 6721 Iron Ore, Unit 324, Elkridge, Md. 21075.

Based on the evidence, a rational fact finder could conclude that appellant was served by Officer Candelaria at Central Booking with a copy of the Interim Protective Order, and that he had notice of the proceedings that followed. The officer's return, as does evidence of his habit in serving such orders at the jail, supports this conclusion. *See generally, Sheehy v. Sheehy*, 250 Md. 181, 185 (1968) (ordinarily, "a proper return is prima facie evidence of valid service of process and a simple denial of service by the defendant is not sufficient to rebut the presumption arising from such a return"); *Ware v. State*, 360 Md. 650, 676 (2000) ("Evidence that a person has a habit of doing something is relevant to show that the person engaged in the conduct on a particular occasion"). And, although appellant did not appear for the protective order hearings, the jury could find that the temporary and final protective orders were served by mail at 6721 Iron Ore, Unit 324, in Elkridge, which was appellant's last known address and, notably, the very location where police later found him on December 8, 2015. For these reasons, we hold that the evidence was sufficient to sustain appellant's conviction for violating a protective order.

II.

Next, appellant contends that the court abused its discretion by not instructing the jury of his right to resist an unlawful arrest. He concedes that defense counsel never asked for that particular instruction, but insists that the right to resist an unlawful arrest instruction was warranted based on his request for a self-defense instruction. Even though self-defense was not generated by the evidence, he contends counsel's comment that the police "did not have probable cause to arrest" him was "some evidence" that his arrest was unlawful and the resisting arrest instruction that was given did not inform the jury of the right to resist

an unlawful arrest. The State responds that this issue is both unpreserved and without merit because there was no evidence that appellant's arrest was unlawful.

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." "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Arthur v. State*, 420 Md. 512, 525 (2011) (citations omitted). To determine whether a trial court 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).

Whether the evidence is sufficient to generate a particular instruction, is a question of law. "The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case . . ." *Bazzle*, 426 Md. at 550 (citations omitted). "[A] defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id*. at 551. (citations omitted). "If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden." *Id.*

That said, appellate review of a trial court's failure to give an instruction is subject to Maryland Rule 4-325(e), which 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.

To preserve a claim that a jury instruction was given in error or that the failure to give a requested instruction was an abuse of discretion, the defendant must object to the instruction or its omission at trial. If not, it is waived. *State v. Rose*, 345 Md. 238, 245 (1997) (failing to object to jury instruction at trial constitutes waiver). To comply with the rule:

> 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, 199-200 (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).

We understand appellant to be making a claim similar to the one made in *Arthur, supra*. In that case, the court was requested to add the following language to the pattern instruction for resisting arrest:

> A police officer may lawfully arrest without a warrant any person for any crime which the arrestee commits or attempts to commit in the officer's presence or within his view, or which the officer has probabl[e] cause to believe is being committed in his presence or within his view and may reasonably believe that arrestee is committing.
>
> You must determine from the facts and circumstances in this case whether the defendant was lawfully arrested. If you find that the defendant was lawfully arrested, you must then proceed to determine whether he

> refused to submit to that arrest, whether that resistance was to an officer of the law in the performance of his legal duties, and whether the officer had identified himself as such.
>
> Resisting an unlawful arrest is not a crime in Maryland. If an arrest is illegal, the arrestee may use any reasonable means even force, to effect his escape. If you determine that the defendant was not lawfully arrested and no arrest warrant was used, then the defendant had a right to resist that arrest.

Arthur, 420 Md. at 520 n. 4.[6]

In this case, the court, in discussing instructions, noted that it would give the pattern instruction on resisting a warrantless arrest which now includes the requirement that the arrest be lawful.[7] It then addressed the defense request for a self-defense instruction. In

[6] The pattern jury instruction for resisting a warrantless arrest in *Arthur* provided:

> The defendant is charged with the crime of resisting arrest. In order to convict the defendant of resisting arrest, the State must prove:
>
> (1) that a law enforcement officer attempted to arrest the defendant;
>
> (2) that the defendant knew that a law enforcement officer was attempting to arrest [him] [her];
>
> (3) that the officer had reasonable grounds to believe that the defendant [was committing] [had committed] (crime); and
>
> (4) that the defendant refused to submit to the arrest and resisted the arrest by force.

MPJI-Cr 4:27.1.

[7] As noted, the trial court in *Arthur* gave the prior version of the pattern jury instruction. *Arthur*, 420 Md. at 519-20 n.3. The instruction given in this case followed the current pattern jury instruction on resisting a warrantless arrest. *See* MPJI-Cr 4:27.1. Therefore, the jury here was informed that they had to find that the arrest was lawful, meaning in this case that "the officer had probable cause to believe that the Defendant had committed the crime" of "violation of a protective order."

support of that request, defense counsel argued that the police did not have probable cause to arrest appellant while he was sitting in his car, and that "[a] person has the right to resist an unlawful arrest." According to counsel, when Officer Frei first laid a hand on appellant, "he can pull away because without a lawful reason, without probable cause for Frei to touch him, he has every right to exercise self-defense and move away from the officer." And, when Officer Navarro touched him, he was "trying to prevent himself from being kidnapped essentially" and he could "defend himself" by "pulling away, by shoving. Get your hands off me. Kick. Get away from me. Don't pick me up." Defense counsel also argued that appellant's statement to Officer Navarro, that "you can't make me," meant "[y]ou don't have the right to arrest me," and provided appellant with a right to self-defense. After hearing argument from the State, the trial court found no evidence of self-defense and declined to propound the requested instruction. At the end of jury instructions, defense counsel objected to the court's failure to give a self-defense instruction, stating "I believe that was fairly generated by Officer Navarro's testimony about what Mr. Ruffin said about, you can't make me. There's no reason."

Appellant did not request an instruction regarding the right to resist an unlawful arrest. Nor did he request or even suggest modification of the resisting arrest instruction to include language similar to that requested in *Arthur*. *See* 420 Md. at 520 n.4. And we are not persuaded that the court was required to divine such a request from the argument presented in support of the self-defense instruction. *See Sifrit v. State*, 383 Md. 116, 136 (2004) (observing that a trial court is not required "to imagine all reasonable offshoots" of arguments presented to them before ruling), *cert. denied*, 543 U.S. 1056 (2005). In short,

this issue is not preserved. And, had it been preserved, appellant would not fare better because an instruction on the right to resist an unlawful arrest was not applicable under the facts in this case. We explain.

It is true that "an individual who is subjected to an illegal arrest may resist such an arrest using any reasonable means, including force, to effect his escape." *Barnhard v. State*, 325 Md. 602, 614 (1992) (citations omitted). *Accord State v. Wiegmann*, 350 Md. 585, 601 (1998). Appellant's argument on appeal that there was "some evidence" that the police lacked probable cause to arrest him is summarized in defense counsel's closing argument. He argued: (1) that Carney was not credible when she informed the officers that appellant contacted her in violation of the protective order; and, (2) the police officers, because they did not produce an order for emergency evaluation or any evidence that he was taken to the hospital for an evaluation, were lying when they stated that they seized appellant for an emergency evaluation. In other words, because Carney and the police officers were not credible, their testimony not only did not establish probable cause, it instead proved the lack of probable cause. Case law, however, explains that "disbelief is not evidence in and of itself." *Grimm*, 447 Md. at 506; *see also Bereano v. State Ethics Comm'n*, 403 Md. 716, 747 (2008) ("The finder of fact properly may assign no weight and no credibility to a particular witness's testimony. It may not assign, however, negative weight to the testimony, inferring that the opposite of that witness's statements is true, without the consideration of any other evidence").

There was no absence of probable cause that appellant violated the protective order. The protective order required that he not abuse, threaten to abuse and/or harass Carney, not

contact her, in person, by telephone, in writing, or by any other means, not enter her residence and stay away from her place of employment. The information, conveyed by Carney to Officer Kershner, who also saw messages on her cellphone, was within the collective knowledge of the Howard County Police Department. *See Ott v. State*, 325 Md. 206, 215 ("In Maryland, probable cause may be based on information within the collective knowledge of the police"), *cert. denied*, 506 U.S. 904 (1992).

In addition, the officers were authorized to detain appellant for an emergency evaluation. Section 10-622 of the Health General ("HG") Article provides procedures for applying for such a petition when a petitioner "has reason to believe that the individual: (1) Has a mental disorder; and (2) The individual presents a danger to the life or safety of the individual or of others." *See also S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 271 (4th Cir. 1998) (observing that the "reason to believe" standard "is not a lesser standard of evidence, but is consistent with the Fourth Amendment's requirement that they have probable cause to lawfully detain an individual for an emergency psychiatric evaluation"). HG Section 10-622 (b) (1) also provides that this petition may be filed by a "peace officer," such as a county police officer, *see* HG Section 10-620 (f), "who personally has observed the individual or the individual's behavior; or (iii) Any other interested person." And, that petition may be based on "(i) [t]he examination or observation; or (ii) Other information obtained that is pertinent to the factors giving rise to the petition." HG Section 10-622 (b) (2).

Here, after he had threatened to kill himself, officers found appellant inside a vehicle that was in an enclosed windowless garage. He was revving the engine and trying to keep

anyone else from entering. When the officers were able to open the garage door, there was smoke and emissions. Under these circumstances, the officers had every reason to believe that appellant was a danger to himself. In addition to the reasons supporting the violation of a protective order, there was probable cause for the officers to detain appellant for an emergency evaluation. Therefore, appellant was not unlawfully arrested or otherwise detained and any instruction on the right to resist an unlawful arrest was not generated by the evidence.

III.

The appellant asserts that the court erred in not sustaining his objection to remarks made by the prosecutor during closing argument. The State responds that the court properly exercised its discretion, and we agree.

The appellant takes issue with the following comments by the prosecutor during the initial closing argument:

> [PROSECUTOR]: Those officers could not leave without [appellant] and they were taking [appellant] out of the car. And it was lawful for them to do that. They were going to arrest him for the violation of protective order and they had to take him in for an emergency petition. They had to. And if they didn't we would be here for a completely different type of case.
>
> [DEFENSE COUNSEL]: Objection. Motion to strike.
>
> THE COURT: Won't you approach?
>
> BENCH CONFERENCE WITH [APPELLANT]
>
> THE COURT: What part do you want stricken?
>
> [DEFENSE COUNSEL]: The part about they did not take him in for a protective – or for an emergency evaluation we would be here for a

completely different case. That speculates to murder. Suicide. It's not in this case.

[PROSECUTOR]: Wasn't speculating to that at all.

[DEFENSE COUNSEL]: It invites speculation. It's completely inappropriate.

THE COURT: I disagree. Overruled. Thank you.

BENCH CONFERENCE ENDS

THE COURT: The objection is overruled. You can continue, Counsel.

Appellate counsel asserts that the remarks, and most particularly those related to a "completely different type of case" were "egregious" and "a blatant attempt to appeal to the passion of the jury" by suggesting that, absent the police response, appellant's "behavior would have escalated from violating a protective order and assaulting officers to murdering Ms. Carney." Generally, "[a] trial court is in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). And, for that reason, trial courts have broad discretion in assessing the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012); *see also State v. Cook*, 338 Md. 598, 615 (1995) (observing that the fundamental rationale for deference is that "the trial judge is physically on the scene, able to observe matters not usually reflected in a cold record . . . [and] has his finger on the pulse of the trial"). We do not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)). Stated differently, an improper remark by a prosecutor will typically merit

reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)).

We are not persuaded that the passing remark about a "completely different type of case" was so egregious or prejudicial as to require reversal. In context, it appears that the prosecutor's comment related more to appellant's mental state and possible suicide than it did to murder. Appellant's suggestion that the prosecutor was asking the jury to speculate that appellant meant to murder Carney ignores the context of the remark. Up to the moment of the objection, the prosecutor's argument was focused on justifying the police officer's conduct at the garage. For example, mere moments before the challenged remarks, the prosecutor argued:

> The officers find the [appellant] in the car. There's smoke. It's clear to them, clear to Officer Frei and Officer Navarro what's going on in that garage. They can't just walk away. They can't go up to [appellant] and say hey, are you okay. All right. We're out of here.
>
> Their duty is to protect the public. They got information. They received information that [appellant] was threatening to kill himself. They go to the scene. [Appellant] is in a car in a closed garage with the car on and emission smoke coming out. They could not leave him there. And they told you they weren't going to leave him there.

We also note that defense counsel offered no objection when the prosecutor had made similar remarks earlier in closing:

> State's Exhibit 4, the front page. (Reading.) At 7:30 I'm going to kill myself if you don't come to my house. And there's a picture that looks like could be a car. She said she thought it was a car. And the officer said he thought it was a car maybe inside a garage. And there are other pictures in State's Exhibit 4 of the dash, the speedometer. Tachometer I think the officer

> said of the dash. There's a message. (Reading.) I hope you're having fun watching me kill myself.
>
> She and Officer Kershner see that message come in on her phone while they're together. Officer Kershner can't ignore that message. If he ignored that message, didn't send police to [appellant's] house to check on him, who knows where we'd be today. Who knows where [appellant] would be today.

See Yates v. State, 429 Md. 112, 120-21 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received") (citation and internal quotation marks omitted).

In sum, we are unable to conclude that the jury was likely to be misled or appellant was prejudiced by the prosecutor's remarks. The trial court's decision not to strike the remarks was well within its sound discretion.

IV.

Finally, appellant asserts that, pursuant to *Nicolas v. State*, 426 Md. 385 (2012), his convictions for second degree assault should merge into his conviction for resisting arrest. Because appellant was only charged with general second degree assault, and not assault on a law enforcement officer, *see* Criminal Law Section 3-203, the State concedes that the sentences, but not the convictions, merge. We agree.

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "A sentence is illegal when the illegality inheres in the sentence itself." *Taylor v. State*, 224 Md. App. 476, 500 (2015) (internal quotations omitted), *aff'd*, 448 Md. 242 (2016), *cert. denied*, 137 S.Ct. 1373 (2017). The "'failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule.'" *McClurkin*

v. State, 222 Md. App. 461, 489 n.8 (2015) (quoting *Pair v. State*, 202 Md. App. 617, 624 (2011)), *cert. denied*, 443 Md. 736, *cert. denied*, 136 S.Ct. 564 (2015). "[A] defendant may attack the sentence by way of direct appeal, or collaterally and belatedly through the trial court, and then on appeal from that denial." *Bishop v. State*, 218 Md. App. 472, 504 (2014) (internal quotations and citation omitted), *cert. denied*, 441 Md. 218 (2015).

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id*. "Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id*.

In *Nicolas v. State*, 426 Md. 385 (2012), three officers responded to a 911 call. Nicolas assaulted two of the officers, but it was unclear whether officers attempted to arrest him after the first of those two assaults or after both had been committed. *Id*. at 390-95. As the officers attempted to arrest Nicolas, a scuffle ensued during which he resisted arrest by committing additional assaults upon the officers. *Id*. Nicolas was convicted of resisting arrest and assaulting two of the officers, both of whom testified that he had assaulted them before and after he was arrested. *Id*. at 396.

The Court of Appeals stated that determining whether the offenses merged depended on: "(1) whether the offenses merge under the required evidence test and (2) whether a reasonable jury would have concluded that the offenses were based on the same

acts or on acts that were separate and distinct." *Nicolas*, 426 Md. at 400. Considering the fact that the assaultive behavior at issue was a battery, and this Court's opinions in *Cooper v. State*, 128 Md. App. 257 (1999), and *Grant v. State*, 141 Md. App. 517 (2001), the Court of Appeals explained "that the offense of second degree assault merges into the offense of resisting arrest under the required evidence test:"

> All of the elements of second degree assault are included within the offense of resisting arrest. The "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. Furthermore, there is no element required to satisfy the offense of second degree assault that is different from or additional to the elements required to satisfy the offense of resisting arrest.

Nicolas, 426 Md. at 407. The Court continued:

> While we agree with the State's contention that the force element of resisting arrest need not always constitute second degree assault against a law enforcement officer, we hold that when the force used by a defendant to resist arrest *is* the same as the offensive physical contact with a law enforcement officer attempting to effectuate that arrest, the convictions merge under the required evidence test.

Nicolas, 426 Md. at 407-08 (emphasis in original); *see also Britton v. State*, 201 Md. App. 589, 600-01 (2011) (noting that felony assault on a law enforcement officer has four additional elements in contrast to misdemeanor second degree assault).

The Court then turned to the question of whether the offenses at issue were based on the same act or acts by Nicolas. After reviewing the trial transcript, the judge's instructions, and the verdict sheet, the Court of Appeals held that the record was ambiguous as to whether the offenses were separate. In the Court's view, "a reasonable jury could have found that the assaults were based on acts that preceded the officers' attempt to arrest

Petitioner, or that the assaults were an integral part of the resisting arrest." *Nicolas*, 426 Md. at 412. The ambiguity was resolved in Nicolas' favor, and the sentences on the two assault convictions were vacated. *Id*. at 423.

Here, as in *Nicolas*, the court's instructions to the jury and the verdict sheet are ambiguous as to the factual bases for the second degree assault convictions. The instructions on the assault charges made no reference to the arrest, and the resisting arrest instruction did not indicate that the charge was to be considered separate from the assaults. And, the verdict sheet does not reflect any distinction between the two charges. In addition, the prosecutor, during closing argument, expressly linked the assaults to the resisting arrest when she stated "[t]he officers lawfully placed the Defendant under arrest and as they were trying to transport him, trying to put him in a vehicle, he assaulted each one of the officers." For all these reasons, it was reasonable for the jury to have found that the assaults were an integral part of appellant's resisting arrest. Because we must resolve this factual ambiguity in appellant's favor, we will vacate the sentences, but not the convictions, for second degree assault. *See Nicolas*, 426 Md. at 423 (vacating sentences for the two second degree assault convictions); *see also Twigg v. State*, 447 Md. 1, 19 n.10 (2016) ("[T]he remedy is to vacate only the sentence imposed upon the lesser included offense, not the conviction itself").

SENTENCES FOR SECOND-DEGREE ASSAULT VACATED, JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY HOWARD COUNTY.