Circuit Court for Anne Arundel County
Case No.: C-02-CR-18-001369

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3283

September Term, 2018

DONTE EDWARD BURLEY

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Shaw Geter,

JJ.

Opinion by Reed, J.

Filed: May 6, 2020

A jury sitting in the Circuit Court for Anne Arundel County found appellant, Donte Edward Burley, guilty of second-degree assault, reckless endangerment, and resisting arrest.[1] The court sentenced appellant to: (1) five years' imprisonment with all but eighteen months suspended for second-degree assault; and (2) six months' imprisonment all suspended to be served consecutively for resisting arrest. The court merged reckless endangerment into second-degree assault for sentencing. Appellant noted an appeal and presents us with the following questions which we have re-phrased:

I. Is the evidence legally sufficient to sustain appellant's conviction for resisting arrest?

II. Did the trial court abuse its discretion by not individually questioning a juror during deliberations who appellant claimed to know?

III. Did the trial court commit plain error by not *sua sponte* prohibiting the State from eliciting evidence of appellant's pre-arrest silence?

For the reasons to be discussed, we shall affirm the judgments.

BACKGROUND

On the evening of June 4, 2018, the victim in this case, Crystal Barnes, called 9-1-1, and requested that the police be sent to her residence. Aside from the 9-1-1 operator, two other voices can be heard on the recording of that call, who were later identified to be the victim, and appellant. Among other things, the following portion of that recording was played for the jury:

OPERATOR: What's going on?

[1] The jury could not unanimously agree on a verdict for a count charging first-degree assault. At the conclusion of the sentencing proceeding, the State entered a *nolle prosequi* on that count.

MS. BARNES:	You was not thinking about your friends when you had me by my throat. You wasn't.
OPERATOR:	Ma'am?
MS. BARNES:	What?
OPERATOR:	What's going on there?
[Appellant]:	(Indiscernible).
OPERATOR:	Ma'am?
MS. BARNES:	Hum?
OPERATOR:	What is going on there?
MS. BARNES:	He –
[Appellant]:	(Indiscernible).
MS. BARNES:	-- because he is over here, choking me.

Corporal Christopher Cook of the Anne Arundel County Police Department, along with two other police officers, went to the victim's residence in response to a domestic violence call. The victim opened the door after Corporal Cook knocked. He noticed that her "neck was red [and] [s]he had some scratches on her neck, neck and chest area." Inside the residence were appellant, the victim, and the victim's thirteen-year-old son.

After the police separated the victim and appellant so that they could investigate the matter, Corporal Cook spoke with the victim upstairs. She said that she and appellant had been in a long term, on-again, off-again, relationship, and that he had been staying at her house for a couple of days. The victim said that a verbal altercation about appellant's drinking had escalated to the point where she had appellant leave the house. Upon appellant's later return they continued to argue, and they pushed each other. "[T]hen

[appellant] began to strangle her to the point that she almost lost consciousness – or did lose consciousness and fell." Appellant told the victim that he was going to kill her, and when the victim went to get her phone, he tried to attack her son who had locked himself in his bedroom.

Corporal Cook explained that he photographed the victim's injuries and filled out the portion of a county domestic violence form that he is required to when responding to a domestic violence call, but that the victim refused to fill out the portion designated for her. When asked what he thought the victim's goal was, he said that "she just wanted [appellant] out of the house. She wanted him to leave."

Corporal Cook explained that appellant was "intoxicated and just wasn't very pleased by our presence." Appellant said "you know, you're in my house" when he saw Corporal Cook coming down the stairs to speak with him. In response to Corporal Cook questioning appellant about what had occurred previously that night, appellant said "[l]ook at this guy coming in here like the authority figure[.]" When Corporal Cook noticed that appellant had blood on his hand and asked him how it got there, appellant responded "Oh, you're the looker, aren't you?" Corporal Cook testified that he had "no idea" what appellant meant by that remark and continued: "That's the only response I got. He didn't explain anything or have anything to really say to me."

Corporal Cook then decided to place appellant under arrest. Corporal Cook described the series of events that unfolded as follows:

> [The] first thing I said was "Put your beer down. You're under arrest," and he refused to put the beer down. So I pulled my handcuffs off, and I grabbed his left wrist, and then put the cuffs on. I said, you know, "Give me your

> hands. You're under arrest." And at that point, he ripped his hand up, straight up into the air, and pulled his hand away[.]

Corporal Cook then described the struggle that ensued between he, appellant, who was "belligerent and intoxicated," and the other two police officers as the group "went to the floor." It took the police officers a "couple minutes" to pull appellant's right hand out from underneath his body while they told him "Stop resisting. Give us your hand. You're under arrest." During the struggle appellant said something to the effect of "you're going to have to try harder." Ultimately the officers were able to gain control of appellant's hands and place him in handcuffs. Corporal Cook explained that appellant "continued to fight … and wouldn't go willingly to the car." The police decided to place appellant in a patrol car with a cage "[b]ecause of the potential for him being combative, and him already resisting arrest, and … those sorts of things." Once the time came to place appellant in the police car appellant "stood straight and rigid and refused to bend his body and sit into the car." As a result, the police "physically placed" appellant in the police car.

Appellant testified in his own defense and said that he was not living with the victim at that time, rather, he was living at Another Chance Recovery Program seeking help for his alcohol and opiate addictions. On the day appellant was given his first day pass from the recovery house, the victim invited him over to her house where he arrived around two o'clock in the afternoon and immediately began drinking alcohol.

He testified that he thought that the victim was upset with him and, therefore, he went upstairs to pay more attention to her. Next, appellant said "We had sex and then I got – I was on my phone, I like to play scrabble, I'm on my Facebook messenger and she –

Crystal walked in front of the bed and smacked the phone out of my hand." After a brief struggle during which the victim "mushed" appellant's forehead, she grabbed appellant's hair in what he called "the Baltimore sling" which is a maneuver where "if you have long hair and someone grabs your head and you can't lift your head, so they can kind of direct your body wherever they want to go." In response, appellant said he "stood firm" and pushed or grabbed her by the throat. He denied choking her or making the marks on her neck and chest, however. According to appellant, the two then began arguing and appellant left. After appellant had "walked it off" he returned with a desire to "sleep it off." The victim, according to appellant, "wasn't going to let up," and "wasn't going to "let [him] sleep it off." He said he did not leave because "[He] couldn't go back to the recovery house drunk like that, and [he] couldn't go around anybody and be a failure, so that was the only place that [he] could – in [his] mind [he] could be."

He admitted that he did not tell the police who responded to the 9-1-1 call anything about the altercation he had with the victim. He also agreed that the photographs taken by Corporal Cook depicted what appeared to be finger marks on the victim's throat. The following exchange occurred during the State's cross examination of appellant after the State had played a portion of the 9-1-1 call:

> Q Okay. That's also you saying you're going to beat her the fuck up, isn't it?
>
> A I was saying I would beat him the fuck up.
>
> Q Him who?
>
> A A phantom him, sometimes she says she's going to call family or it's a phantom him.

> Q You are in her home, she has just called the police telling them that you're choking her, and your testimony is that you're stating that you were telling a phantom person who was not there … that you were going to beat them the fuck up.
>
> A Yeah, the audio it doesn't depict everything that was said.

Any additional facts will be added in the following discussion as they become relevant.

DISCUSSION

I.

As noted earlier, the jury found appellant guilty of resisting arrest. Resisting arrest is prohibited in Maryland by Section 9-408(b) of the Criminal Law Code, which provides, in pertinent part that "[a] person may not intentionally … resist a lawful arrest…" Thus, the elements that the State must prove are that: "(1) a law enforcement officer arrested, or attempted to arrest, the defendant; (2) the arrest was lawful, and; (3) the defendant refused to submit to the arrest and resisted the arrest by force." *DeGrange v. State*, 221 Md. App. 415, 421 (2015). Appellant contends that the evidence was legally insufficient to support his conviction because, according to him, the State did not provide sufficient evidence that (1) the arrest was lawful, and (2) that he resisted that lawful arrest. We disagree.

STANDARD OF REVIEW

The standard of review for determining whether there is sufficient evidence to support a conviction is 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." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting

Facon v. State, 375 Md. 435, 454 (2003)); *see also Perry v. State*, 229 Md. App. 687, 696-97 (2016).

> The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.

Derr v. State, 434 Md. 88, 129 (2013), *cert. denied*, 134 S. Ct. 2723 (2014) (cleaned up). Our concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994).

A.

The Lawfulness of the Arrest.

As noted, appellant claims that the State failed to prove that his arrest was lawful, which is an element of the crime of resisting arrest. He claims the arrest was not lawful because Corporal Cook (1) did not confirm that appellant was the source of the injuries to the victim, (2) relied on appellant's pre-arrest silence as "assessing the situation," and (3) gave no explanation or warning to appellant about the arrest.

Fatal to appellant's claim is that he never argued to the trial court when moving for judgment of acquittal that the State failed to offer sufficient evidence that the arrest was

lawful. Nor did appellant argue that the police "erroneously" used his pre-arrest silence against him. Those arguments are, therefore, not preserved for appellate review because a criminal defendant is not entitled to base his appellate insufficiency of the evidence claim on arguments raised for the first time on appeal. *Starr v. State*, 405 Md. 293, 302 (2008).

Nevertheless, even if appellant had made the foregoing arguments at trial, he would fare no better because the evidence that the arrest was lawful was clearly legally sufficient and Corporal Cook's use, or non-use, of the fact that appellant said nothing in response to the Corporal's questions is irrelevant to the question of the sufficiency of the evidence.

The general common law rule is that, so long as a police officer has probable cause to believe that an individual has committed a misdemeanor in the presence of the police officer, or committed a felony (in or out of the presence of the police officer), the police officer may effectuate a warrantless arrest of that individual. *Bailey v. State*, 412 Md. 349, 374 (2010). By enacting Ch. 561 of the Acts of 1969 the Maryland General Assembly codified that common law rule which is now found in Section 2-202[2] of the Criminal Procedure Article[3]. *See Ashton v. Brown*, 339 Md. 70, 122 (1995). In addition to codifying

[2] Formerly Art. 27 § 594B(b)

[3] Section 2-202 provides as follows:

(a) A police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of the police officer.

(b) A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime.

(continued)

the common law by enacting that provision, the General Assembly also legislatively extended the authority of the police to make warrantless arrests for certain misdemeanors committed not in the presence of the police officer. *Id*. Section 2-204 of the Criminal Procedure Article authorizes a warrantless arrest in certain domestic violence situations, as follows:

> *Grounds for warrantless arrest*
>
> (a) A police officer without a warrant may arrest a person if:
>
> (1) the police officer has probable cause to believe that:
>
> (i) the person battered the person's spouse or another person with whom the person resides;
>
> (ii) there is evidence of physical injury; and
>
> (iii) unless the person is arrested immediately, the person:
>
> 1. may not be apprehended;
>
> 2. may cause physical injury or property damage to another; or
>
> 3. may tamper with, dispose of, or destroy evidence; and
>
> (2) a report to the police was made within 48 hours of the alleged incident.
>
> *Mutual battery and self-defense considerations*
>
> (b) If the police officer has probable cause to believe that mutual battery occurred, and arrest is necessary under subsection (a) of this section, the police officer shall consider whether one of the persons acted in

(c) A police officer without a warrant may arrest a person if the police officer has probable cause to believe that a felony has been committed or attempted and the person has committed or attempted to commit the felony whether or not in the presence or within the view of the police officer.

> self-defense when determining whether to arrest the person whom the police officer believes to be the primary aggressor.

"Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Longshore v. State*, 399 Md. 486, 501 (2007) (cleaned up).

> Probable cause, we have frequently stated, is a nontechnical conception of a reasonable ground of a belief of guilt. A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion. Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge.... Therefore, to justify a warrantless arrest the police must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion.

Bailey, 412 Md. at 374–75 (cleaned up).

Turning to the instant case, in support of his position that the evidence is insufficient to show that his arrest was lawful, appellant contends that (1) Corporal Cook did not have proof that the marks on the victim's neck were caused by appellant, (2) the blood on appellant's hands could have come from an injury caused by the victim, and (3) it was unclear whether appellant was a victim who acted in self-defense.

A premise of appellant's argument appears to be that the General Assembly, in enacting Ch. 561 of the Acts of 1969 sought to make it more difficult for the police to effectuate a warrantless arrest. That is simply not the case. The General Assembly expanded the situations where the police could lawfully arrest a person. As noted, a police

officer may arrest a person without a warrant if the police officer has probable cause to believe that the person has committed a felony. Here, in light of the fact that Corporal Cook saw marks on the victim's neck and was told by the victim that appellant strangled her to the point that "she almost lost consciousness – or did lose consciousness and fell" and that he was going to kill her, we think that a "common sense evaluation of the totality of the circumstances," *Bailey*, 412 Md. at 374–75, established probable cause to believe that appellant had committed a first-degree assault[4] on the victim. Because first-degree assault is a felony, Corporal Cook was justified to effectuate a warrantless arrest on appellant. Appellant's focus on Section 2-204 of the Criminal Procedure Article is therefore beside the point.

Moreover, as noted earlier, whether Corporal Cook relied on appellant's pre-arrest silence, or whether Corporal Cook explained to appellant the reason for the arrest are both irrelevant to our analysis because the lawfulness of an arrest depends not upon whether the officer articulated the correct basis for the arrest, rather, it depends upon whether the officer had probable cause to arrest. *Herod v. State*, 311 Md. 288, 299 (1987).

[4] Section 3-202 of the Criminal Law Article provides, in pertinent part, as follows:

Prohibited

(a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.

****

Penalty

(b) A person who violates this section is guilty of the felony of assault in the first degree and on conviction is subject to imprisonment not exceeding 25 years.

B.

Resistance

As noted, the elements of the crime of resisting arrest are that: "(1) a law enforcement officer arrested or attempted to arrest the defendant; (2) the arrest was lawful, and; (3) the defendant refused to submit to the arrest and resisted the arrest by force." *DeGrange*, 221 Md. App. at 421. Appellant contends that the evidence was legally insufficient to show that he resisted arrest because, while appellant did not cooperate with police, the evidence did not show that he tried to escape or was forceful or violent. In essence, he claims that the evidence did not show that he displayed enough force to support that element of the offense. We disagree.

Regarding the level of force necessary to satisfy that element of the offense, we observed in *DeGrange v. State*, 221 Md. App. 415, 421–22 (2015) that:

> We held, in *Rich* [*v. State*, 205 Md. App. 227, 250 (2012)], that *both* a refusal to submit to lawful arrest *and* resistance by force or threat of force are necessary to commit the crime of resisting arrest. The level of force required, however, is not high. Although we agreed with Rich that "mere flight" from an arresting officer is not active conduct and does not supply the requisite force to sustain a conviction for resisting arrest, we pointed out, in *dicta*, that, for example, "when a person 'goes limp' in response to an officer's attempt to effectuate an arrest courts have held that such conduct constitutes force for resistance purposes." [*Rich*, 205 Md. App. at 253 n. 8], and case cited therein.

Id. at 421-22 (emphasis supplied). In conducting a merger analysis for sentencing, the Court of Appeals has recognized that the "force element of resisting arrest need not always constitute second degree assault against a law enforcement officer." *Nicolas v State*, 426 Md. 385, 408 (2012).

We are persuaded that, in the instant case, the evidence was legally sufficient to show that appellant resisted his arrest with sufficient force to support sending the count charging resisting arrest to the jury. Appellant, who was belligerent and intoxicated, failed to comply with lawful orders and resisted his arrest at every turn. He did not comply with Corporal Cook's instruction to put his beer down. He did not put his hands behind his back so that he could be handcuffed. Once Corporal Cook had handcuffed appellant's left wrist, appellant "ripped his hand up, straight up into the air, and pulled his hand away." Once the police officers got appellant on the ground, appellant "laid on top of his right hand," thereby preventing the officers from handcuffing him, and told the officers, "You're going to have to try harder." Appellant failed to comply with the officer's repeated entreaties to "Give us your hand." It took the officers "a couple of minutes" to pull appellant's "hand out from underneath him" and to secure the handcuffs around his wrists. Once handcuffed, appellant refused to enter the police car. Instead, appellant "just stood straight and rigid and refused to bend his body and sit in the car." To place appellant in the car, the officers had to "pick his feet up and push him into the car."

In *DeGrange*, we found the evidence sufficient where the defendant pulled away from the police after she refused to stand and place her hands behind her back, she fell forward and continued to struggle with the police, and continued to refuse to submit to the arrest kicking and yelling. 221 Md. App. at 422. We believe that the circumstances of *DeGrange* are analytically indistinct from the circumstances of the present case. In both cases, the defendant struggled with the police when they attempted to place the defendant in handcuffs. No more force than that is required to sustain a conviction for resisting arrest.

II.

Appellant next contends that the trial court abused its discretion by refusing to conduct a *voir dire* examination of a juror that appellant claimed to know.

The court was made aware that appellant knew one of the jurors during deliberations and after the jury had sent a note asking "If we cannot agree on the assault first charge, but do agree on the other three, how do we proceed having exhausted what we feel to be all reasonable avenues." While considering the appropriate response to the question from the jury, the parties engaged in guilty plea negotiations. During those discussions, appellant urged his counsel to explain his concerns about a juror to the court. The following occurred after the court invited appellant's counsel to place appellant's concerns on the record:

DEFENSE COUNSEL: It's my understanding based on my conversation with [appellant] that he is familiar acquaintances with Juror No. 2, which he identified as Rebecca. As I indicated to the Court and the State in chambers that when I spoke with Mr. Burley this afternoon and he raised the issue of being familiar with one of the jurors and indicated that he had known them from childhood, and I told him that I needed to disclose it to the Court, he said that he was just joking, he was lying, that he didn't think it was a serious thing, and he didn't mean to make fund [sic] of it.

And so about 15, 20 minutes ago when we were discussing the offer that the Court was inclined to proceed on the assault second and offer five, suspend all but three, with two years supervised probation and I indicated to him that the State while – would not take a position at this time, but certainly suggested that a year out that I could request a modification from the Court to suspend the balance of the sentence.

He said, well, what about the issue that I discussed with you earlier. I said – he said the juror issue. I was like,

you said that was a lie. Is it true, he's like, yeah, it's true, explore it, and I jumped up, dialed [The State], went back to chambers and disclosed both to the State and to the Court.

THE COURT: So, sir [Appellant], which is true?

APPELLANT: Juror No. 2 looked familiar, but I wasn't – without names, I wasn't sure, it was so long ago. I just didn't want if there's going to be –

THE COURT: Wait a minute. So at what point were you provided the name?

APPELLANT: No, I wasn't. I was thinking in the hallway if that is – I wanted [Defense Counsel] to confirm if that's – because I don't want a situation that happened with the other juror[5] and I'm thinking about going into a plea and someone feels threatened by me and brings up that they would later on may feel threatened if they do know me, I just don't want that situation to –

THE COURT: Sir, no one has indicated – certainly there was a juror who indicated you were here in the courtroom, that they expressed a reason why they could no longer be fair and impartial, and the Court went ahead and released that juror. No other juror has made any other comment or statement to the Court, to the bailiffs or to the court clerk of any such concern.

THE STATE: Nor to the State.

THE COURT: Nor to the State of that concern. No one has raised that, they have taken an oath to be fair and impartial, and the jury members have indicated that they can be fair and impartial.

Each individual was asked if they knew you. And no member of this jury pool of 50 candidates indicated that they knew you. You did not indicate at that time or at

[5] After the jury was sworn but before evidence was heard a juror insisted that he could not give a fair verdict in the case and was dismissed. He was replaced by the alternate juror.

any time during jury selection that you knew any of the jurors or that you thought that you knew any of the jurors.

At what point, sir, did you think you might know one of those jurors?

APPELLANT: In passing in the hallway.

THE COURT: When?

APPELLANT: Yesterday.

THE COURT: So yesterday you thought you knew a juror, and you didn't tell your attorney, so you basically believed that you permitted an acquaintance to – somebody that you knew, a friend to sit on the jury?

APPELLANT: I wouldn't – yes, Your Honor, I didn't intend to permit it, I just didn't want to make a – I told [Defense Counsel] I didn't want to make a fuss if it's not important, but if we're talking about a conviction of sorts, I don't want it to become like this real dramatic –

THE COURT: No juror has indicated that they have – no juror sitting right now that has been deliberated [sic] has indicated that they have any intent to do anything but fair and impartial. They were instructed that at the beginning, the middle, and the end of the jury – I mean, of this case.

APPELLANT: Okay. I understand, Your Honor, I just didn't – you know, with the first witness, I mean, first juror saying that –

THE COURT: And he was excused.

APPELLANT: And I wasn't sure. I was even asking [Defense Counsel], is there a possibility that that opinion could have been –

THE COURT: That opinion was not shared –

APPELLANT: – talked about with other jurors.

THE COURT:	– with any other juror. He gave his opinion and he walked out that door, he never communicated with the jurors that remained to sit on your trial.
APPELLANT:	I just was unsure because it was lunch break when – he come back from lunch break and he saying it may be a potential harm to him to stand on the juror, so I didn't – I'm just – the whole time –
THE COURT:	And he was excused –
APPELLANT:	– I haven't been sure about that.
THE COURT:	–for that. No other juror has given this Court or any of its parts, meaning the State, the defense counsel, the clerks, the sheriffs, the bailiffs any indication that they had any difficulty continuing on this case to conclusion.
APPELLANT:	I understand.
THE COURT:	I'm going to bring them in. I'm going to indicate to them that I'm going to release them and I'm going to let them come back tomorrow morning, despite the fact that this member of the bench is off, I will be here tomorrow.

The following day, the trial court recited on the record the steps that Juror No. 2 had been through during *voir dire* for jury selection, including the fact that Juror No. 2 did not affirmatively respond when the jury pool was asked whether any of them knew appellant. The court noted that appellant was an active participant in jury selection and had more than one opportunity to view Juror No. 2 separate and apart from the remainder of the jury pool when Juror No. 2 stood in response to several *voir dire* questions. The court observed that, "[a]t no time from the jury selection through the swearing in of the jury was the issue raised that [appellant] believed he knew any members of the jury panel." The court noted that appellant had first raised the issue about Juror No. 2 with his lawyer at lunchtime the

preceding day but, when his lawyer inquired about it, appellant said he was only kidding and that he did not really know anybody on the jury.

The court then found that "the defendant was given ample opportunity to raise an issue with regard to Juror [No.] 2 throughout *voir dire*, throughout the State's case, before [appellant] took the stand, [and] before the conclusion of the case." The court stated that appellant had "only raised [the issue] after it appeared from the contents of Juror Note Number 2 that there was an indication of guilt on one or more counts that the jury was deliberating." On the basis of the foregoing, the court ruled that appellant "waived his right or waived the issue of challenging the jury at this time."

Several hours later, while the jury continued to deliberate, appellant's counsel asked, out of an "overabundance of preserving [appellant's] constitutional rights," the court to ask Juror No. 2 whether she was "familiar with anybody, either the State, the Court, [or] the defendant[.] The court then denied appellant's request, in pertinent part, as follows:

> This morning I certainly placed on the records [sic] the -- and after listening to your client last night the issue of whether he recognizes or he knows or thinks he knows the juror is not the issue. The issue is whether a juror knows any of the individuals in this case and would presumably in the multiple times that they were asked a variety of different questions that would give them that opportunity, and as clearly as we saw with the replacement of the one juror with our alternate, that if an issue had arisen the Court certainly handles it. And I take that very seriously.
>
> In this case there were at least three, at least three opportunities where the juror in this case, if she recognized the client, could have or the defendant could have made a comment -- you know, a mention or certainly could have gone to the clerk or certainly could have gone to the bailiff to let me know[.]
>
> ****

> In this case Juror -- now juror, Seated Juror Number 2 has had a name, a face, has had multiple opportunities. The Court takes jurors at their word and at their value when they promise to decide a case fairly and impartially; that if there is a conflict, a problem, an issue arises that they have a process for communicating that with me. None of that has happened within -- with regard to this.
>
> And your client in his comments yesterday, interestingly it was after … when they – the note reflected what – what may come to fruition, that it was only after you came out and told him about that that he then wanted to press with you something that he made very clear to you. And – and I take you at your [word] … [t]hat when he told you, oh, I'm just kidding, I'm messing around with you, one, I believe thas what he said to you. And, two, I believe you made a decision at that point that there was – that he's pulling on your strings … And that not until he was faced with the prospect that perhaps from his thought process that the verdict was not going to go in his favor did he want to press with you something that he very clearly told you he was only joking around about.

Appellant contends that the trial court abused its discretion when, after he indicated that he had some familiarity with Juror No. 2, it declined to question the juror about it. Appellant likens the scenario outlined above with the circumstances that arose in *Williams v. State*, 394 Md. 98 (2006) where the Court of Appeals held that, "where there is a non-disclosure by a juror of information that a *voir dire* question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial." *Id*. at 114.

In *Williams*, it was learned after the verdict was rendered that one of the jurors did not disclose that one of her family members was an employee in the office of the State's Attorney prosecuting Williams. *Id.* at 101. To be sure, the Court of Appeals made clear that, under those circumstances, the failure of the trial court to question the juror about the non-disclosure prevented the court from exercising its discretion because it lacked critical

facts. *Id*. at 114-15. Such is not the case here. In this case, it was not a juror who withheld information, rather, it was appellant. As the trial court found, Juror No. 2 never gave any indication that she knew appellant and that she could not therefore be fair and impartial despite multiple opportunities to do so. We also agree with the trial court that appellant waived any complaint about Juror No. 2 by not revealing that he allegedly knew her "until he was faced with the prospect that perhaps … the verdict was not going to go in his favor." Under these circumstances, where it is apparent that appellant attempted to achieve a tactical advantage by manipulating his lawyer and the court in bad faith, we discern no abuse of discretion by the trial court.

III.

Next appellant contends that the trial court committed a plain error when it allowed the jury to hear evidence of appellant's pre-arrest silence through the testimony of Corporal Cook. Specifically, appellant points to the following areas of Corporal Cook's testimony:

- After the State asked Corporal Cook on direct examination what Appellant meant by the statement, "Oh, you're the looker aren't you," Corporal Cook responded "I have no idea. That's the only response I got. He didn't explain anything or have anything to really say to me."
- When asked on direct examination whether appellant gave any indication that he had been hurt, Corporal Cook said, "[h]e didn't say that he had been hurt at all."
- After the State asked Corporal Cook on direct examination to explain at what point during the encounter with appellant he decided to place him under

arrest, Corporal Cook responded "[r]ight after I was speaking to [appellant], trying to get his account of the events, when I asked him 'What was going on tonight?' and he didn't give me any response, and he didn't want to discuss any of it with me."

Also, the following exchange occurred while Corporal Cook was being questioned by the State on redirect examination:

[THE STATE]:	Okay. When, if ever, did [appellant] tell you that something else had physically happened to him?
[CORPORAL COOK]:	He did not.
[THE STATE]:	When, if ever, did he tell you that [the victim] had physically touched him?
[CORPORAL COOK]:	He didn't.
[THE STATE]:	Okay. When if ever, did you provide [appellant] an opportunity to do those things?
[CORPORAL COOK]:	After I was done speaking with [the victim], I asked him to "Tell me what happened this evening? Give me your side of the story."

Appellant acknowledges that because he did not lodge an objection to any of the foregoing testimony, that the issue is therefore not preserved for appeal. Nevertheless, he asks us to review the matter for plain error. For the reasons that follow, we decline appellant's invitation.

Maryland Rule 8–131(a) restricts appellate review generally to matters that "plainly appear[ ] by the record to have been raised in or decided by the trial court." In assessing whether to address, and possibly correct, an unpreserved error, "[t]he touchstone remains our discretion." *Williams v. State*, 34 Md. App. 206, 211 (1976). "[E]ven the likelihood of

reversible error is no more than a trigger for the exercise of discretion and not a necessarily dispositive factor." *Morris v. State*, 153 Md. App. 480, 513 (2003). It is only "the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative" of reviewing a question for plain error. *Martin v. State*, 165 Md. App. 189, 195 (2005). (quoting *Williams v. State*, 34 Md. App. 206, 212, (1976) (Moylan, J., concurring)). "We have defined plain error ... as 'error which vitally affects a defendant's right to a fair and impartial trial and have limited our review under the plain error doctrine to circumstances which are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Miller v. State*, 380 Md. 1, 29-30 (2004) (internal citations omitted).

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Moreover, the Court of Appeals has made clear that an appellate court will "intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397 (1984).

In exercising our discretion to notice plain error, we utilize a four-factor test: (1) there must be an error or defect that has not been intentionally relinquished or abandoned; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3)

the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial; and (4) if the foregoing three prongs are satisfied, the appellate court has the discretion to remedy the error. *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up).

Regarding the first factor of the *Rich* test, we simply have no idea whether any error was intentionally relinquished or abandoned. It is entirely possible that trial counsel did not object to the testimony outlined above as part of a trial strategy and therefore did, in fact intentionally relinquish or abandon any complaint about it. During appellant's closing argument, for example, his lawyer explained to the jury that the reason that appellant said nothing to Corporal Cook was to protect the victim. According to appellant, he was afraid that, had he told Corporal Cook what had actually occurred, Corporal Cook would have arrested the victim too, leaving her son behind.

Under the second factor of the *Rich* test, we examine whether a clear error occurred which is not subject to reasonable dispute. While it is true that the use of a defendant's silence *as an indication of his guilt* is nearly universally prohibited and highly prejudicial, under the circumstances presented by this case, it is at the very least reasonably debatable whether the State used appellant's silence as a badge of guilt. Pre-arrest silence is generally inadmissible not because of any constitutional concerns, but because it is irrelevant under Maryland evidence law. *See Weitzel v. State*, 384 Md. 451, 461 (2004). In this case, however, its irrelevance, *vel non*, is not so clear.

This case involves a charge of resisting arrest. To prove that charge, the State was required to prove that the arrest was lawful. As indicated earlier, Section 2-204 of the

Maryland Criminal Procedure Article dictates when a police officer may effectuate an arrest in certain domestic violence situations. Pursuant to subsection (b), if a police officer has probable cause to believe that a mutual battery occurred, "then the police officer shall consider whether one of the persons acted in self-defense when determining whether to arrest the person whom the police officer believes to be the primary aggressor." In appellant's opening statement, he telegraphed that his defense at trial was that he acted in self-defense after the victim attacked him. In response to the State's brief opening statement which outlined what had occurred that night, *i.e.,* that appellant got drunk and grabbed the victim by the throat causing her to call 9-1-1 which brought the police who arrested appellant, appellant said the following during opening statement:

> [Appellant and the victim] have been in a relationship, on-again, off-again, for six or seven years. By all accounts, it's an everyday relationship, except it's fraught with extreme passion, right, either way. And so when they love, they love hard, and when they fight, they fight hard. And that has been consistent for them, on-again, off-again, for the past six or seven years.
>
> June 4th was no different. So what the State told you, for the most part, is accurate. The part that [the State] doesn't tell you is that they were at each other, like couples sometimes are. What she didn't tell you is that Crystal was mad and pulled his dreads. What she doesn't tell you is that Crystal is not a victim.

Moreover, Corporal Cook testified that the victim admitted that she had pushed appellant before he choked her. He also noticed that appellant had blood on his hand. Thus, Corporal Cook had reason to believe that a mutual battery had occurred. As a result, to prove that the arrest was lawful, the State had to show that appellant did not act in self-defense when he choked the victim. In order to prove that Corporal Cook had no reason to believe that appellant was acting in self-defense, it was necessary for the State to show why that was

the case – which was done by eliciting evidence that appellant gave no indication he was acting in self-defense when he was asked what had occurred earlier that night.

Lastly, we do not believe that appellant's substantial rights were affected. The State's elicitation of the fact that appellant failed to respond to Corporal Cook's question about what had occurred came as part of the jury learning the full circumstances of appellant's arrest, and his drunken belligerent resistance thereto. With regard to the resisting arrest charge at least, that he did not speak when spoken to was arguably the least incriminating thing that appellant did after the police entered his home.

Given that appellant has not satisfied us that the *Rich* test has been met, under the circumstances of this case, we decline to exercise our discretion to review the matter as plain error.

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