

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1820

September Term, 2015

DAVID ANDREW POTEE

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: August 8, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On October 9, 2015, an Anne Arundel County jury convicted David Andrew Potee of possession of cocaine and heroin and of resisting arrest. The court imposed consecutive sentences of six years' imprisonment, with all but three years suspended, followed by five years of probation. Potee filed this timely appeal, alleging several errors in a jury instruction concerning resisting arrest.

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

During the evening of May 13, 2015, the Anne Arundel County Police initiated a traffic stop of a car near Crownsville. Potee was the front-seat passenger.

Within two minutes of the stop, a K-9 unit arrived and began conducting a scan of the car while citations were being written. The officers asked the occupants to step out of the car during the scan. As the driver exited the car, he made a quick gesture towards his feet, and a narcotics detective saw two gel caps containing white powder fall to the ground. The detective immediately shouted that gel caps had been found.

Upon hearing the narcotics detective's alert, Potee shouted an obscenity and threw down a cigarette wrapper that contained a crack pipe. An officer told Potee that he was under arrest. As the officers attempted to handcuff him, Potee pulled away, and a brief struggle ensued. Following an alert by the police dog, the officers found a satchel containing a total of 34 additional gel caps filled with white powder in the back seat of the car.

Laboratory tests indicated that both cocaine and heroin were present in the satchel.

QUESTION PRESENTED

Potee presents one question: Did the trial court err in its jury instruction on resisting arrest? We affirm.

DISCUSSION

Before deliberations, the court gave the following instruction on the crime of resisting arrest:

The defendant in this case is... charged with the crime of resisting arrest. In order [to] convict the defendant of resisting arrest, the State must prove that a law enforcement officer in fact arrested or attempted to arrest the defendant. Number two, that the defendant knew that [the] law enforcement officer had arrested him or was attempting to arrest him; and that the defendant intentionally refused to submit to the arrest and resisted the arrest by force or threat of force. And four, that the arrest was lawful; that is, that the officer had probable cause to believe that the defendant had committed the crime. Probable cause exists where the facts and circumstances taken as a whole would lead a reasonable law enforcement officer to believe that the defendant had committed a misdemeanor in his presence. Probable cause is less than a certainty but more than mere suspicion. An arrest is the taking, seizing, or detaining of a person by touching or putting hands on that person, or by any act or words that indicate the officer's intention to take him into custody and that subjects him to the actual control and will of the officer making the arrest.

Although the instruction largely follows Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 4:27.1, the pattern jury instruction on resisting a warrantless arrest, Potee complains of several deviations from that instruction. He contends that the deviations rendered the instruction improper. We reject his contentions because he failed to preserve most of them, and the trial court did not abuse its discretion on the one that he did preserve.

I. Omitted Verbiage

Potee identifies three components of the pattern jury instruction that the court omitted.

The first omission occurred immediately after the portion of the instruction about the State’s obligation to prove “that the arrest was lawful; that is, that the officer had probable cause to believe that the defendant had committed the crime.” The pattern jury instruction envisions that the court will identify the specific crime that the officer claims to have “had probable to believe that the defendant had committed.” The court did not identify the crimes, which apparently were littering and possession of narcotics paraphernalia.

The second omission occurred after the portion of instruction in which the court states that “[p]robable cause exists where the facts and circumstances taken as a whole would lead a reasonable law enforcement officer to believe that the defendant had committed a misdemeanor in his presence.” The pattern jury instruction envisions that the court will inform the jury that the crimes in question are misdemeanors. It did not.

The third omission occurred at the end of the instruction, just after the court has instructed the jury that “[a]n arrest is the taking, seizing, or detaining of a person by touching or putting hands on that person, or by any act or words that indicate the officer’s intention to take him into custody and that subjects him to the actual control and will of the officer making the arrest.” At that point, the pattern jury instruction envisions that the court will inform the jury that “[t]he test” for whether a person has been arrested “is an objective one – that is, whether a reasonable person in the defendant’s position would

have understood that he or she was under arrest.” The court did not read the portion of the instruction regarding the objective test to determine whether a person had been arrested.

We need not address these omissions, because Potee admits that he failed to object to them after the court had read the instruction. Under Md. Rule 4-325(e),

[n]o 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. . . .

Rule 4-325(e) makes it clear that a failure to object to the giving or the failure to give a jury instruction at trial ordinarily constitutes a waiver of claim that the instructions were erroneous. *Morris v. State*, 153 Md. App. 480, 509 (2003). A party cannot fault a court for failing to correct an alleged error that he or she neglected to bring to the court’s attention.

Despite Potee’s failure to register a timely objection, he contends that the omissions should be subject to “plain error” review. *See* Md. Rule 4-325(e) (“[a]n appellate court . . . may . . . take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object”). In the exercise of our nearly “unfettered discretion” (*Morris*, 153 Md. App. at 507), we decline to review the omissions for plain error.

“[A]ppellate invocation of the ‘plain error doctrine’ 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.” *Id.* “The plain error hurdle, ‘high in all events, nowhere looms larger than in the context of alleged instructional errors.’”

Peterson v. State, 196 Md. App. 563, 589 (2010) (quoting *Martin v. State*, 165 Md. App. 189, 198 (2005)).

The Court of Appeals has articulated the following four-part test for plain error review:

First, there must be an error or defect – some sort of “[d]eviation from a legal rule” – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, 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 . . . proceedings.*” Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error – *discretion* which ought to be exercised only if *the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”* Meeting all four prongs is difficult, “as it should be.”

State v. Rich, 415 Md. 567, 578 (2010) (citations omitted; emphasis added); see *McCree v. State*, 214 Md. App. 238, 272 (2013).

Even a cursory analysis of the facts reveals that this is not a case of plain error. Potee points to three omissions: the failure to identify the crimes for which he was being arrested, the failure to specify that those crimes were misdemeanors, and the failure to include a sentence stating that Potee was under arrest if a reasonable person in his position would understand that he or she was under arrest. These omissions are insubstantial: they could not have affected the outcome of the proceedings, nor did they seriously affect the fairness, integrity, or public reputation of judicial proceedings.

In this simple, straightforward case, there was no serious question that the officers arrested Potee for possessing narcotics paraphernalia and littering. It was hardly an error,

much less a serious error that affected the outcome or the integrity of the proceedings, for the court not to repeat the identity of the crimes for which Potee was arrested.

Similarly, the court did not commit a serious error that affected the outcome or integrity of the proceedings when it omitted the final sentence of the instruction about the objective test for determining whether a person was under arrest. The detective testified that, after he saw Potee throw the crack pipe to the ground, he advised Potee that he was under arrest. In those circumstances, a reasonable person in Potee’s position would certainly have understood that he or she was under arrest.

II. Omission of Fact-Specific Instruction on Probable Cause

Potee argues that, by not including a fact-specific instruction regarding probable cause, the court failed to follow the advice in the “Notes on Use” for MPJI-Cr 4:27.1, which state: “If probable cause is an issue, the court should draft a fact-specific version of or supplement to” the jury instruction. MPJI-Cr 4:27.1. Potee objected in a timely fashion to the court’s decision not to include a fact-specific instruction, thereby preserving the issue for review. The court duly noted Potee’s objection.

““We review a trial court’s decision whether to grant a jury instruction under an abuse of discretion standard.”” *See, e.g., Derr v. State*, 434 Md. 88, 133 (2013) (quoting *Cost v. State*, 417 Md. 360, 369 (2010)). A court does not abuse its discretion in declining to give an instruction if the content of the instruction was fairly covered elsewhere in instructions actually given. *See id.* at 368-69.

As the State points out, the “Notes on Use” commentary for MPJI-Cr 4.27.1 is an obsolete advisory comment that was designed for an earlier version of the instruction.

Unlike the current instruction, the earlier version did not incorporate a specific requirement that the officer have probable cause to make an arrest. Instead, it spoke only of “reasonable grounds to believe that the defendant” was committing or had committed a crime.

In discussing the earlier instruction in *Arthur v. State*, 420 Md. 512, 527-28 (2011), the Court of Appeals stated that the term “reasonable grounds” “can be ambiguous depending on the context.” The Court explained that “reasonable grounds” could refer both to “probable cause,” which permits police officers to arrest a suspect, and to the lower standard of a “reasonable articulable suspicion,” which permits police officers to stop a suspect, but *not* to make an arrest. *See id.* According to the Court, the Notes on Use “suggest[ed] that the drafters recognized that the naked pattern instruction would not work well in all contexts.” *Id.* at 528. “If the jury interpreted the given jury instruction as meaning ‘reasonable articulable suspicion,’ it may have wrongly concluded that the ‘probable cause’ element of the resisting arrest crime was met.” *Id.*

By contrast, the current instruction, which the court read in this case, dispenses with any reference to “reasonable grounds” and explicitly requires the jury to find “that the arrest was lawful, that is, that the officer had probable cause to believe that the defendant had committed the crime.” Consequently, any fact-specific instruction would have been unnecessary and superfluous. *See* Md. Rule 4-325(c) (“[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given”).

The Notes on Use for MPJI-Cr 4:27.1 are an anachronism dating back to a time when the instruction contained a potential ambiguity that the current instruction has eliminated. In the circumstances of this case, the court did not abuse its discretion in declining to fashion a fact-specific instruction about probable cause.

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